COURT OF APPEAL FOR ONTARIO

CITATION: Wong v. Pretium Resources Inc., 2022 ONCA 549
DATE: 20220722
DOCKET: C69140

van Rensburg and Roberts JJ.A. and Tzimas J. (*ad hoc*)

BETWEEN

David Wong

Plaintiff (Appellant)

and

Pretium Resources Inc., and Robert A. Quartermain

Defendants (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

Michael Spencer, Andrew Morganti, Albert Pelletier and Charlotte K.B. Harman, for the appellant

H. Michael Rosenberg and Amanda Di Gesù Iarusso, for the respondents

Heard: November 24 and 25, 2021

On appeal from the judgment of Justice Edward P. Belobaba of the Superior Court of Justice, dated February 2, 2021, reported at 2021 ONSC 54.

van Rensburg J.A.:

I. OVERVIEW

[1] The appellant is the representative plaintiff in a common law and statutory secondary market misrepresentation class action. The respondents are Pretium

Resources Inc. (“Pretium”), a mineral exploration company which was and is a reporting issuer under the *Securities Act*, R.S.O. 1990, c. S.5 (the “OSA”), and its former CEO, Robert Quartermain. The appellant asserted that the respondents failed to publicly disclose concerns about Pretium’s Brucejack mining project in northwestern British Columbia (the “Brucejack project”), that had been conveyed to Pretium in writing by Strathcona Mineral Services Ltd. (“Strathcona”), a mining expert Pretium had retained to perform certain work. Strathcona resigned from the Brucejack project in the face of Pretium’s refusal to publicly disclose its concerns. When Pretium issued news releases disclosing the resignation, and later, the reasons for Strathcona’s resignation, its stock price fell by over half. The appellant’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. The appellant appeals the summary dismissal of the action by Belobaba J. (the “motion judge”).

[2] In July 2017, on a contested motion, the motion judge, pursuant to s. 138.8 of the OSA, had granted the appellant leave to proceed with a statutory secondary misrepresentation claim, after concluding that there was a reasonable possibility that the action would be resolved in favour of the appellant at trial. The action 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 motion judge

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. The appellant seeks an order setting aside the dismissal of the class proceeding and directing a trial of the issues.

[3] For the reasons that follow, I would dismiss the appeal. First, I disagree with the appellant that the motion judge erred in law in his characterization of what constituted an actionable "misrepresentation", and in concluding that Strathcona's concerns were not a material fact that required disclosure because they were "unsolicited, inexpert, premature, and unreliable". Nor has the appellant established any misapprehension of the evidence or palpable and overriding error in the motion judge's factual findings with respect to the alleged misrepresentations. The motion judge's decision was fact-driven and properly took into account the entire context in which the misrepresentations were alleged to have been made. Second, and contrary to the appellant's arguments, the motion judge's decision did not depend on his acceptance of the respondents' *post hoc*, subjective views, or defer to Pretium's business judgment concerning its disclosure obligations. Third, the motion judge did not err in failing to find a misrepresentation based on the drop in the price of Pretium's shares in October 2013. The motion judge's conclusions reveal no reversible error: they reflect the application of the

correct legal standard to a set of facts, based on a proper assessment of all of the evidence.

[4] I will begin by setting out a brief summary of what transpired, that is sufficient to understand the issues on this appeal. To put the appellant's submissions in their proper context, I will provide a somewhat detailed summary of the motion judge's reasons on each of the leave and summary judgment motions. I will then discuss the arguments raised on appeal and explain why, in my view, there was no reversible error.

[5] My determination that there was no error in the motion judge's conclusion on the misrepresentation issue is sufficient to dispose of the appeal. As such, it is unnecessary to address the appellant's alternative argument: that the motion judge erred in giving effect to the reasonable investigation defence, which was, in any event, touched on only briefly by the parties on appeal. These reasons should not be read as taking any position on the motion judge's reasonable investigation analysis.

II. THE FACTUAL BACKGROUND

(1) The Bulk Sample Program

[6] The respondent Pretium is a mineral exploration company based in British Columbia. It is a reporting issuer in all Canadian provinces and territories, and a registrant with the U.S. Securities and Exchange Commission. At all material times

its common shares were listed for trading on the Toronto and New York Stock Exchanges. The respondent Robert Quartermain was Pretium's Chairperson and Chief Executive Officer.

[7] During 2011 and 2012, Pretium conducted a mineral exploration program at Brucejack that involved surface mapping and exploratory drilling. It hired Snowden Mining Industry Consultants ("Snowden"), a well-known mining consultant, to review the results and to prepare a mineral resource estimate. After preparing two earlier estimates in February and April 2012, Snowden produced the November 2012 Mineral Resources Update Technical Report (the "Resource Estimate"), which was used by another contractor, Tetra Tech Inc., as the basis for a June 2013 feasibility study (the "Feasibility Study"). The validity of the Feasibility Study was thus dependent on the validity of the underlying Resource Estimate, which took into account the unique style of mineralization in the Valley of the Kings ("VOK") section of the Brucejack mine. The Feasibility Study concluded that Brucejack contained economically recoverable mineral reserves capable of supporting a successful bulk-mining operation.

[8] In order to test and verify the accuracy of its Resource Estimate (and by extension the Feasibility Study) Snowden recommended that Pretium extract a 10,000-tonne bulk sample for milling and testing. In November 2012, Pretium retained another well-known mining consulting firm, Strathcona, to oversee and report on the Bulk Sample Program (the "BSP").

[9] There were two components of the BSP: the excavation of a 10,000-tonne bulk sample, and a 15,000-meter underground drill program in areas around the bulk sample. The original intention was to process the bulk sample in its entirety at a custom mill, as this was the most reliable means of determining the mineral content. However, in light of the difficulty in finding an available custom mill, Pretium agreed with Strathcona's use of a "sample tower", in which it would test a small fraction of the mined material, and send the balance to a mill in Montana. The intention was for Strathcona to compile the results and to provide them to Snowden, who would update the Resource Estimate.

[10] Pretium announced in a May 8, 2013 news release that the BSP and associated underground drilling were ready to begin. The news release described the work and anticipated reporting as follows:

> *Underground Drilling*
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> Approximately 15,000 meters of underground drilling will be completed as part of the Bulk Sample Program. After the initial cross-cut along section 426600, the north drill drift will be developed, and drilling will be conducted at 7.5-meter and 15-meter centres along 120 meters of strike length, and at 15-meter centres vertically for 60 meters above and 60 meters below the 1345-meter level of the Valley of the Kings. Drilling is planned to commence later this month, prior to excavating the bulk sample, and will run concurrently with the excavation of the bulk sample. Results from drilling will be reported as they are received.

> *Bulk Sample Program*
>
> The sample tower and related equipment for the Bulk Sample Program in the Valley of Kings has been transported over the recently-completed all-weather access road into Brucejack camp and is now on site. Strathcona Mineral Services Ltd. of Toronto has been engaged as the independent Qualified Person to oversee and report on the 10,000-tonne bulk sample.
>
> The 1345-meter level at the 426600 cross-section of the Valley of the Kings was selected as the bulk sample location based on Strathcona's requirements that the bulk sample be excavated from an area representative of the (a) drillhole density that informs the Indicated Mineral Resource, (b) average grade of the Indicated Mineral Resource and the global resource for Valley of the Kings, (c) proportion of low-grade, high-grade and extreme grade populations in the overall Indicated Mineral Resource and (d) style of stockwork gold mineralization characteristic of the Valley of the Kings. Excavation of the bulk sample is scheduled to begin in early June, with the final report expected later in the year after compilation of all bulk sample data. [Emphasis added.]

[11] In a May 28, 2013 news release, Pretium provided more information about the BSP and the anticipated reporting, stating in part:

> *Sample Tower and Mineral Processing*
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> The 10,000-tonne bulk sample will be excavated in approximately 100-tonne rounds. Each round will be crushed and run through a sample tower currently assembled on site. The sample tower has been designed and constructed to extract two 30-kilogram representative samples from each 100-tonne round processed by the sample tower. The representative samples extracted by the sample tower will be assayed, and the assay results will be reported by Strathcona in their report on the Program.

> The remainder of the 10,000-tonne bulk sample will be shipped to a mill for processing. The mill will use a similar circuit, gravity and flotation, to extract gold and silver from the bulk sample as contemplated in the feasibility study for the Brucejack Project currently underway. The bulk sample remainder is expected to be milled in the third and fourth quarters of this year.
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> *Bulk Sample Drilling*
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> Approximately 15,000 meters of underground drilling in 190 holes will be completed as part of the Program. The drilling will define the portions of the two domains of mineralization being tested by the Program along 120 meters of strike length, and vertically for 60 meters above and 60 meters below the 1345-meter level of the Valley of the Kings. The drilling will be completed on sections 7.5 meters apart along the 120 meters of strike length. Each section will be drilled from the north or south, with drill holes at 15-meter centers vertically at the margins of the mineralized domains. The supporting infrastructure will include an initial cross-cut through the Valley of the Kings along section 426600, and the north exploration drill drift. The drill program will run concurrently with the mining of the bulk sample. …
>
> *Program Reporting*
>
> Assay results from underground drilling will be reported as they are received. Strathcona's report on the Program is expected later in the year after compilation of all data. The amount of gold and silver produced by the mill will be reported following the completion of the milling of the bulk sample. [Emphasis added.]

[12] In June 2013, Pretium received the Feasibility Study, prepared by Tetra Tech. On June 11, 2013, it issued a news release stating that the Feasibility Study had predicted a mine life of 22 years, producing an estimated 7.1 million ounces of gold, and indicating that the mineral reserves resulting from the Feasibility Study

were based on the Resource Estimate, and that the results of the 10,000-tonne BSP currently underway were expected later in the year.

(2) Strathcona's Concerns

[13] At the heart of the litigation is a disagreement between Pretium and Strathcona about the accuracy and reliability of the Resource Estimate, and in turn, the predictions in the Feasibility Study, based on Strathcona's observations during its work on the BSP. Over a three-month period from July 23 to October 21, 2013 (the "Class Period"), Strathcona, based on the assays of the samples processed at the sample tower, and before the entire bulk sample had been excavated, milled and tested, expressed the view that the Feasibility Study was premised on inaccurate and unreliable information, and urged Pretium to make certain disclosures. Pretium disagreed, countering that Strathcona's concerns were premature and that the disclosures proposed by Strathcona would be inappropriate.

[14] The record of what transpired during this period is voluminous. It is sufficient to set out some of the communications of Strathcona's concerns and Pretium's responses, and the relevant public disclosure during the Class Period.

[15] The first relevant event took place on July 11, 2013, when Henrik Thalenhorst, the Independent Qualified Person ("QP") from Strathcona overseeing the BSP, sent an email to Ken McNaughton, Pretium's Chief

Exploration Officer. Dr. Thalenhorst expressed disappointment with the BSP results to date, and stated that the "feasibility study at least for this part of the [mine] is based on unreliable grade interpolation" and that "[t]hese developments have profound implications for the project". He cautioned that Pretium "[would] have to consider how and when to inform the public on these developments".

[16] Mr. McNaughton replied to the email the next day, stating that it was "premature to come to conclusions based on the limited number of drill data and without reliable sample tower results or processing results". He noted that there needed to be "a complete dataset" before coming to any conclusions, and he concluded: "Reacting to incomplete data is not in the best interests of our shareholders or the public".

[17] Pretium's first public disclosure following this exchange was a July 23 news release, which marks the start of the certified Class Period. (This is the first of seven documents alleged to have contained a misrepresentation.) The news release reported on additional underground drill results, and the amount of material that had been processed through the sample tower. The news release reiterated that drilling results would continue to be reported as they are received (indeed, Pretium's disclosure throughout the Class Period reported all assay results from the underground drilling that was part of the BSP), and, with respect to the BSP, stated that "Strathcona's report on the [BSP] is expected later in the year after compilation of all data". (A draft of this news release had been provided to

Dr. Thalenhorst, who proposed some edits that were incorporated into the final version, but did not repeat the concerns raised in his July 11 email.)

[18] Pretium's Management Discussion & Analysis ("MD&A") for the six months that ended June 30, 2013 was released on August 1, 2013. (This is the second document alleged to have contained a misrepresentation.) It described in some detail the BSP and the excavation of the bulk sample. Under the heading "Sample Tower and Mineral Processing", the MD&A stated:

> The 10,000-tonne bulk sample is being excavated in approximately 100-tonne rounds. Each round is crushed and run through a sample tower on site. The sample tower has been designed and constructed to extract two 30-kilogram representative samples from each 100-tonne round processed by the sample tower. The representative samples extracted by the sample tower will be assayed, and the assay results will be reported by Strathcona in their report on the Program.
>
> We have begun shipping the remainder of the 10,000-tonne bulk sample to a mill for processing. The mill will use a similar circuit, gravity and flotation, to extract gold and silver from the bulk sample as contemplated in the feasibility study for the Brucejack Project. The bulk sample remainder is expected to be milled in the third and fourth quarters of this year. [Emphasis added.]

[19] I pause here to note that the appellant acknowledged in oral argument that at this point, Strathcona's concerns had not yet "crystallized", and that this only occurred after Strathcona expressed concerns that were not "retracted", beginning with a letter, dated August 14, 2013, from Dr. Thalenhorst to Mr. McNaughton, copied to Mr. Quartermain.

[20] The August 14 letter stated, in part, that:

> [T]he results of sufficient drill-hole and bulk-sample assay data…show that the resource block model developed and reported on in the [Resources Estimate], and used for the recent [Feasibility Study] is not reliable. The resource model greatly over-estimates the gold grade of the bulk-sample area which was estimated to be bulk-mineable with a gold grade of between 10 and 15 g/t.

Dr. Thalenhorst continued: "Since it is now obvious that the Feasibility Study … is no longer valid, and since this represents a material change for Pretium, we strongly recommend that Pretium make these findings known to the public so that investors are no longer relying on the invalid results of the [Feasibility Study] and the [Resource Estimate]".

[21] The following day, Pretium's Vice President and Chief Development Officer, Joe Ovsenek, replied to the Strathcona letter, stating in part that "[t]he purpose of the [BSP], amongst other things, is to assess whether the current resource estimate reconciles with the bulk sample. One of the possible outcomes of the [BSP] is that the resource estimate does not reconcile with the bulk sample", and that this was "public knowledge". Mr. Ovsenek reminded Dr. Thalenhorst that the parties had agreed that the bulk sampling results would not be disclosed until Strathcona had completed its work, and concluded that, accordingly, the disclosure that "Strathcona's report on the Program is expected later in the year after compilation of all data" was satisfactory.

[22] On August 15 and August 23, 2013, respectively, Pretium issued a news release and a material change report, in which it: (i) reported additional underground drill results from the BSP, stating that "[a]ssays from the Program continue to confirm the projection of high-grade gold mineralized domains, and visible gold continues to be encountered" (setting out the assay results in table form)[1]; (ii) provided an update on the progress of the BSP, including that 8,600 tonnes of material had been excavated to date and that the program was expected to conclude in early September; and, (iii) reiterated that Strathcona's report on the BSP was expected later in the year, after compilation of all data, with the amount of gold and silver produced by the mill to be reported following the completion of the milling of the bulk sample. (These are the third and fourth documents alleged to contain misrepresentations.)

[23] On August 16, Pretium forwarded the August 14 Strathcona letter to Ivor Jones at Snowden, the QP overseeing the resource at the Brucejack project. Mr. Jones responded, expressing his "serious concerns about the validity of the sample tower results with respect to the Brucejack mineralisation", and his view that it was "too early to form any opinion on the meaning of any results of the bulk

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[1] As confirmed by the appellant's counsel in argument on the appeal, there is no issue in this case about the reporting of the actual drilling assay results, and their treatment in the disclosures. The focus is on the failure to disclose Strathcona's concerns about the reliability of the Resource Estimate and Feasibility Study, which it based on its field observations, the drilling assay results and the interim sample tower results produced by the BSP.

sample". He noted that he would be "very concerned about making any conclusions with respect to the bulk sample and the validity of the mineral resource and subsequent studies".

[24] On August 20, there was a presentation to the Pretium board of directors about Strathcona's concerns that included an outline of Snowden's response. The issues of the sample tower representativity, the validity of the Feasibility Study, and market disclosure were discussed. The following day, Mr. Ovsenek reported to the Board that he met with Dr. Thalenhorst, who was still of the view that the sample tower results were representative, that Strathcona's main concern was disclosure, and that they "definitely intended to finish the bulk sample program".

[25] On August 22, following a meeting between the parties the previous day, Mr. Ovsenek sent a letter to Dr. Thalenhorst for the express purpose of addressing the issues raised in Strathcona's letter and to reinforce Pretium's "efforts to make full and timely disclosure to the investment community". The letter noted that the framework for Pretium's disclosure of the BSP was consistent: "the results of the underground drilling will be disclosed as received throughout the program and the results of the sampling of the bulk sample by the sample tower will not be disclosed until all data have been compiled and we have received [Strathcona's] report on the [BSP]". The letter concluded that Pretium had been advised by the QP responsible for the VOK resource estimate (Mr. Jones) that it was too early to form any opinion on the meaning of any results of the bulk sample, and that Pretium

believed that the best approach was “to complete the underground drilling, to excavate the bulk sample and to mill the bulk sample material after it has passed through the sample tower, with reporting to follow as we have advised the investment community”.

[26] On September 5, Dr. Thalenhorst sent Pretium an “Interim Technical Report”, after having visited the mine between August 16 and 20. The stated purpose of the report was to reiterate Strathcona’s “strong conviction, now based on additional data and deeper geological insight, that the technical and economic information about the…project currently in the public domain as a result of the June 2013 Feasibility Study…is materially inaccurate”. Dr. Thalenhorst noted that, while the bulk sample results were not for all of the material, “they are nonetheless significant, relevant and indisputable”. Again, he urged that “Pretium should make public, without further delay, this very material change of the gold grade and gold content of the VOK deposit as a result of the very obvious conclusions to be drawn from the bulk sample program”.

[27] Three further news releases went out from Pretium on September 9, September 23 and October 3, 2013, essentially maintaining the *status quo*: reporting that drilling was underway and continuing to intersect high-grade gold, and that Strathcona was undertaking the 10,000-tonne BSP and would provide a report, now expected in early 2014, after compilation of all data. The September 9 news release also included information on the Feasibility Study, indicating that the

“updated Mineral Resource estimate for the Valley of the Kings will incorporate all 2013 underground and surface drilling and will be prepared following receipt of all assays of the 2013 drill program”. (All three news releases are alleged to have contained misrepresentations.)

[28] In the interim, Dr. Thalenhorst continued to email Mr. Ovsenek, asserting that the assay results for the bulk-sample tonnage continued to disprove the current block model, which projected wide zones of mineralization, and advising public disclosure, while Mr. Ovsenek responded that the Interim Technical Report had been sent to Mr. Jones at Snowden, that any disclosure prior to his response would not be appropriate, and that the “theme in current market commentary about Pretium is to ‘wait-and-see’ if the final results of the bulk sample are reconcilable with the resource estimate”.

[29] On October 7, 2013, Strathcona resigned from its engagement in the BSP, with a letter to Pretium management, noting that it “has become apparent that there is a substantial difference between what information on the VOK program that Pretium believes should be disseminated to public markets, and what emphasis there should be on the interpretation of results, as compared with that which Strathcona believes to be appropriate”. Strathcona stated that the factor causing it the most concern was the content of Pretium’s news releases in July, August and September, which contained “erroneous and misleading” statements. Pretium

urged Strathcona to await the bulk sample mill data which were expected within a few days, but Strathcona refused to reconsider its decision.

[30] In an October 9 news release, Pretium announced Strathcona's resignation and in a further news release on October 22, Pretium provided a detailed summary of the reasons provided by Strathcona for its withdrawal, setting out its own views and those of Snowden, responding to the concerns.

[31] Over these 13 days in October 2013, the Pretium share price dropped from $7.01 to $3.45. The appellant represents a class of Pretium shareholders who, during the Class Period, purchased Pretium common shares listed on the TSX (or on the NYSE, if the shareholder resided in Canada during the Class Period), and held some or all of those common shares at the close of trading on October 8, 2013 or October 21, 2013.

[32] On December 13, 2013, following the Class Period, Pretium released the final processing results from the bulk sample program. The mill results confirmed the validity of the Resource Estimate: the 10,302 tonnes of bulk sample yielded 5,865 ounces of gold, which was about 42% more than had been predicted. Using these results, Snowden prepared an updated Resource Estimate, which was in turn used to update the Feasibility Study in 2014. The Brucejack mine entered commercial production in 2017.

III. LEAVE AND CERTIFICATION

[33] The appellant brought a proposed class proceeding for common law and statutory secondary market misrepresentation. The action was commenced by Statement of Claim issued on October 29, 2013, which was subsequently amended, with the final version being the Second Fresh as Amended Statement of Claim (the "Claim").[2]

(1) The Leave Decision

[34] The statutory claim was brought pursuant to Part XXIII.1 of the OSA, which provides under s. 138.3 for a claim in respect of a document issued by a "responsible issuer" (which includes a reporting issuer), where that document contains a misrepresentation, by a person who acquired or disposed of the issuer's security between the time the document was released and the time when the misrepresentation was publicly corrected. A "misrepresentation" is defined as (a) an untrue statement of a material fact, or (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made. "Material fact when used in relation to securities issued or proposed to be issued" is defined as

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[2] The appellant's motion to further amend his Statement of Claim was refused in part by the motion judge on July 22, 2020. The appeal record refers only to the Second Fresh as Amended Statement of Claim, and not to any subsequent amended pleading.

“a fact that would reasonably be expected to have a significant effect on the market price or value of the securities”. Section 138.4 provides for a number of defences to the statutory claim, including the defence of reasonable investigation.

[35] Section 138.8 sets out a leave requirement, which requires the court to be satisfied that (1) the action is brought in good faith, and (2) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[36] The motion judge framed the first issue as whether there was a reasonable possibility that the appellant’s claim that Strathcona’s concerns were material and should have been disclosed (such that the failure to do so in the various impugned documents amounted to a misrepresentation by omission) would succeed at trial. The motion judge accepted that Pretium genuinely believed that Strathcona’s concerns were based on faulty data which, in Pretium’s judgment, were inherently unreliable. He also accepted that Pretium was ultimately proven right: the mill results after completion of the BSP were positive and confirmed the validity of the Resource Estimate. The issue was, however, whether there were misrepresentations by omission by virtue of the failure to disclose material information.

[37] Citing the Supreme Court’s guidance in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 (an authority relied on by both sides at all stages of these proceedings, including on appeal), the motion

judge observed that the materiality standard calls for the disclosure of information that a reasonable investor would consider important in making an investment decision, and that materiality is determined objectively from the perspective of the reasonable investor, and not based on the subjective views of the issuer.

[38] In determining at the leave stage that Strathcona's concerns were material, the motion judge noted the following:

- Pretium publicly announced the fact that Strathcona was hired to oversee and report on the BSP and described Strathcona as a "reputable firm" and a "recognized expert." It continued to "tout Strathcona's involvement" in various press releases, such that Strathcona's involvement was "obviously newsworthy".
- Pretium confirmed in its MD&A of August 1, 2013 that the sample tower was an integral part of the testing procedure.
- Strathcona, a well-known mining consultant (indeed a "recognized expert" according to Pretium) genuinely believed in the integrity and reliability of the sample tower testing method.

[39] While the motion judge accepted that Pretium would eventually "win the debate" on the reliability of the sample tower method, he held that, during the relevant time period, it could not be said that "the unreliability of the sample tower [data] was so obvious and self-evident and Strathcona's concerns so wrong-

headed that Strathcona's findings and views were not material and that no reasonable investor would want to know what Strathcona was saying": at para. 36. He concluded 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 as to whether there were valid mineral resources in the VOK zone of the Brucejack mine, a question that went to the very heart of Pretium's entire business model": at para. 37.

[40] The motion judge turned to the second issue: whether there was a reasonable possibility that the defendants would not be able to establish one or both branches of the reasonable investigation defence. Section 138.4(6) provides that a person or company is not liable in a Part XXIII.1 misrepresentation action if that person or company proves: (1) that it conducted or caused to be conducted a reasonable investigation before the document containing the misrepresentation was released; and (2) that at the time of the document's release, it had "no reasonable grounds to believe that the document … contained the misrepresentation".

[41] The motion judge accepted that Pretium took Strathcona's concerns seriously and discussed them both internally and with Snowden, and that Pretium had accordingly conducted a reasonable investigation into the reliability of Strathcona's findings and concerns, thereby satisfying the first branch of s. 138.4(6). He concluded, however, that there was a reasonable possibility the

respondents would not be able to satisfy the second branch: “that when they decided to omit Strathcona’s findings and concerns they had no reasonable grounds to believe that this was an omission of a material fact that a reasonable investor in all the circumstances already noted would find important”. He held that the surrounding circumstances, viewed objectively, favoured disclosure and Pretium could easily have satisfied both the disclosure obligations under the OSA and its own desire to make clear that Strathcona’s findings were unfounded by doing what it did in the October 22 news release. As such, he concluded that there was a reasonable possibility that the defendants would not be able to establish the second branch of the reasonable investigation defence at trial.

(2) Certification as a Class Proceeding

[42] The class proceeding was certified on consent, by order dated January 23, 2019 (the “Certification Order”). The certified common issues included: “(a) Did Pretium release core documents on July 23, August 1, August 15, September 9, September 23, October 3 or October 9, 2013 that contained misrepresentations as pleaded in the Claim”; and “(k) If the answer to common issue (a) is yes, are the Defendants relieved of liability pursuant to [s. 138.4(6)] of the [OSA], which provides a defence of reasonable investigation”.

[43] According to the Claim, the respondents made misrepresentations in each of the impugned documents by omitting Strathcona’s concerns that “the Bulk

Sample Program was failing to confirm the validity of the [Resource Estimate], including the grade distribution and classification of Mineral Resources contained in the [Resource Estimate], and by necessary extension the validity of the Feasibility Study".

[44] The parties exchanged affidavits of documents and conducted examinations for discovery.

IV. THE SUMMARY JUDGMENT MOTIONS

[45] In 2020, the parties brought cross-motions for summary judgment on the certified common issues. The principal focus was on certified common issues (a) and (k). The motion judge dismissed the appellant's action after concluding that the appellant had been unable to prove that Pretium's failure to disclose Strathcona's concerns was an omission of material fact constituting a misrepresentation. In the alternative, he was satisfied that the respondents had made out the defence of reasonable investigation under s. 138.4(6) of the OSA.

[46] In arriving at this decision, the motion judge recognized that the result appeared contrary to what he had decided in respect of the leave motion, which he explained by reference to the different evidentiary records that were before him on each occasion, and the different standards the appellant was required to meet: proving only a reasonable possibility of success in the leave motion and proving the case on a balance of probabilities on summary judgment.

(1) The Evidence

[47] The respondents had filed affidavit evidence from Pretium representatives Quartermain, Ovsenek and McNaughton. The motion judge noted that, although participant affidavits submitted seven years after the relevant time might be self-serving, these affidavits re-stated and expanded on the evidence adduced at the leave stage. He emphasized that this evidence was reinforced by the evidence of "independent witnesses": Mr. Jones; Simon Dominy, Snowden's bulk sampling expert; and Herbert Smith, a mining engineer who had peer-reviewed the 2013 and 2014 Feasibility Studies.

[48] The motion judge noted that, by contrast, the appellant led substantive evidence only from Mohan Srivastava, who was described by the motion judge as an "otherwise…well-credentialed mining expert who, by his own admission, had no involvement in the relevant events". The motion judge noted that Mr. Srivastava had not spoken with any of the witnesses who participated in the relevant events, and that he offered no opinion on whether Strathcona's concerns were even reasonable. Rather, for the most part, he had reviewed an incomplete selection of documents prepared by class counsel and he did not review Snowden's Resource Model. Instead, Mr. Srivastava paraphrased Strathcona's concerns, and "explicated" them from his own point of view. The motion judge concluded that "much, if not all, of this evidence – if indeed admissible – is less than compelling and should probably be given little weight": at para. 18.

[49] The motion judge considered important the appellant's failure to provide evidence from Strathcona (including by compelling its representatives as third-party witnesses).[3] Indeed, the motion judge observed that the appellant's evidence left "a lot to be desired" and that "actual evidence from Strathcona's principals may have resulted in a more balanced assessment of its expertise in mineral resource estimation or its understanding of the VOK mineralization and appropriate measurement techniques". Instead, the appellant relied almost exclusively on its expert, "whose contribution to the issues in play was of minimal value at best": at paras. 19, 84.

(2) The Motion Judge's Findings

[50] The motion judge explained that, while in the original leave motion he had concluded that "reasonable investors would have considered it material that two respected mining consultancies retained by Pretium…fundamentally disagreed as to whether there were valid mineral resources in the VOK zone of the Brucejack mine", the initial characterization of Strathcona and Snowden as two equally skilled resource estimate consultants with equal expertise and qualifications, offering equally valid opinions, had now been dislodged by the evidence on the motions: "Strathcona was simply not as expert or as qualified as Snowden on the key issues

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[3] The motion judge also noted that, while the appellant did not provide an affidavit, his examination for discovery transcript was filed, and confirmed that he did not rely on, nor was he even aware of, any of the impugned documents containing any of the alleged misrepresentations.

in play and based its unsolicited and inexpert (contrary) opinions on deeply flawed estimation methodology and data". The motion judge was now satisfied on a preponderance of the evidence that Pretium acted properly throughout and was right in not disclosing what he characterized as "bad and misleading information": at paras. 13-15.

[51] The motion judge explained his findings of fact with reference to the evidence. First, he found that "[g]iven the unique mineralization, the 'only true test' of Snowden's 2012 Mineral Resource Estimate was the milling of the 10,000-tonne bulk sample". He explained that the gold deposit at Brucejack is characterized by high-grade veinlets that are not dispersed in any uniform or linear fashion and that some 82% of the gold can be found in 1% of the rock. The motion judge described how Mr. Jones, who "understood how to best estimate the resource value of this unusual mineralization", had explained how he prepared the Resource Estimate, and his recommendation that Pretium excavate and mill a 10,000-tonne sample in its entirety to test the estimate's validity. The motion judge noted that Pretium allowed Strathcona to run the excavated bulk sample through a sample tower of Strathcona's design and calibration, "but only on the understanding that the sample tower data would be disclosed together with the bulk sample mill results in Strathcona's final report". He noted that, in its public disclosures, Pretium repeatedly made clear that "the amount of gold and silver produced by the mill [would] be reported following completion of the milling of the bulk sample", and that

"the representative samples extracted by the sample tower [would] be assayed and the assay results [would] be reported by Strathcona in their report on the [Bulk Sample] Program". The motion judge stated the "important point" that "[f]rom the outset and throughout the class period…Pretium agreed with Snowden and repeatedly conveyed the message to Strathcona that 'the only true test of the resource estimate' was the actual milling of the entire 10,000-tonne bulk sample": at paras. 26-33.

[52] The motion judge's second finding was that Strathcona's unsolicited and inexpert opinions were premature and unreliable. The opinions were unsolicited because, while Strathcona was retained to design and oversee the 10,000-tonne BSP that Snowden had recommended, it had always been Snowden's responsibility to interpret the BSP results once the entire bulk sample was milled and, if necessary, to adjust the Resource Estimate, and no one asked or needed Strathcona to opine on the validity of the Resource Estimate. The opinions were inexpert because Strathcona's linear measurement approach assumed subject-matter consistency or "stationarity", exactly the opposite of what was found in the uniquely variable Brucejack deposit. In this regard, the motion judge accepted Mr. Jones' evidence that Strathcona's experience preparing mineral resource estimates appeared to be limited to techniques that had been shown to understate the high-grade mineralization and underestimated the Brucejack Resource, and that Pretium and Snowden agreed that Strathcona did not have the ability and

knowledge to appropriately assess the Resource Estimate. Strathcona's inexperience in this regard was acknowledged by Mr. Srivastava under cross-examination. Strathcona's opinions were premature because Pretium had repeatedly advised it to wait for the results from the bulk sample before making conclusions. Finally, Strathcona's opinions were also unreliable. Based on the evidence, the motion judge agreed with Pretium that Strathcona made two overarching errors in concluding that there were "no valid gold mineral resources" at Brucejack: Strathcona's sample tower data were inherently unreliable because the sample tower results were not necessarily representative; and, as Mr. Jones explained, the simple linear measurement resource estimation technique that Strathcona was using was inappropriate for a variable deposit like Brucejack, where most of the gold is highly concentrated (the motion judge noted that Mr. Srivastava had also agreed with this observation): at paras. 34-52.

[53] The motion judge's third finding was that Pretium "acted properly throughout in its handling of Strathcona's so-called concerns". Pretium was clear in all public disclosures that the results of the BSP would not be disclosed until the bulk sample had been milled and the final report submitted. Additionally, every time Strathcona expressed a concern, Pretium discussed the matter internally and referred it to Snowden. The Pretium executives also vetted Strathcona's concerns with the company's disclosure committee and discussed them fully at two Board meetings.

The Board concluded on both occasions that Strathcona's opinions were incorrect, and that it would be misleading to disclose erroneous opinions: at paras. 53-58.

(3) The Motion Judge's Conclusion

[54] In light of his findings, the motion judge's conclusion was unequivocal: "the Pretium defendants were under no obligation to disclose bad and misleading information. As such, there was no omission of any material fact": at para. 59.

[55] After setting out the definition of "material fact" from the OSA, the motion judge observed that "unreliable information is not a material fact": at para. 61. He referred to a passage from *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, 38 B.L.R. (3d) 248, at para. 105, where the B.C. Court of Appeal concluded that, in order to determine the materiality of certain information that was not disclosed to the prospective purchaser of a gold mine, it was necessary to assess its objective reliability. He also referred to the Nova Scotia Supreme Court decision *Amirault v. Westminer Canada Ltd.* (1993), 120 N.S.R. (2d) 91, at para. 581, where preliminary mining results were not required to be disclosed where "within a day or week the sample grade may change upward dramatically".

[56] The motion judge also referred to para. 65 of *Sharbern Holding*, where the Supreme Court observed that the statutory requirement of disclosing material information does not impose an obligation on issuers to "disclose all facts" as this

would “overwhelm investors with information and impair, rather than enhance, their ability to make decisions”.

[57] The motion judge concluded by stating that “[b]y any objective measure, Pretium was not obliged to publicly disclose information that was premature, unreliable and ‘dead wrong’ – these were not material *facts* that would assist a reasonable investor in making an informed investment decision”: at para. 67 (emphasis in the original).

(4) The Reasonable Investigation Defence

[58] The motion judge concluded that, if he was wrong in the analysis he had just completed, he would find in the alternative, on the evidence before him, that the defendants had satisfied both prongs of the “reasonable investigation” defence. He noted that the additional evidence adduced on the summary judgment motions, in particular the evidence of Mr. Jones and the other independent experts, added an important objective dimension to the defendants’ subjective perspective of why the Strathcona data were “inherently unreliable”, such that the second branch of the reasonable investigation defence had been satisfied. The motion judge agreed with, and quoted from, a decision dismissing the claim in parallel U.S. proceedings, where, among other things, the court upheld a reasonable investigation defence, concluding that Pretium was entitled to take a reasonable period of time – that is,

until October 22, 2013, when the first mill results were delivered and Pretium "disclosed the disagreement", to investigate Strathcona's concerns.

V. DISCUSSION

[59] The appellant submits that the motion judge 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 appellant contends that the motion judge 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.[4]

[60] After identifying the appropriate standard of review in this appeal, I will address the appellant's arguments.

(1) Standard of Review

[61] The appellant contends that the standard of review is correctness. Essentially, the appellant advances what he says are legal errors. The

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[4] In his factum the appellant also made a procedural argument, that the motion judge should not have resolved "complex mining issues substantively disputed" between parties on a summary judgment motion. This argument was understandably not pressed in oral argument. Both sides brought mirror motions, seeking to have the certified common issues resolved by summary judgment. This court has consistently held that a party who has participated in a process below without complaint cannot object to this process on appeal: *Maurice v. Alles*, 2016 ONCA 287, 130 O.R. (3d) 452, at para. 25; *Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 150, 394 D.L.R. (4th) 601, at para. 17, leave to appeal refused, [2016] S.C.C.A. No. 173; *Harris v. Leikin Group Inc.*, 2014 ONCA 479, 120 O.R. (3d) 508, at para. 53. Here, the appellant not only acquiesced to the summary judgment process – he brought his own cross-motion.

respondents disagree, asserting that the standard of review is palpable and overriding error because what the motion judge had to decide involved questions of fact alone or of mixed law and fact.

[62] Typically, whether a defendant made a misrepresentation by the omission of a material fact is a question of mixed fact and law, and subject to a palpable and overriding error standard of review: *Sharbern Holding*, at para. 45; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36. To the extent that an extricable legal issue is identified, the standard of review is correctness: *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, 132 O.R. (3d) 161, at paras. 37-38, leave to appeal application discontinued, [2016] S.C.C.A. No. 454. The legal test for what constitutes a “material fact” under the OSA may constitute a question of law, subject to review on a correctness standard. However, absent an error in the legal standard, the motion judge’s determination that there was no omission of a material fact is subject to deference, and to review on a palpable and overriding error standard: *A.M. Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 21, at para. 60, leave to appeal requested, [2022] S.C.C.A. No. 89.

(2) Whether Strathcona's Concerns Were a Material Fact Whose Omission Constituted a Misrepresentation

(i) The Alleged Misrepresentations

[63] The point of departure is Part XXIII.1 of the OSA, which provides for civil liability for secondary market misrepresentation. Section 138.3 sets out the statutory cause of action as follows:

> 138.3 (1) Where a responsible issuer…releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages…

[64] "Misrepresentation" as defined in s. 1(1) includes "(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made". A "material fact", in turn, is defined as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities".

[65] In the present case it is not alleged that Strathcona's concerns were a material fact that was "required to be stated" (such as a "material change" as defined elsewhere in s. 1(1)). Rather, the allegation is that Pretium made a misrepresentation by omission of a "material fact that [was]… necessary to make a statement not misleading in the light of the circumstances in which it was made".

[66] Certified issue (a) that was before the motion judge was whether Pretium released documents on July 23, August 1, August 15, September 9, September 23, October 3 or October 9, 2013 that contained misrepresentations as pleaded in the Claim. The Claim asserted that the impugned documents contained material misrepresentations "as they omitted to state an adverse material fact that Strathcona, the Qualified Person responsible for the [BSP], had formed and communicated to Pretium its belief that the [BSP] was failing to confirm the validity of the [Resource Estimate], including the grade distribution and classification of Mineral Resources contained in the [Resource Estimate], and by necessary extension the validity of the Feasibility Study". While this is how the misrepresentations are specifically referred to in the Claim, in the proceedings the motion judge and the parties (including on appeal) referred to the omitted information as "Strathcona's concerns".

[67] There was no question that Strathcona had communicated concerns to Pretium in the course of its work on the BSP; the issue before the motion judge was whether Strathcona's concerns were a material fact, where the omission to state that fact in Pretium's public disclosures during the Class Period rendered any statement contained therein misleading and, thereby, constituted a "misrepresentation" as defined by the OSA.

[68] In oral argument, the appellant 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.

[69] Because *Sharbern Holding* occupied a central role in the appellant's submissions, I will begin my analysis by setting out what that case 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. I will then address the appellant's arguments and explain why I have concluded that the motion judge applied the correct test and made no palpable and overriding error in his conclusion that Strathcona's concerns were not a material fact that Pretium was required to disclose, and for that reason, in his dismissal of the misrepresentation claim.

(ii) *Sharbern Holding*

[70] *Sharbern Holding* is a decision of the Supreme Court that addresses the materiality of omitted information in the context of an alleged misrepresentation. At issue was information that was not disclosed by Vancouver Airport Centre Ltd. (VAC), in its marketing of strata lots in two hotels (a Hilton and a Marriott) it was developing on the same property. At trial, VAC was found liable at common law and under s. 75 of the *Real Estate Act*, R.S.B.C. 1996, c. 397, for having made material false statements in its disclosure documents when it failed to disclose to

prospective purchasers of the Hilton units the more favourable financial arrangements it had offered to purchasers of the Marriott units. It was alleged that the Disclosure Statement (a document required under the *Real Estate Act*) for the Hilton units made actionable misrepresentations when it stated that VAC had entered into agreements with the Marriott that were "similar in form and substance" to those governing the Hilton, and that VAC was not aware of any existing or potential conflicts of interest that could reasonably be expected to materially affect the purchaser's investment decision.

[71] The B.C. Court of Appeal allowed VAC's appeal, concluding that, based on VAC's extensive factual and expert evidence concerning actual and industry practice in the management of multiple hotels by a single entity, and the absence of evidence to objectively support that a reasonable investor would have been concerned about the details of the financial arrangements, the omitted information was not material.

[72] On further appeal, the Supreme Court concluded that the trial judge erred in finding that the omitted facts were "inherently" material and in not considering their materiality in light of the evidence. In his reasons for a unanimous court, Rothstein J. addressed in detail the meaning of "materiality" in the context of the requirement to disclose material facts, including the standard of proof that is required and the type of evidence that is relevant.

[73] At para. 45, Rothstein J. formulated the test for the materiality of an omitted fact as follows:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote…Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available" [citing *TSC Industries Inc. v. Northway Inc.*, 426 U.S. 438 (1976), a leading U.S. case dealing with proxy solicitations, at p. 449].

[74] He observed that: “materiality” involves the application of a legal standard to particular facts; it is a question of mixed law and fact, determined objectively from the perspective of a reasonable investor; and, it is a fact-specific inquiry to be determined on a case-by-case basis in light of all relevant considerations and “from the surrounding circumstances forming the total mix of information made available to investors”: at para. 61.

[75] Rothstein J. explained that the requirement that the material fact “would”, rather than “might”, have been considered important by a reasonable investor creates a “standard tending toward probability rather than toward mere possibility”: at para. 49. He held that issuers are not under an obligation to “disclose all facts that would permit an investor to sort out what was material and what was not”, and that doing so would “overwhelm investors with information and impair, rather than enhance, their ability to make decisions”: at para. 65.

[76] He explained that the materiality of a fact, statement or omission is something that must be proven by the party alleging materiality, except in those cases where common sense inferences are sufficient. He described the required analysis for materiality in the case of an omission as follows, at para. 61:

> A court must first look at the disclosed information and the omitted information. A court may also consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. As well, evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. However, the predominant focus must be on a contextual consideration of what information was disclosed, and what facts or information were omitted from the disclosure documents provided by the issuer. [Emphasis added.]

(iii) The Alleged Errors

[77] The appellant contends that, in deciding the summary judgment motion, the motion judge departed from the teachings of *Sharbern Holding* by injecting a new and irrelevant factor of "reliability". The appellant says that, not only is reliability entirely absent from Rothstein J.'s discussion, but that by considering the reliability of the information or fact that was withheld, the motion judge ignored the court's exhortation, at para. 51, that, "[g]iven that materiality is determined objectively, from the perspective of a reasonable investor…the subjective views of the issuer do not come into play when assessing materiality". The appellant contends that

the motion judge improperly relied on Pretium's subjective views and business judgment, in finding Strathcona's concerns to be unreliable and, therefore, not material information that had to be disclosed. The appellant says that the reliability of the information should play no role at all: whether or not Pretium agreed with Strathcona's concerns, they needed to be disclosed, so that the market could make up its own mind.

[78] I would not give effect to the appellant's arguments, which I will address in turn.

(iv) The Motion Judge Applied the Correct Test

[79] I am not persuaded that the motion judge 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. As I will explain, 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, the motion judge 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.

[80] The motion judge was right to begin his analysis by identifying the alleged misrepresentations. At para. 21 he set out what the appellant himself had pleaded:

that the respondents made misrepresentations in each of the impugned documents by omitting Strathcona's concerns that "the Bulk Sample Program was failing to confirm the validity of the [Resource Estimate], including the grade distribution and classification of Mineral Resources contained in the [Resource Estimate], and by necessary extension the validity of the [Feasibility Study]".

[81] The motion judge identified as the central issue the materiality of the information that was not disclosed. He noted that the case was in essence about the opinions expressed by Strathcona about the validity of Snowden's Resource Estimate and the related Feasibility Study – that the Resource Estimate was "unreliable", "invalid", "materially inaccurate" and "incorrect", that immediate public disclosure to this effect was required, and ultimately (in its resignation letter) that "there [were] no valid gold mineral resources for the VOK zone", and that all of Pretium's disclosures suggesting the opposite were "erroneous and misleading": at paras. 34 and 35. These were strongly stated opinions, with which Pretium disagreed. As I explain below, it was relevant for the motion judge to assess the objective reliability of Strathcona's concerns, for the purpose of determining whether they were material facts that would assist a reasonable investor to make an informed investment decision.

[82] The motion judge, as *Sharbern Holding* instructs, undertook a "fact-specific inquiry" in light of all relevant considerations. He assessed the "contextual evidence", examining both the disclosed information and the omitted information.

He considered Strathcona's role, the record of communications and the evidence of Snowden (which had not been presented at the leave stage) to conclude that Strathcona was expressing opinions prematurely, outside the scope of its retainer and based on faulty assumptions. His characterization of Strathcona's opinions as inexpert, unsolicited, premature and unreliable was firmly anchored in the evidence. He explained why he accepted the respondents' evidence respecting Strathcona's concerns, and why he was unpersuaded by the appellant's evidence. (I note that the appellant does not contest the motion judge's findings of fact, or point to any palpable and overriding error, except, as discussed below, to suggest that the finding that Strathcona's concerns were unreliable relied on *post hoc* evidence and Pretium's subjective views).

[83] The motion judge considered the omitted information in the context of Pretium's public disclosures – see, for example, paras. 30 and 53. He considered the public communications about the BSP, noting that the market expected the reporting on the BSP and its effect on the Resource Estimate to occur at the completion of the program, after the bulk sample had been milled and the final report submitted: at para. 53.

[84] Referring to the definition of misrepresentation in the OSA, the motion judge concluded that there was no omission of any material fact because the respondents were not obliged to disclose "bad and misleading information": at para. 59.

[85] In my view, the motion judge 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". I will now address the appellant's discrete concerns with the motion judge's analysis.

a. The reliability of Strathcona's concerns was a relevant consideration in the context of this case

[86] The motion judge concluded that Strathcona's concerns were not reliable because Strathcona made two overarching errors: its sample tower data were inherently unreliable because they were based on samples that were not necessarily representative; and, the resource estimation technique that Strathcona was using (based on the assumption of "stationarity" of the resource) was inappropriate for a variable deposit like Brucejack, where most of the gold is highly concentrated in narrow veins.

[87] I do not agree with the appellant's submission that the motion judge 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".

[88] The appellant is correct that reliability was not identified as a component of a "material fact" in *Sharbern Holding*. In that case, however, the quality or reliability of the omitted information was not at issue: there were in fact more favourable financial arrangements offered to the Marriott unit purchasers and there was in fact a potential or actual conflict of interest. The only question was whether the trial judge erred in concluding that these facts were material and that their omission from VAC's Disclosure Statement was, accordingly, a misrepresentation.

[89] In the present case, by contrast, what was omitted was not (as in *Sharbern Holding*, and many other material fact cases), an undisputed fact. The omitted information was the expression of an opinion by Strathcona that the BSP was failing to confirm the validity of the Resource Estimate, and by necessary extension the validity of the Feasibility Study. While the appellant argues that it was the fact of Strathcona having expressed an adverse opinion that was material, it is the substance of the opinion that Strathcona was urging Pretium to disclose, and indeed that the appellant asserts was a "material adverse fact". The appellant, at para. 35 of his factum, asserts that "the Claim alleges that Strathcona's concerns were material facts that Pretium was required, but omitted to disclose in its public

statements at the time". The opinion was offered in the course of, and before completion of, the BSP. It was based on sample tower results and Strathcona's field observations. It was an opinion that was not shared by Pretium or Snowden. In determining the materiality of such an opinion to a reasonable investor it was relevant to consider, among other things, its objective reliability.[5]

[90] The motion judge, in considering the reliability of Strathcona's concerns, referred to *Inmet*, a decision of the B.C. Court of Appeal that also dealt with the materiality of an opinion in the context of disclosure. The action involved an alleged breach of contract for the sale of a gold mine. The purchaser asserted that it was relieved of liability for its refusal to complete the purchase because of the vendor's breach of a disclosure clause in the contract. Among other things, the court considered whether certain information expressing concerns about ore reserves and expressions of doubt, speculations and recommendations for further investigation of Inmet employees and consultants following a blasthole study was individually or cumulatively "material fact information". The court observed that the

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[5] There is case law in Ontario in the secondary market misrepresentation context (see for example *Miller v. FSD Pharma*, *Inc*., 2020 ONSC 4054) that adopts a "market impact" test for materiality, rather than the "reasonable investor" approach in *Sharbern Holding* and other cases. While the appellant points this out in his factum, at para. 49 he states, "[w]hile the subtleties of the two definitions of materiality may be important in some situations, that is not the case here", reiterating his position that "[u]nder either approach, Strathcona's Concerns were material for Pretium's investors and the market for its securities". I agree that nothing turns in this case on whether one or the other approach is appropriate in all or particular cases, and I express no view in that regard. The parties agreed that whether an omission is a material fact is governed by the principles in *Sharbern Holding* and joined issue on whether the motion judge adopted an approach on summary judgment that was consistent with the principles outlined in that case.

question was not, as the trial judge had opined, whether the information was subsequently proven to be true or accurate, but that "the analysis of whether any of the undisclosed information was material fact information…has to include an assessment of its objective reliability": at paras. 104-5.

[91] Similarly, in the present case, in assessing whether Strathcona's concerns – which were also the expression of an opinion – constituted a material fact, their objective reliability was a relevant consideration. Reliability does not mean that the information was proven to be true. Nor does it depend on an issuer's subjective views. *Sharbern Holding* instructs that materiality is determined objectively, from the perspective of a reasonable investor – whether there is a substantial likelihood that the disclosure of the information would have been viewed by the reasonable investor as having significantly altered the total mix of information made available: at para. 61. Whether omitted information constitutes a material fact depends in part on the nature of the information, and how it would be considered by a reasonable investor – not in a vacuum, but in the context of the disclosure already made. The motion judge was required to consider the omitted information in context.

[92] This ties into a related argument made by the appellant, that Strathcona's concerns were material because a reasonable investor would have considered this information to be important in light of the information that was already public. The appellant contends that, as soon as Pretium chose to talk about Strathcona and the BSP in its news releases and other disclosure, it was required to disclose

Strathcona's concerns based on its visual observations, the underground drilling and the sample tower, so long as the concerns were not retracted. The appellant relies on the fact that the BSP was highlighted in the disclosure and that Strathcona was a recognized mining expert that was responsible for the program. Even if Strathcona's concerns were not true or accurate, they were from a source that was already within the total mix of information. By remaining silent, Pretium misrepresented that the BSP was proceeding "business as usual". In providing updates on the BSP without disclosing adverse facts, Pretium's disclosures were misleading.

[93] I disagree. The problem with this argument is that it takes an unwarranted "broad brush" approach to the question of disclosure and material facts, that is inconsistent with the fact-specific inquiry mandated by *Sharbern Holding*. What is required is an objective determination – considering what was occurring and known by the issuer within the context of the total mix of information – of what would have been important to a reasonable investor, and whether the failure to disclose the information would render misleading something already stated in the issuer's disclosure.

[94] In this case, the disclosure that had already been made – about the BSP and Strathcona's role, and their relationship with the Resource Estimate and the Feasibility Study – is an essential part of the context. While Strathcona's responsibility for the BSP was addressed in Pretium's disclosures, none of the

disclosures suggested that Strathcona was to analyze and report on testing of the bulk sample through the sample tower, that the Resource Estimate would be assessed before the milling of the entire bulk sample was completed and Strathcona had provided its report, or that Strathcona was expected to opine on the Resource Estimate or the Feasibility Study, based on the sample tower results, or at all. The motion judge concluded, at para. 53, that "[f]rom the outset, Pretium made clear in its public disclosures that the results of the Bulk Sample Program would not be disclosed until the bulk sample had been milled and the final report submitted".

[95] There was also nothing in the information that had been publicly disclosed to suggest that the tower sample results were already confirming the Resource Estimate or that Strathcona's work was endorsing it. Indeed, the evidence was that the market had adopted a "wait and see" approach. A secondary market misrepresentation by omission requires evidence that disclosure already made is misleading because of the omission. The appellant was unable to point to anything specific in the impugned documents that was misleading as a result of the failure to communicate Strathcona's concerns.[6]

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[6] In his factum the appellant suggests that the impugned disclosures "portrayed that the BSP's results were continuing to affirm the accuracy of the Resource Estimate and Feasibility Study", however there is nothing in the public disclosures to support this statement. The further suggestion that the August 1, 2013 MD&A

[96] If the information available to the market suggested otherwise – that, for example, Strathcona was expected to express its views on the Resource Estimate as its work on the BSP progressed – then, presumably Strathcona's concerns would have had to have been disclosed. In such circumstances, the failure to disclose Strathcona's concerns would have constituted the omission of material information, irrespective of their reliability. However, a negative opinion expressed prematurely by a QP who had not yet completed its work, that was based on incomplete information outside what it was required to do (and what had been represented that it would do), would not have been material to a reasonable investor. In fact, it would have been misleading to have disclosed such information. The approach suggested by the appellant, that such disclosure should have been made so that investors could have decided what to do with the information, was squarely rejected by Rothstein J. at para. 65 of *Sharbern Holding*:

> … [The trial judge] said that the conflict of interest must be disclosed so that investors can weigh its costs and benefits against those of other factors. However, the statutory requirement does not impose on issuers an obligation to disclose all facts that would permit an investor to sort out what was material and what was not. This approach would not only result in excessive disclosure, regardless of materiality, it would overwhelm

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informed the market that the "BSP will confirm that the resource model is accurately projecting the Mineral Resource estimate within the bulk sample area", takes the statement out of its context, which, together with earlier statements, makes it clear that the BSP work that was designed to test two domains of mineralization used in the Resource Estimate was for the purpose of confirming the Resource Model projections. Similar statements were made before the Class Period, in describing the BSP. None of this was pressed in oral argument, where the essence of the alleged misrepresentation was that it was "business as usual".

> investors with information and impair, rather than enhance, their ability to make decisions.

[97] Accordingly, in this particular case, the reliability of the information provided by Strathcona was relevant in assessing whether Pretium omitted material facts from its disclosure that ought to have been disclosed for the benefit of "the reasonable investor". The motion judge made findings of fact that Strathcona's concerns, which were opinions, were based on objectively unreliable information, that they were premature, and that they were expressed outside the scope of the work Strathcona had been engaged to perform. Disclosure of facts that the motion judge found to be objectively unreliable would not have benefitted the "reasonable investor" but would have led to the kind of mischief in the market that the disclosure obligations under the OSA seek to obviate.

[98] As such, I would not give effect to the appellant's submission that the motion judge erred in considering the reliability of Strathcona's concerns as part of his analysis.

b. The motion judge did not rely on *post hoc* evidence or defer to Pretium's subjective views

[99] The appellant submits that the motion judge's assessment of materiality relied on a *post hoc* evaluation that accepted Pretium's subjective opinions and business judgment. There is simply no basis for this contention.

[100] First, the evidence adduced on the summary judgment motion was not *post hoc* evidence that was created with the benefit of hindsight. Although assembled years after the relevant events, the respondents' evidence included emails and letters that showed the discussions about Strathcona's concerns by the relevant actors at Pretium at the time and, importantly, included Snowden's contemporaneous views. The affidavits of Pretium and Snowden representatives spoke to the views they had expressed to Strathcona when the events were unfolding, which were consistent with what was contained in the contemporaneous communications. The evidentiary record showed that, during the Class Period, Pretium was actively engaging with Strathcona and raising exactly the same concerns as it did on the summary judgment motion, namely that Strathcona had always been skeptical of the modelling method used in the Feasibility Study, that it prematurely and outside "its own lane" expressed an opinion that the Resource Estimate over-estimated the gold grade, even with very little data, and that the sample tower method was not a representative sample.

[101] 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.

[102] Nor did the motion judge simply accept Pretium's subjective views or business judgment. While on the leave motion, the motion judge concluded that Pretium's subjective views were not sufficient to displace the "objective reality that

Strathcona, an experienced mining consultant, was telling Pretium that its testing was showing almost no gold", he observed that the initial characterization of the two consultants as equally skilled resource estimate consultants "with equal expertise and qualifications offering equally valid opinions" had been dislodged by the evidence on the summary judgment motions: at paras. 12-14. He concluded that the additional evidence adduced on the summary judgment motions added "an important objective dimension" to Pretium's view that the Strathcona concerns were "inherently unreliable": at para. 74.

[103] Contrary to the appellant's submission, the motion judge did not allow Pretium's business judgment to qualify or undermine its duty of disclosure. In *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, the company, after making public a prospectus forecast, and between the release of the forecast and the offer closing, did not disclose that its fourth quarter numbers were lagging and did not match the forecast. Instead, management relied on its belief that by year-end the company would achieve or exceed the forecast. When numbers kept dropping, the information was disclosed, and stock prices dropped. Binnie J. held that "[t]he Business Judgment Rule is a concept well-developed in the context of *business* decisions but should not be used to qualify or undermine the duty of disclosure": at para. 54 (emphasis in original). In this case, Pretium did not base its disclosure decision on the belief that further work on the BSP would provide favourable results. Instead, its representatives were reasonably of the view –

supported by the opinions of the consultant responsible for the Resource Estimate – that the results from the BSP could only be accurate upon completion of the project, which included milling the sample at the Montana mill. This was consistent with the contemporaneous evidence of the behaviour of institutional investors. The market was adopting a "wait and see" approach. It may have been a "business as usual" message, but the failure to disclose Strathcona's concerns did not render any prior statement by Pretium misleading.

[104] The motion judge 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. He considered the evidence of contemporaneous communications between Pretium and Snowden, internally at Pretium (including to its board of directors) and between Pretium and Strathcona, about Strathcona's concerns, including the substance of Strathcona's opinions and advice and the obligation to make disclosure.

c. What is a material fact does not depend on "reasoning backwards" from the alleged public correction

[105] In a similar argument, the appellant asserts 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.

[106] In this case it is not admitted that the October 22, 2013 news release constituted a public correction – in the sense that it corrected information that was previously misstated. The respondents assert that what is alleged to have been a public correction in fact corrected nothing from the previous disclosures. The disclosure was made in order to inform the market that Pretium's expert responsible for the BSP was leaving the project unexpectedly, and it was in this context that Strathcona's concerns and Pretium's responses were communicated. There was no correction of previous information, since Strathcona had remained on the project during the Class Period, and had confirmed that it would complete the BSP, even after it began expressing concerns. Nor did the October news releases validate Strathcona's concerns.

[107] Even in cases where it is admitted or obvious that there was a public correction, the market response, while relevant to materiality, is not determinative: *Peters v. SNC-Lavalin Group Inc*., 2021 ONSC 5021, at paras. 195, 197. And, as Ducharme J. noted in *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107 (Div. Ct.), in connection with a material change, "if the material change is disclosed by the issuer along with other information, the market reaction to the combined disclosure may not be a reliable indicator of the market impact of the disclosure of one particular piece of information in isolation":

at para. 59. In this case the appellant led no evidence to tie the decline in Pretium's share price to the disclosure of Strathcona's concerns.

[108] Here, as in *Peters*, 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. As 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.

VI. CONCLUSION

[109] The motion judge did not err in his analysis. He 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.

[110] Finally, I would observe that the motion judge's analysis does not run afoul of the well-canvassed policy objectives of securities regulation. It is trite that a core objective of the continuous disclosure regime is the protection of investors through the "full, true and plain disclosure of all material facts": *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112, at p. 126. Continuous disclosure creates "a 'level playing field' where all investors have access to the same information and all pricing and investment decisions are made from the same starting point": *Theratechnologies Inc. v. 121851 Canada Inc.,* 2015 SCC 18, [2015] 2 S.C.R. 106, at para. 25. Continuous disclosure in the secondary market is "at the heart of securities regulation and must be scrupulously accurate and fair": *Rahimi v. SouthGobi Resources Ltd.,* 2017 ONCA 719, 137 O.R. (3d) 241, at para. 80, leave to appeal refused, [2017] S.C.C.A. No. 443. None of these policy objectives would have been served by the disclosure of Strathcona's concerns in the factual circumstances of this case.

[111] The motion judge reasonably concluded that the objectively unreliable and erroneous opinion of Strathcona, which was offered prematurely and outside "its own lane", was not a material fact that was required to be disclosed in the context of the disclosures already made. The motion judge did not reach his conclusion by changing the legal test from the leave stage to the summary judgment stage.

Rather, the appellant's evidence, which was sufficient to make out a reasonable possibility of success at the leave stage, did not withstand the higher burden of proof on the summary judgment motion. The motion judge did not err in finding, on a preponderance of the evidence, that there were no omissions of material fact and thus no misrepresentations to ground a claim under s. 138.3.

VII. DISPOSITION

[112] For these reasons, I would dismiss the appeal and I would award the respondents their costs of the appeal in the agreed amount of $50,000, inclusive of HST and disbursements.

Released: July 22, 2022 "K.M.v.R."

"K. van Rensburg J.A."
"I agree. L.B. Roberts J.A."
"I agree. E. Ria Tzimas, J. (*AD HOC*)"