

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**DAVID WONG**

Plaintiff

- and -

**PRETIUM RESOURCES, INC. AND ROBERT QUARTERMAIN**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE PLAINTIFF**

(Motion for Production of Information from Non-Parties pursuant to Rule 30.10 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194)

***Motion in Writing - Returnable: March 2, 2020***

February 14, 2020

550 W. Merrill Street, Ste. 100  
Birmingham, Michigan 48009

**Andrew J. Morganti** (LSO#: 57895E)  
Tel: (647) 344-1900  
Fax: (416) 352-7638  
amorganti@morgantico.com

*Lawyer for the Plaintiff*

**TO:           McCARTHY TÉTRAULT LLP**  
66 Wellington Street West,  
Suite 5300, TD Bank Tower Box 48,  
Toronto, ON. M5K 1E6  
Fax: (416) 868-0673

**R. Paul Steep** (LSO#: 21869L)  
Tel: (416) 601-7998  
psteep@mccarthy.ca

**H. Michael Rosenberg** (LSO#: 58140U)  
Tel: (416) 601-7831  
mrosenberg@mccarthy.ca

**Caroline H. Humphrey** (LSO#: 71951F)  
Tel: (416) 601-7924  
chumphrey@mccarthy.ca

*Lawyers for the Defendants*

**AND TO:    BENNETT JONES LLP**  
3400 One First Canadian Place  
P.O. Box 130  
Toronto, ON. M5X 1A4  
Fax: (416) 836-1716

**Jeffrey S. Leon** (LSO#: 18855L)  
Tel: (416) 777-7472  
leonj@bennettjones.com

**Joseph N. Blinick** (LSO#: 64325B)  
Tel: (416) 777-4828  
blinickj@bennettjones.com

*Lawyers for the non-party,  
Strathcona Mineral Services Limited*

## PREAMBLE<sup>1</sup>

1. In this motion, the Plaintiff is seeking an Order requiring Henrick Thalenhorst, on behalf of the non-party Strathcona Mineral Services Ltd. (“**Strathcona**”), to produce certain documents identified herein regarding Strathcona’s engagement by the Defendant Pretium Resources Inc. (“**Pretium**” or the “**Company**”), and its views on and work relating to Pretium’s Brucejack Mine (collectively, the “**Strathcona Materials**”), including:

- (i) The retainer agreement between Strathcona and Pretium;
- (ii) Any communications between Strathcona and Snowden Mining Consultants Ltd. (“**Snowden**”) pertaining to Pretium, the Brucejack Mine or the Programs (as defined below);
- (iii) Any communications between Strathcona and Agnico Eagle Mines Limited and other third-party companies with regards to Pretium, the Brucejack Mine or the Programs (as defined below); and
- (iv) Any internal communications concerning the Pretium project and its senior executives.

## THE MATERIAL FACTS

2. On October 9, 2013, Pretium issued a material change report<sup>2</sup> that disclosed, *inter alia*, that Strathcona had resigned from its position as the Qualified Person (expert) for Pretium’s Bulk Sample Program, comprised of: (i) a 10,000 tonne sample tower analysis of the ore; and (ii) 15,000 meter underground drilling/exploration of the Brucejack Mine (collectively referred to as the “**Programs**”).

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<sup>1</sup> Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Statement of Claim, issued January 22, 2018 [Plaintiff’s Supplementary Motion Record (“PSMR”), Tab 1].

<sup>2</sup> Material Change Report dated October 9, 2013, Exhibit F to Affidavit of Hadi Davarinia sworn February 14, 2020 (“**Davarinia Affidavit #2**”) [PSMR, Tab 2, Ex. F, p. 661-662].

3. Pretium did not disclose the reason for Strathcona's departure at this time nor Strathcona's adverse statements and findings, conveyed to Pretium on July 11 (email), July 12 (conference), August 14 (letter), August 21 (meeting), September 5, 2013 (an Interim Technical Report), September 13 (email), September 20 (email), September 28, 2013 (email), and October 7, 2013 (resignation letter), that its ongoing analysis of data obtained from the Programs, including material processed through the sample tower and underground drilling/exploration, was failing to confirm the validity of the Company's November 2012 Mineral Resource Estimate and June 2013 Feasibility Study.

4. On October 22, 2013, however, Pretium did release a news release on SEDAR<sup>3</sup> (followed by a corresponding material change report on October 24, 2013) revealing the reasons for Strathcona's departure.

5. In a lengthy section of the press release and material change report entitled "Strathcona's Withdrawal from the Program",<sup>4</sup> Pretium stated that:

As stated above, consultants from Strathcona were engaged in late 2012 as independent Qualified Persons to oversee the 10,000-tonne bulk sample and produce a report at the conclusion of the Program once all data, including the assay results from sample tower and the 16,789 meters of completed underground drilling, had been compiled. The report was expected to reconcile the assay results from the sample tower against a local resource estimate prepared by Snowden based on the Program drilling, which would provide an empirical grade prediction variance for a stope-sized tonnage that could be related to and used for resource classification. Strathcona's report on the Program was expected in early 2014.

[ ] Strathcona advised Pretium that "...there are no valid gold mineral resources for the VOK Zone, and without mineral resources there can be no mineral reserves, and without mineral reserves there can be no basis for a Feasibility Study." They also advised that "...statements included in all recent press releases [by Pretium]

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<sup>3</sup> The System for Electronic Document Analysis and Retrieval, or "SEDAR", is an electronic database developed for the Canadian Securities Administrators. Canadian reporting issuers, subject to certain exemptions, are required to file press releases and public filings on SEDAR, where they are then retrievable by the general public.

<sup>4</sup> Material Change Report dated October 24, 2013, Exhibit G to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. G, pp. 663-670].

about probable mineral reserves and future gold production [from the Valley of the Kings zone] over a 22-year mine life are erroneous and misleading." Snowden maintains its stance that the November 2012 Mineral Resource Estimate remains valid, and has taken steps to involve a third party peer review in its up-coming mineral resource update.

In addition, Strathcona advised that, "The infrequent high-grade intercepts reported in the press releases have been shown in the underground exposures of the bulk sample program to usually be of very narrow width (0.5 meters) and associated with narrow geological structures that occasionally have mineable continuity as in the case of the Cleopatra Vein." The results from Valley of the Kings Program drilling have been, from the outset, consistent with results from prior exploration drilling in the Valley of the Kings. Drilling has frequently intersected extreme grade mineralization over narrow widths, with 47 intersections grading greater than 1,000 grams of gold per tonne from underground drilling (on average there is one in every 550 meters of 2013 drilling) and 125 intersections in total to date grading greater than 1,000 grams of gold per tonne for the Valley of the Kings. The Program was initiated, amongst other reasons, to determine the bulk minability of the Valley of the Kings mineralization. These reasons and the form of mineralization were discussed with Strathcona prior to their engagement.

When it withdrew, Strathcona advised Pretium that it had previously asserted similar views critiquing the Snowden resource model for the Valley of the Kings, accompanied with "recommendations" for public disclosure of the preliminary bulk sample data supporting their conclusions. At one point, these assertions, conclusions and "recommendations" were made on the basis of approximately 20% of the underground drilling results, no assay results from the sample tower and no results from production.

Snowden has consistently and repeatedly advised in response to all comments from Strathcona that the true test of the resource estimate will only come from the reconciliation results between the ultimate grade of the bulk sample (as defined by produced metal and metal accounting) and the grade of the resource estimate for the same volume. Strathcona resigned before Snowden had an opportunity to formally respond to their assertions.

Both Pretium's management and Snowden share a number of significant concerns with respect to Strathcona's conclusions. They contend that the Strathcona conclusions are based on: (a) the interpretation of preliminary data, (b) the interpretation of too few data, and (c) the incorrect interpretation and application of preliminary local data for comparison to the resource estimate model. Pretium management and Snowden also share significant concerns that the sampling tower approach for the Valley of the Kings deposit may be flawed.

6. Pretium's news releases dated October 9 and 22, 2013, exposed contradictions between material facts revealed in Pretium's documents released on SEDAR during the Class Period.

7. On November 27, 2013, The Northern Miner released an article entitled, “Strathcona’s Farquharson on the problem with Brucejack,”<sup>5</sup> whereby Farquharson, on behalf of Strathcona, was quoted as saying:

But the main item was that we found the bulk-sample program, which was comprised of underground drilling, underground geological mapping and the results of the sample tower. [sic] The main objective of all that was validation of the resource model that Snowden had prepared in November 2012.

That was the basis of the feasibility study [], which suggested it was going to be a big mine producing 425,000 oz gold a year for the next 10 years within 22-year mine life... which had 16 million tonnes with a grade of 16 grams per tonne in the indicated category... and we didn’t find that.

And Pretium didn’t find that -- when they did all the underground drilling and geological mapping and the results from the sample tower, and so on -- so we told them on several occasions that they should be alarming the world that the resource model was not panning out.

The good grades in [the Cleopatra Vein] do not substantiate or corroborate the initial resource model, which was based on big dimensions, big stopes and the grade of 16 grams per tonne.

We told Pretium that, from all the drilling they’ve done -- and it’s a heck of a lot of drilling -- and with the sample-tower results and so on, none of those come anywhere close in finding a grade of 16 grams per tonne, which is what allows bulk-mining methods.

8. This Court, with the Divisional Court’s concurrence, granted the Plaintiff’s motion for leave to proceed with a statutory secondary market claim,<sup>6</sup> pursuant to section 138.8 of the *Securities Act*.<sup>7</sup>

9. Although the parties have not completed discovery, the Defendants have moved for summary judgment, seeking to absolve themselves of any liability for omitting to disclose material

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<sup>5</sup> Northern Miner Article dated November 27, 2013, Exhibit H to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. H, pp. 671-677].

<sup>6</sup> *Wong v. Pretium Resources, Inc.*, 2017 ONSC 3361, leave to appeal to Div. Ct. refused, Affidavit of Hadi Davarinia sworn February 7, 2020 (“**Davarinia Affidavit #1**”) at Exhibit A [Plaintiff’s Original Motion Record, Tab 2, Exh. A, pp. 16-29].

<sup>7</sup> R.S.O. 1990, c. S.5 (“*OSA*”).

facts to the Class. It is to this summary judgment motion that the Plaintiff's within Rule 30.10 motion corresponds.

10. The proposed examination of Henrick Thalenhorst of Strathcona is relevant to the Plaintiff's opposition to the Defendants' pending summary judgment motion.

11. With the benefit of discovery, the Plaintiff now believes that Mr. Thalenhorst is in a position to offer relevant evidence, and the Plaintiff has narrowly tailored the scope of the examination in the Notice of Motion. The motion does not prejudice the Defendants.

12. Notwithstanding Strathcona's concerns and opinions conveyed during the Class Period, a third-party mining company having access to a "data room" and, perhaps Snowden, reached the same conclusion as Strathcona (i.e. that the Resource Estimate was not accurate) and walked away from any potential acquisition of Pretium and never returned, *even* Pretium's actual 2017 - 2019 mining results, i.e., when the Mine went into commercial production, confirmed Strathcona's concerns and opinions during the Class Period as reflected in the following chart:<sup>8</sup>

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<sup>8</sup> It is noteworthy to point out that at the time of the Plaintiff's motion under s. 138.8 of the *OSA*, these results were unknown because the Brucejack Mine did not go into commercial production until July of 2017.

<b>Pretium's Representations</b>	<b>Actual Results</b>	<b>Difference</b>
<p><b>Resource Estimate<sup>9</sup> and Feasibility Study<sup>10</sup></b></p> <p>Indicated 16.1 million tonnes of mineralized ore at an average grade of 16.4 Au g/t containing a total of 8.5 million Au oz.</p>		
<p>1st year of commercial production (2017) to mill 600,000 [300,000] tonnes with an average grade of 16.3 Au g/t.</p>	<p>532,763 tonnes had to be milled with an average grade of a mere 9.4 Au g/t to produce 152,484 oz. of gold.<sup>11</sup></p>	<p>Had to mill 232,763 more ore, or 78% with an average grade being 42% lower than forecasted by Pretium but consistent with Strathcona.</p>
<p>2nd year of commercial production (2018) to mill 900,000 tonnes with an average grade of 13.8 Au g/t.</p>	<p>1.06M tonnes had to be milled with an average grade of a mere 11.9 Au g/t to produce 376,012 oz. of gold.<sup>12</sup></p>	<p>Had to mill 160,000 more ore, or 18% with an average grade being 14% lower than forecasted by Pretium but consistent with Strathcona.</p>
<p>3rd year of commercial production (2018) to mill 1M tonnes with an average grade of 13.1 Au g/t.</p>	<p>1.36M tonnes had to be milled with an average grade of a mere 8.7 Au g/t to produce 354,405 oz. gold.<sup>13</sup></p>	<p>Had to mill 360,000 more ore, or 36% with an average grade being 34% lower than forecasted by Pretium but consistent with Strathcona.</p>
<p><b>Material Change Report (July 23, 2013)<sup>14</sup></b> Commencing the Class Period.</p> <p>Indicated 15.1 million tonnes of mineralized ore at an average grade of 13.6 Au g/t with an average production of 426,000 Au oz. annually for the first 10 years.</p>	<p>Between 2017 and 2019, Pretium had to mill 2.95M tonnes of ore with an average grade of a mere 8.48 Au g/t to produce a total of 882,901 oz. of gold</p> <p>Between 2017 and 2019, Pretium only produced 882,901 oz. of gold.</p>	<p>The 3 year take-away:</p> <p>Milled ore: increased 34%</p> <p>Average Au g/t: down 38%</p> <p>Produced Au: down 31%</p> <p>Strathcona appears to have been accurate in its warnings.</p>

<sup>9</sup> Mineral Resource Update Technical Report dated November 20, 2012, Exhibit A to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. A, pp. 43-148] (emphasis added).

<sup>10</sup> Feasibility Study and Technical Report dated June 21, 2013, Exhibit B to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. B, pp. 149-640].

<sup>11</sup> News Release dated March 8, 2018, Exhibit J to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. J, pp. 774-790].

<sup>12</sup> News Release dated February 14, 2019, Exhibit K to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. K, pp. 791-804].

<sup>13</sup> News Release dated February 12, 2020, Exhibit L to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. L, pp. 805-815].

<sup>14</sup> Material Change Report dated July 23, 2013, Exhibit C to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. C, pp. 641-656].



13. Indeed, with the benefit of actual results, it appears that Strathcona's Class Period warnings were accurate, i.e., the Resource Estimate and Feasibility Study were not accurate. For example, after 3 years of commercial production Pretium has:

- (a) Not produced close to 426,000 ounces of gold per year;
- (b) Not been able to find an average 13.6 g/t; and
- (c) Been required to mill greater quantities of ore than represented in the Impugned Documents as well as the Resource Estimate and Feasibility Study.

14. Moreover, even Pretium's executives consider Strathcona's views as important, which resulted in significant alterations of the total situation for Pretium as reflected by the following events:

- (a) Immediately prior to the Class Period, Mr. Ovsenek asked an employee of Pretium to force Strathcona to believe that it had incomplete data but then questioned whether Strathcona had "sufficient sample tower results to reach this conclusion";<sup>15</sup>
- (b) During the Class Period, Pretium asked for Strathcona to provide input and edits to multiple press releases; and
- (c) Immediately after Strathcona's resignation, Mr. Ovsenek emailed an employee of Pretium that, "We are in the middle," between Snowden and Strathcona's views about the Resources Estimate.<sup>16</sup>

15. Nevertheless, the Defendants have advanced an aggressive summary judgment motion and make affirmative statements conflicting with and discounting Strathcona's adverse findings and statements.

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<sup>15</sup> Discovery Document PRET0001649\_0002, Exhibit D to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. D].

<sup>16</sup> Discovery Document PRET0004582\_0002, Exhibit E to Davarinia Affidavit #2 [PSMR, Tab 2, Ex. E, pp. 659-660].

## ISSUES AND LAW

### *The requirements of Rule 30.10 are satisfied*

16. Rule 30.10<sup>17</sup> sets out the test for production of non-parties with leave. This test is satisfied on this Motion:

- (a) the documents are relevant to a material issue in the action; and,
- (b) it would be unfair to require the moving party to proceed to trial without having discovery of the documents.

17. The Factors from *Ontario (Attorney General) v. Stavro*<sup>18</sup> are generally applied in Rule 30.10 motions. Those factors include:

- (a) the importance of the documents in the litigation;
- (b) whether production at the discovery state of the process, as opposed to production at trial, is necessary to avoid unfairness to the moving party;
- (c) whether the discovery of the opposing party in the litigation with respect to the issues to which the documents are relevant is adequate, and if not, whether responsibility for that inadequacy rests with that party;
- (d) the position of the non-party with respect to production;
- (e) the availability of the documents or their informational equivalent from some other source which is accessible to the moving party; and
- (f) the relationship of the non-party from whom production is sought to the litigation and the parties to the litigation. A non-party who has an interest in the subject matter of the litigation and whose interests are allied with the party opposing production

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<sup>17</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 30.10.

<sup>18</sup> 1995 CanLII 3509 (ON CA) [Plaintiff's Book of Authorities ("PBOA"), Tab 1].

should be more susceptible to a production order than a true “stranger” to the litigation.<sup>19</sup>

18. The moving party’s need should be balanced with the non-party’s exposure to inconvenience, expense or liability.<sup>20</sup>

19. It is indisputable that Strathcona’s evidence is relevant to the material issues in this action.

20. It is the Plaintiff’s belief that denying the Class access to Strathcona’s internal documents, including its retainer with Pretium, would be unfair under the circumstances, e.g., it is the Defendants that are advancing the rushed summary judgment motion.

21. The Plaintiff is unable to obtain the discovery from any other source.

22. Although Strathcona’s position should be aligned with that of the Plaintiff, Strathcona’s lawyer has aligned himself with that Pretium.

23. In this case, Class Counsel’s need far outweighs any inconvenience or expense to Strathcona. The documents are integral; Class Counsel cannot obtain the discovery from Pretium or other third-parties.

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<sup>19</sup> *Ibid* at para 15 [PBOA, Tab 1, pp. 14-15].

<sup>20</sup> *Lowe v Motolanez*, [1996] O.J. No. 2914 (C.A.) at para 17 [PBOA, Tab 2, p. 19].

**CONCLUSION**

24. For all of the above reasons, the Plaintiff respectfully requests that this Honourable Court issue an Order requiring the non-party Strathcona to produce the Strathcona Materials.

February 14, 2020

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**BY:**

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Andrew J. Morganti  
**Morganti & Co, P.C.**

## **SCHEDULE “A” – LIST OF AUTHORITIES**

1. *Ontario (Attorney General) v. Stavro*, 1995 CanLII 3509 (ON CA).
2. *Lowe v Motolanez*, [1996] O.J. No. 2914 (C.A.).

## SCHEDULE “B” – LIST OF RELEVANT LEGISLATION

### Rules of Civil Procedure, R.R.O. 1990, Reg. 194

#### PRODUCTION FROM NON-PARTIES WITH LEAVE

##### *Order for Inspection*

**30.10** (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

- (a) the document is relevant to a material issue in the action; and
- (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document. R.R.O. 1990, Reg. 194, r. 30.10 (1).

##### *Notice of Motion*

(2) A motion for an order under subrule (1) shall be made on notice,

- (a) to every other party; and
- (b) to the person not a party, served personally or by an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 30.10 (2).

##### *Court may Inspect Document*

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue. R.R.O. 1990, Reg. 194, r. 30.10 (3).

##### *Preparation of Certified Copy*

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original. R.R.O. 1990, Reg. 194, r. 30.10 (4).

##### *Cost of Producing Document*

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise. O. Reg. 260/05, s. 5.

DOCUMENT DEPOSITED FOR SAFE KEEPING

**30.11** The court may order that a relevant document be deposited for safe keeping with the registrar and thereafter the document shall not be inspected by any person except with leave of the court. R.R.O. 1990, Reg. 194, r. 30.11.

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Plaintiff

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PROCEEDINGS COMMENCED AT *TORONTO*

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550 W. Merrill Street, Ste. 100  
Birmingham, Michigan 48009

**Andrew J. Morganti** (LSO#: 57895E)  
amorganti@morgantico.com  
Tel: (647) 344-1900  
Fax: (416) 352-7638  
amorganti@morgantico.com

*Lawyer for the Plaintiff*