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Business

Court's 'pragmatic' view of disclosure 'provides useful direction,' counsel says

By **Amanda Jerome**

(July 22, 2022, 4:22 PM EDT) -- The Ontario Court of Appeal has dismissed the appeal of a representative plaintiff in a "common law and statutory secondary market misrepresentation class action" against a mineral exploration company and its former CEO, ruling that the motion judge did not err in his analysis.

"The Court of Appeal's discussion of materiality provides helpful guidance for those tasked with making real-time decisions about disclosure," said Michael Rosenberg, a partner at McCarthy Tétrault LLP in Toronto and counsel for the respondents with Amanda Iarusso.

"This case concerned the omission of an adverse opinion from a consultant," Rosenberg said. "The issuer determined that the opinion was wrong. The Court of Appeal confirmed that the reasonable investor test for materiality in *Sharbern* [*Sharbern Holding Inc. v. Vancouver Airport Centre* Ltd., 2011 SCC 23] is contextual, and it can incorporate an assessment of reliability.

"Unreliable information would not help reasonable investors make informed decisions," he explained, noting that in this case, "as the Court of Appeal affirmed at paragraph 96, it would in fact have been misleading to disclose the consultant's concerns because they were unreliable."

"The Court of Appeal's pragmatic and purposive view of disclosure provides useful direction," he added.

Michael Rosenberg, McCarthy Tétrault LLP

In *Wong v. Pretium Resources Inc*., 2022 ONCA 549 the appellant, David Wong, was the "representative plaintiff in a common law and statutory secondary market misrepresentation class action" while the respondents were Pretium Resources Inc. (Pretium), a mineral exploration company which was and is a reporting issuer under the *Securities Act* (OSA), and its former CEO, Robert Quartermain.

According to court documents, Wong "asserted that the respondents failed to publicly disclose concerns about Pretium's Brucejack mining project in northwestern British Columbia," which had "been conveyed to Pretium in writing by Strathcona Mineral Services Ltd. (Strathcona), a mining expert Pretium had retained to perform certain work."

Strathcona, the court noted, "resigned from the Brucejack project in the face of Pretium's refusal to publicly disclose its concerns" and when a press release was issued by Pretium "disclosing the resignation, and later, the reasons for Strathcona's resignation, its stock price fell by over half."

Wong's claim "alleged common law and statutory (under s. 138.3 of the OSA) misrepresentations by omission in Pretium's continuing disclosure: the failure of the respondents to disclose what were alleged to have been material facts in seven of its public disclosure documents between July and October, 2013."

According to court documents, the motion judge, Justice Edward Belobaba of the Superior Court of Justice, "granted the appellant leave to proceed with a statutory secondary misrepresentation claim" in July 2017 "after concluding that there was a reasonable possibility that the action would be resolved in favour of the appellant at trial." This was granted on a "contested motion" and "pursuant to s. 138.8 of the OSA."

The action, the court noted, was "certified as a class proceeding on consent in 2019, and in 2020 the parties brought competing summary judgment motions."

"In dismissing the action," the court explained, Justice Belobaba "concluded that there had been no actionable misrepresentations by the respondents when they failed to disclose what is referred to in this litigation as 'Strathcona's concerns,' and that in the alternative (with respect to the statutory claim), the respondents had conducted a reasonable investigation, pursuant to s. 138.4(6) of the OSA."

On appeal, Wong submitted that Justice Belobaba "erred in concluding that Pretium's failure to disclose Strathcona's concerns was not a misrepresentation by the omission of a material fact."

"In particular," the court noted, Wong contended that Justice Belobaba "applied the correct test for a material fact at the leave stage, but a different, and incorrect, test when, on the summary judgment motion, he injected the irrelevant consideration of 'reliability,' and relied on post hoc evidence of Pretium's subjective views and its business judgment."

On this issue of whether "Strathcona's concerns were a material fact whose omission constituted a misrepresentation," the court noted that Wong "relied almost exclusively on the Supreme Court's decision in *Sharbern Holding* as authority for what constitutes a material fact in the context of a misrepresentation by omission."

Justice Katherine van Rensburg, writing for the Court of Appeal, reviewed what *Sharbern Holding* "says about the legal test for a material fact in the context of securities disclosure, and how materiality is to be determined in a particular case."

She concluded in not giving effect to Wong's argument on this point, noting that she was not "persuaded" that Justice Belobaba "applied a test that was wrong at law when he determined that the Strathcona concerns were not material information, in part because they were unreliable."

She noted that "although the motion judge did not repeat the principles from *Sharbern Holding* that he previously set out in his leave decision, he undertook an analysis that was consistent with, and did not depart from, the framework articulated in that case."

"Moreover," she added, Justice Belobaba "properly focused on the relevant factors, including reliability, in concluding that Strathcona's concerns, which were the expression of an opinion, did not constitute a material fact that ought to have been disclosed."

In Justice van Rensburg's view, Justice Belobaba "adopted a contextual and fact-specific approach to the materiality of Strathcona's concerns and, in particular, whether they were material facts that

were required to be disclosed."

"He conducted a detailed review of the evidence on the summary judgment motion, and explained, by reference to such evidence, why he concluded that Strathcona's concerns were premature, inexpert and unreliable, and in turn, by reference to the disclosure already made, 'were not material facts that would assist a reasonable investor in making an informed investment decision,' " she wrote.

Justice van Rensburg also disagreed with Wong's submission that Justice Belobaba "erred in considering the reliability of Strathcona's concerns as part of his materiality analysis."

"While the reliability of omitted information is not necessarily relevant to the question of materiality in all cases, it was relevant here, together with the observations that Strathcona's concerns were premature and expressed outside 'its own lane,' " she wrote in deciding not to give effect to this ground of appeal.

With regard to Wong's submission that Justice Belobaba's "assessment of materiality relied on a post hoc evaluation that accepted Pretium's subjective opinions and business judgment," Justice van Rensburg stressed that "[T]here is simply no basis for this contention."

"The motion judge's findings were based on evidence dating from the Class Period, and he did not adopt a hindsight assessment of whether Strathcona's concerns were justified or correct," she wrote, noting that Justice Belobaba "considered the materiality of the information that was withheld in the circumstances that existed at the time, not with hindsight, and he did not defer to Pretium's business judgment."

On the appellant's argument that "the fact that Pretium's share price dropped precipitously after the October 9 and 22, 2013 news releases (the latter of which he characterizes as a corrective disclosure, or, using the words of the OSA, a public correction), confirms that Strathcona's concerns must have been material," Justice van Rensburg noted that "[E]ven in cases where it is admitted or obvious that there was a public correction, the market response, while relevant to materiality, is not determinative."

"Here, as in *Peters* [*Peters v. SNC-Lavalin Group Inc*., 2021 ONSC 5021], it would be 'reasoning backwards' from a 'precipitous decline in the market value of the issuer's shares' to infer that the omitted information was material," she wrote, noting that "[A]s such, the decline in the market at the time of the October 2013 news releases says very little, if anything, about the materiality of Strathcona's concerns."

Justice van Rensburg, with Justices Lois Roberts and Ria Tzimas in agreement, concluded that Justice Belobaba "did not err in his analysis" and "was correct to consider the omitted information's reliability, in the context of the public disclosures already made, when concluding that Pretium had not made misrepresentations by omission."

"The objective unreliability of Strathcona's concerns, as well as their prematurity and the fact that they were expressed by Strathcona outside 'its own lane,' was relevant to whether a reasonable investor would have viewed the information as having significantly altered the total mix of information. The motion judge did not rely on post hoc evidence or Pretium's subjective views in his analysis. The evidence he accepted consisted of the contemporaneous views of Pretium and Snowden, which provided an objective picture of the merits of Strathcona's concerns at the relevant time. And, the drop in share price in October 2013 after the public announcement of Strathcona's resignation and the reasons therefor, did not provide evidence of misrepresentations by omission in the earlier disclosures," Justice van Rensburg wrote, noting that Justice Belobaba's analysis also did "not run afoul of the well-canvassed policy objectives of securities regulation."

The court dismissed the appeal, awarding $50,000 in costs to the respondents, in a decision released July 22.

In an interview with *The Lawyer's Daily*, Rosenberg noted as a takeaway that "a leave decision is not determinative of the merits of a secondary market securities class action."

"As the Court of Appeal noted, Justice Belobaba granted leave because he saw a reasonable prospect of success for the plaintiff," he said. "But that is not the end of the matter. Not by a country mile. And on a full evidentiary record it became clear that some of the assumptions in the leave decision were no longer valid. The Court of Appeal agreed that plaintiffs cannot simply rely on their leave record when seeking judgment, and it affirmed that an amplified view of the facts may lead to a very different result," he explained, noting that a "second takeaway is that the decline in the issuer's share price is not determinative of the merits either."

"The Court of Appeal confirmed that a decline in the price of an issuer's shares proves neither the prior omission of a material fact nor a public correction. The plaintiff had encouraged the court to 'work backwards' from a falling share price, and the court rejected that kind of ex post facto reasoning," he concluded.

Counsel for the appellant was not immediately available for comment.

The appellant was represented by Andrew Morganti, of Morganti & Co., P.L.C in Toronto, Albert Pelletier, of Albert Pelletier Professional Corporation in Toronto, Charlotte Harman, of Charlotte K.B. Harman Professional Corporation in Toronto, and Michael Spencer, of Milberg LLP in Garden City, N.Y.

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