

Ontario Superior Court denies leave in securities class action against Wheaton Precious Metals Corp.

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On January 5, 2022, the Ontario Superior Court of Justice denied leave to commence a secondary market securities class proceeding under Part XXIII.1 of the *Securities Act* in *Poirier v. Silver Wheaton Corp. et al.*, 2022 ONSC 80.^[1] Justice Akbarali's reasons address the high bar that the courts have imposed at the leave stage and confirmed the courts' "important gatekeeping role" in determining whether the proposed action can be said to have a reasonable possibility of success. In this regard, the decision reiterates the courts' obligation to undertake "a reasoned consideration of the evidence to ensure that the action has some merit."

Background

The plaintiff, a secondary market purchaser of securities, claimed that Silver Wheaton Corp. (now Wheaton Precious Metals Corp.) (Wheaton Canada or the Company) failed to properly disclose a tax liability in its financial statements and public disclosures and, in particular, misled the putative class about the likelihood that the Company would be exposed to an eventual tax liability in relation to an ongoing audit by the Canada Revenue Agency (the CRA). While the Company at all times disclosed the risk of a reassessment by the CRA and the potential for additional tax liabilities, the plaintiff argued that management's assessment of this risk was unduly "optimistic". The plaintiff alleged that it was only after Wheaton Canada issued a press release announcing the CRA's delivery of a proposal letter that the public was truly able to appreciate the nature and extent of the risk, pointing to the drop in share price following this public announcement as evidence of this allegedly inadequate disclosure.

The CRA's eventual reassessment of Wheaton Canada, which became the subject of a lengthy tax appeal, was ultimately resolved in the Company's favour.^[2] Accordingly, the Company's forward-looking public statements, including its continued confidence in its internal tax structures, were ultimately validated. Nevertheless, the proposed representative plaintiff subsequently sought leave pursuant to Part XXIII.1 of the *Securities Act* to commence an action against Wheaton Canada and two of its executives for alleged misrepresentations in its public disclosure documents and financial statements. The plaintiff also sought certification of a class proceeding advancing *Securities Act* claims, and common law claims in negligence and negligent misrepresentation.

Justice Akbarali's reasons

In her reasons, Justice Akbarali sided entirely with the Company on all issues and ultimately denied leave, finding that the plaintiff failed to discharge her evidentiary burden to establish

that there was a reasonable possibility that the action would be resolved at trial in her favour.

No credible evidentiary basis for the claim

In support of its application for leave, the plaintiff relied on the evidence of a former employee of a subsidiary of Wheaton Canada, as well as two expert reports filed in relation to various tax and accounting issues. Given that both experts expressly relied on one another, as well as the veracity of the former employee's evidence, Justice Akbarali noted that the plaintiff's evidentiary record was comprised of three witnesses whose evidence was "stacked like a precarious Jenga tower". On the basis of her review of this interwoven evidentiary record, the judge ultimately concluded that the plaintiff's evidence was fundamentally flawed in a number of material respects:

- **the plaintiff's fact evidence:** While Justice Akbarali ultimately found the former employee's evidence to be admissible, she ascribed it no weight as it was "neither credible nor reliable".
- **the expert evidence:** Justice Akbarali found that both of the plaintiff's expert reports were inadmissible on various grounds, including a lack of relevant expertise and a demonstrated lack of impartiality. Conversely, she accepted the Company's expert's qualifications and opinion as to the Company's compliance with the applicable accounting standards. Justice Akbarali concluded that "there is no credible evidence that Wheaton Canada had a probable tax liability that it was required to disclose on its financial statements, or that the financial statements were not prepared in accordance with applicable accounting standards."

No public correction

Having found that there was no credible evidence to support the plaintiff's claims of misrepresentation, Justice Akbarali also found that there was no "public correction" in this case. She noted that the alleged corrective disclosure could not reasonably be construed as "correcting" anything, but rather was entirely consistent with the disclosure that had preceded it.

Justice Akbarali noted that this finding of an absence of a public correction was not necessary to her conclusion that there was otherwise no reasonable possibility that the action would resolve in favour of the plaintiff. Nevertheless, the lack of an identifiable public correction was supportive of her conclusion that there was no credible evidence supporting the plaintiff's evidentiary theory about the alleged misrepresentation. She further found that the impugned statements were not capable of amounting to a misrepresentation in this case.

On the basis of her analysis, Justice Akbarali offered the following concluding remarks: "Finding liability for accurately disclosing management's real and, as proven in hindsight, reasonable, assessment of the potential tax liability would not incentivize accurate and timely disclosure by public issuers. Such a result would only confuse public issuers, leading to uncertainty that would most likely degrade the quality of disclosure issuers would provide to the market."

Certification

Having denied leave under the *Securities Act*, Justice Akbarali reviewed the plaintiff's request to nonetheless certify the common law claims. She dismissed this request on a number of grounds, most notably on the basis that a class proceeding was not the preferable procedure because of the multiplicity of individual issues.

On the basis of all of the foregoing, Justice Akbarali dismissed the plaintiff's motion for leave to proceed with her claim under s. 138.3(1) of the *Securities Act* and declined to certify the plaintiff's remaining claims as a class proceeding on the basis that:

- a class action was not the preferable procedure to resolve the common law claims
- no proposed representative plaintiff had a claim against the defendants that would allow a claim under s. 130 of the *Securities Act* to also proceed
- the common law claims and the s. 130 claim did not disclose a reasonable cause of action as the plaintiff had not pleaded a statement that was capable of being a misrepresentation

Key takeaways

This case is a helpful reminder that the leave requirement for secondary market misrepresentation claims remains a meaningful screening device and a robust gatekeeping tool. In addition, the decision highlights the evidentiary burden imposed on plaintiffs seeking to bring such proceedings, particularly in the context of forward-looking statements by management about future risks. Among other things, the case highlights the fact that a failure to properly plead identifiable public misrepresentations, supported by credible evidence, may be fatal to a proposed securities class action.

[1] The authors were counsel of record for Wheaton Precious Metals Corp.

[2] Osler also represented Wheaton Precious Metals Corp. in the underlying tax dispute.