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The perils of evidentiary 'Jenga towers' in securities class actions

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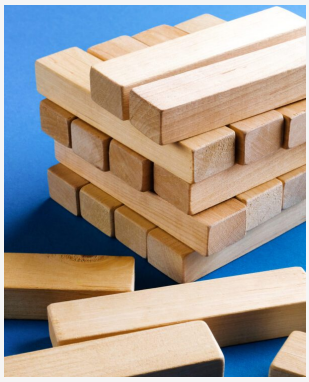

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Authors: Mark A. Gelowitz, Craig Lockwood, Robert Carson, Lipi Mishra, Elie Farkas

In a series of securities class action decisions issued in 2022, Ontario courts provided useful guidance on elements of the statutory cause of action for secondary market misrepresentation. In *Lundin Mining*, the Ontario Superior Court of Justice clarified the "change" aspect of a "material change" under the Ontario *Securities Act* and, in *Pretium*, the Ontario Court of Appeal confirmed that the reliability of information is a relevant consideration when determining whether information is "material."

In addition, courts have continued to show an increasing willingness to engage, at the preliminary leave stage, in detailed examinations of both the fact and opinion evidence adduced by the parties. In 2022, leave motion judges diligently performed what the Supreme Court of Canada has called their "important gatekeeping role," repeatedly cautioning against attempts to "reason backwards" from a decrease in share price to argue that a claim has a reasonable possibility of success. In each of *Silver Wheaton*, *Americas Gold and Silver*, *Maxar* and *Barrick*, the motion judge's thorough consideration of the evidentiary record resulted in the court denying leave for some or all of the asserted claims.

The decisions provide welcome clarity on the statutory secondary market cause of action and serve as critical reminders of the plaintiffs' burden to adduce admissible and cogent evidence on a leave motion.

Welcome guidance on the elements of the statutory cause of action

The *Lundin Mining* decision: Clarifying 'material change'

Justice Glustein's decision in *Lundin Mining* provides useful guidance on what constitutes a material change for the purposes of the *Securities Act* (Ontario). In that case, the plaintiff sought leave to commence a statutory secondary market claim based on alleged delays in Lundin's disclosure of wall instability and an eventual rockslide at its copper mine in Chile. Lundin did not disclose these occurrences until roughly one month after the rockslide occurred. Its share price declined significantly following this disclosure.

Justice Glustein considered whether the plaintiff had a reasonable possibility of proving that either the pit wall instability or the rockslide constituted a material change requiring immediate disclosure. Although Justice Glustein was satisfied that the plaintiff had a

reasonable chance of proving that these events were "material," he found that they were not "changes" as contemplated by the *Securities Act*.

A "material change" under the *Securities Act* must be "a change in the business, operations or capital" of the issuer. Justice Glustein reaffirmed that there is no bright-line test for identifying a "change" and that the inquiry is highly fact-specific. He also clarified that, for the purposes of the definition of material change, "business" refers to "what the company does," "operations" refers to "where the company conduct[s] business" or "the activities conducted by the company to engage in its lines of business," and "capital" generally refers to the "share structure and rights of shareholders" of a corporation. He also emphasized that the requirement to immediately disclose material changes is not an obligation to provide running commentary on the company's progress or events that may impact its performance.

On the facts in *Lundin Mining*, Justice Glustein found that neither the pit wall instability nor the rockslide constituted "changes." Neither occurrence resulted in any change to Lundin's business, operations or capital. Pit wall instability and rockslides were anticipated, inherent risks in Lundin's open pit mining operations, and their occurrence did not affect Lundin's line of business. Lundin continued to engage in copper mining and simply had to make some changes to its previously planned resequencing.

While Lundin's share price did decline following disclosure of the pit wall instability and rockslide, this was not determinative of whether these occurrences constituted "changes." As Justice Glustein stressed, a court cannot "reason backwards" from a share price decline to find that there was a change in an issuer's business.

The *Pretium* appeal decision: Reliability as a relevant factor for 'materiality'

As discussed in last year's Legal Year in Review, *Pretium* was the first merits decision in a statutory secondary market claim. The plaintiff alleged that Pretium committed a misrepresentation by omission when it chose not to disclose a negative opinion from one of its consultants regarding the viability of its mine. Justice Belobaba found that the underlying opinion was "unsolicited, inexpert, premature, and unreliable." He concluded that there was no actionable misrepresentation and dismissed the plaintiff's claim.

In July 2022, the Ontario Court of Appeal dismissed the plaintiff's appeal of Justice Belobaba's decision. In doing so, the Court confirmed that it was appropriate for the motion judge to consider the objective reliability of the consultant's opinion when assessing whether it constituted a material fact. In so doing, the Court reaffirmed the Supreme Court of Canada's guidance in *Sharbern Holding* that the materiality inquiry is fact-specific and requires context. While the Court in *Sharbern Holding* did not expressly identify reliability as a component of a material fact, its instruction that materiality must be determined from the perspective of a reasonable investor confirmed that the nature of the impugned information is a relevant consideration.

The Court of Appeal emphasized that the materiality inquiry requires consideration of "what was occurring and known by the issuer within the context of the total mix of information." Finally, the Court noted that disclosure of facts that were determined to be objectively unreliable "would have led to the kind of mischief in the market that the disclosure obligations under the [*Securities Act*] seek to obviate."

Scrutiny of plaintiffs' evidence at the leave stage

The *Silver Wheaton* decision: The perils of a 'precarious Jenga tower'

In *Silver Wheaton*, Justice Akbarali denied leave to commence a statutory secondary market claim.

The plaintiff, a secondary market purchaser, claimed that Silver Wheaton Corp., which subsequently changed its name to Wheaton Precious Metals (Wheaton), failed to properly disclose a tax liability and misled the market about the likelihood that Wheaton would be exposed to a tax liability as a result of an ongoing audit by the Canada Revenue Agency (CRA). The plaintiff alleged that it was only after Wheaton issued a press release announcing a CRA proposal letter that the public was truly able to appreciate the nature and extent of the alleged risk, pointing to the drop in share price following this public announcement. Notably, however, the tax dispute was ultimately resolved in Wheaton's favour.

In support of its application for leave, the plaintiff relied on the evidence of a former employee of a subsidiary of Wheaton, as well as two expert reports regarding various tax and accounting issues. Because each expert relied on the other, as well as on the veracity of the former employee, the Court stated that the plaintiff's evidence was "stacked like a precarious Jenga tower."

Justice Akbarali found that the plaintiff's evidence was fundamentally flawed, due to, among other things, the former employee's lack of credibility, and declined to grant leave. And, because leavewas denied, Justice Akbarali found that a class proceeding would not be the preferable procedure to advance the plaintiff's remaining common law claims.

The decision also highlights the substantial evidentiary burden imposed on plaintiffs seeking to bring statutory secondary market claims based on forward-looking statements by management about future risks.

Osler acted for Wheaton in the leave motion and in the underlying tax dispute.

The *Americas Gold and Silver* decision: Cogent evidence required where technical disclosures do not reveal any obvious misrepresentation on their face

In *Americas Gold and Silver*, Justice Morgan dismissed a plaintiff's motion for leave and certification. Justice Morgan held that the plaintiff had not adduced sufficient evidence to satisfy either the leave test or the certification test, in large part because the plaintiff did not tender any expert evidence to assist the Court in interpreting the technical mining issues at the heart of the allegations.

The plaintiff alleged that adverse news that Americas disclosed in May 2021 regarding the Relief Canyon gold mine should have been disclosed in prospectuses that were filed several months earlier.

Justice Morgan made clear that, for an actionable misrepresentation by omission, the allegedly omitted facts must have at least been "knowable" prior to the impugned omission. He found that on the record before him, however, there was no credible evidence for the plaintiff's claim that the information contained in the May 2021 disclosures was known or

knowable at the time of the prospectuses.

Justice Morgan found that the prospectuses did "precisely what one would expect them to do in the circumstances" by disclosing that there were challenges at the mine that were being investigated. He stated further that "[t]he entire disclosure sequence [...] followed a pattern that anyone would expect it to follow as the exploration of the mine site moved forward."

Osler acted for Americas on the certification and leave motions.

The *Barrick* decision: A detailed consideration of the factual timeline and expert evidence

In *Barrick*, Justice Akbarali considered certain aspects of a plaintiff's motion for leave, which the Ontario Court of Appeal had returned to the Ontario Superior Court of Justice for reconsideration. The claim centred on alleged misrepresentations in Barrick's public disclosures about a mining project on the border of Chile and Argentina.

Justice Akbarali's decision focused predominantly on allegations that Barrick had issued misleading forecasts regarding capital expenditures and the anticipated project schedule. She found that only a limited subset of the claims had a reasonable possibility of success. She held that some of the other claims could not succeed because there was no realistic chance of proving that Barrick knew or should have known at the relevant times that its capex budget or schedule were inaccurate. Other claims could not succeed because Barrick was accurately warning the market that its budget and schedule were uncertain and under review.

Notably, Justice Akbarali declined to consider the evidence of either of two expert witnesses proffered by the plaintiffs. She found that the first, a quantity surveyor, had limited and outdated experience, opined on issues outside the scope of his expertise, repeatedly made statements without foundation and cherry-picked evidence. She found that the second, a former CEO of a mining company, had never been involved in a megaproject like the one at issue, embellished his qualifications and was evasive about them on cross-examination, and made serious allegations without any evidentiary foundation.

Justice Akbarali also criticized several of the plaintiffs' claims for being based solely on speculation and "backwards reasoning"; the mere fact that a budget or schedule eventually required adjusting was not, on its own, sufficient evidence of a prior misrepresentation. In her view, the plaintiffs had "approached this litigation as if it were a loss in search of a claim."

The *Maxar* decision: Inadmissible evidence results in the denial of leave

Justice Akbarali also declined to grant the plaintiffs' motion for leave to proceed with secondary market misrepresentation claims in the *Maxar* case, holding that there was no reasonable possibility that the action would be resolved in favour of the plaintiffs.

The plaintiffs alleged that Maxar's financial results were misrepresented in two ways. First, they alleged that the results failed to take a timely impairment of assets, and second, that they improperly used the percentage of completion approach to recognize revenue. They also argued that Maxar's internal controls over financial reporting were deficient.

The leave motion turned on the evidence. Justice Akbarali concluded that the plaintiffs' expert evidence failed to satisfy the threshold requirements of the first branch of the *Mohan* test for admissibility of expert evidence. The plaintiffs' expert was not qualified to give the proffered

opinions, had improperly stepped into the role of advocate and had made obvious errors in his report such that his evidence was unnecessary. Justice Akbarali then dismissed the motion, as there was no expert evidence supporting the plaintiffs' case.

Key takeaways

The securities case law from this past year provides useful guidance on elements of the statutory cause of action and the court's role in scrutinizing plaintiffs' evidence at the leave stage.

Taken together, these decisions serve as a helpful reminder that the leave requirement for statutory secondary market claims continues to function as a meaningful screening device and a robust gatekeeping tool. Importantly, a share-price decline, on its own, should not persuade a court to grant leave.