



No. C985348
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

DONALD PEARSON, ELIZABETH MATUS and KENNETH
ELLIOT as representative plaintiffs

PLAINTIFFS

AND

BOLIDEN LIMITED, TRELLEBORG INTERNATIONAL BV,
TRELLEBORG AB, ANDERS BULOW, JAN PETER
TRAAHOLT, KJELL NILSSON, LARS OLOF NILSSON,
ALEX G. BALOGH, ROBERT K. McDERMOTT, ROBERT R.
STONE, FREDERICK H. TELMER and NESBITT BURNS,
INC.

DEFENDANTS

**STATEMENT OF DEFENCE OF THE DEFENDANTS
ALEX G. BALOGH, ROBERT R. STONE AND FREDERICK H. TELMER**

1. The Defendants Alex G. Balogh, Robert R. Stone and Frederick H. Telmer (the "Individual Defendants") deny every allegation in the Further Amended Statement of Claim unless expressly admitted below.

2. The Individual Defendants admit the allegations in paragraphs 11, 13 and 14 of the Further Amended Statement of Claim.

A. Corporate Parties and Defendants

3. The Defendant Boliden Limited ("Boliden") was incorporated April 18, 1997 under the *Canada Business Corporations Act*, RSC 1985, c. C-44, with a current head office at 1000-145 King Street West, Toronto, Ontario, M5H 1J8. Boliden was incorporated as a wholly owned subsidiary of the Defendant Trelleborg International BV ("Trelleborg BV"), the selling shareholder in the 1997 initial public offering ("IPO") from which this action arises.

4. Trelleborg BV was incorporated under the laws of the Netherlands with a head office in Hoogezand, Netherlands. At all material times, Trelleborg BV was an indirectly wholly owned subsidiary of the Defendant Trelleborg AB.

5. Trelleborg AB was incorporated under the laws of Sweden with a head office in Trelleborg, Sweden. Trelleborg AB is the head corporation of the corporate group of which Trelleborg AB, Trelleborg BV and Boliden (the "Corporate Defendants") collectively form a part.

6. In the months leading up to the IPO, Trelleborg AB transferred its world-wide mining, smelting and fabricating operations to Trelleborg BV, which transferred them to Boliden in exchange for common shares of the latter. Shortly after its incorporation, therefore, and shortly before the IPO, Boliden owned the entirety of Trelleborg AB's substantial world-wide mining interests.

7. Boliden held these assets through Boliden BV, a Netherlands holding company that for all material times owned all the shares of a Netherlands metals fabrication entity, and all the shares of Boliden AB, a Swedish company that for all material times directly or indirectly owned substantial interests in mining, fabricating, smelting and engineering operations in Belgium, Sweden, United Kingdom, Saudi Arabia, Norway and Spain.

8. Boliden BV for all material times also owned all the shares of Boliden Apirsa SL ("Boliden Apirsa"), the Spanish company through which Trelleborg AB indirectly came to own the mining facility at issue in this action.

9. At all material times, the Corporate Defendants and its many subsidiaries were engaged in the mining, processing, and fabricating of metals and mineral products. Though central control for the Trelleborg/Boliden group resided in Sweden, international operations were conducted almost exclusively in the languages of the countries in which they operated.

10. The Defendant Alex G. Balogh became a director of Boliden April 24, 1997 and resigned on or about May 18, 2001. Mr. Balogh resides at 355 Balboa Court, Oakville, Ontario, L6J 6K2.

11. The Defendant Robert R. Stone became a director of Boliden April 24, 1997 and remains a director to this day. Mr. Stone resides at 1609 Balsam Street, Vancouver, British Columbia, V6C 2G8.

12. The Defendant Frederick H. Telmer became a director of Boliden April 24, 1997 and remains a director to this day. Mr. Telmer resides at 4451 Lakeshore Road, Burlington, Ontario, L7L 1B3.

13. At all material times, Mssrs. Balogh, Stone and Telmer were outside directors who remained uninvolved in the day to day operations of Boliden.

B. Early Mine Ownership and Tailings Dam Construction

14. This action concerns a tailings dam failure that occurred April 25, 1998 at the Aznalcollar mine located 45 km west of Seville, Spain.

15. The Aznalcollar mine and its associated tailings dam were constructed in the 1970s by Andaluza de Piritas SA ("Apirsa"), a Spanish firm then owned by another Spanish firm Banco Central SA. Apirsa built the mine to exploit a nearby mineral deposit for which Apirsa then held the mining rights.

16. The mine was constructed with an adjoining tailings dam consisting of four perimeter walls enclosing a 200 hectare area designated as a storage pond for mine tailings. Tailings comprise the residue of water, chemical agents and finely crushed rock (measured in microns) from initial stages of ore processing. They are environmentally toxic and must be permanently impounded. Where a naturally occurring structure does not exist for this purpose, a tailings dam must be constructed.

17. During initial stages of constructing the Aznalcollar mine, Apirsa commissioned the engineering firm Intecsa to design a tailings dam appropriate to the needs of projected operations for the Aznalcollar pit. Intecsa developed a design in three documents it produced in the years 1974-1978.

18. The third of these documents, "Final Tailings Dam Project," outlines parameters of the dam eventually constructed at the Aznalcollar site. This document contemplates a dam bearing a maximum height of 30.5m, under a construction design positing a starter wall to hold initial mine tailings, and future lifts to the walls to accommodate expected tailings from subsequent years of mining. Intecsa claimed in this document that the proposed dam, elevated to maximum design height and subject to a design-centre earthquake, would remain stable with a 30% margin of stability.

19. Apirsa accepted the Intecsa design and obtained government approval to construct a dam according to it. Apirsa then commissioned the firm Dragados y Contruccion SA to perform the construction work, which work began in 1978. Mining production, following completed construction of mine and starter dam, began in 1979.

20. During the years 1979-1987, Apirsa periodically elevated the dam walls to meet ongoing requirements for tailings storage. Also during this time, Spanish regulatory authorities regularly inspected and approved the dam walls.

C. Boliden Mine Ownership

21. In 1987, Boliden AB purchased the shares of Apirsa, thereby acquiring the Aznalcollar mine and Apirsa's mineral rights to the Aznalcollar and surrounding deposits.

22. Following this acquisition, Boliden AB began exploring Apirsa's properties for additional mining opportunities. In 1988, it discovered the Los Frailes deposit just east of the Aznalcollar pit.

23. In 1994, Boliden Apirsa purchased the business and assets of the Aznalcollar mine. In 1995, with the Aznalcollar deposit nearly depleted, Boliden Apirsa decided to produce the Los Frailes deposit.

24. Boliden Apirsa intended to commence production at Los Frailes in 1997 and planned to use the Aznalcollar tailings pond to hold tailings generated from the Los Frailes mine. To lay the groundwork for proceeding as such, Boliden Apirsa commissioned the engineering firm Geotecnica y Cimientos ("Geocisa") to investigate the stability of the tailings dam at its then current height of 24.5m (being <85% of the 1978 design maximum), and at the 1978 design maximum with one section of the dam raised an additional 5%.

25. In March 1996, Geocisa issued a stability report declaring the dam at both current and adjusted 1978 maximum heights stable under earthquake conditions with a 30% margin of stability. The report also recommended installing monitoring equipment in and near the dam walls to detect water seepage and possible dam wall movements.

26. In June 1996, Geocisa drafted an enlargement project to raise the dam to the adjusted 1978 maximum height. The report also established a program to implement monitoring recommendations contained in the March report.

27. On June 20, 1996, Spanish authorities approved the March and June reports and authorised Boliden Apirsa to enlarge the dam accordingly. Boliden Apirsa commissioned a third-party firm to perform first-phase enlargement work, and commissioned Geocisa to install the necessary monitoring equipment.

28. In 1996, Boliden Apirsa ceased production at the Aznalcollar deposit.

29. In early 1997, respective parties completed first-phase enlargement work and equipment installation. In February 1997, Boliden Apirsa commenced production at the Los Frailes deposit. In March 1997, Geocisa, on contract to Boliden Apirsa, commenced monitoring water seepage and wall movements in a monitoring program entailing weekly site visit and data reports, quarterly monitoring reports and annual summary reports.

D. The Prospectus

30. In 1996, Trelleborg AB resolved to sell a majority interest of its mining and fabrication operations by causing Trelleborg BV to conduct an IPO in Canada and private placements in United States and Europe to sell 51% or more of the common shares of a new subsidiary (Boliden) to be created in part for that purpose.

31. On April 18, 1997, Boliden was incorporated.

32. On June 10, 1997, Trelleborg BV filed a prospectus (the "Prospectus") in accordance with applicable securities laws in each province in Canada, including the following relevant legislation:

- (a) the British Columbia *Securities Act*, R.S.B.C. 1996, c.418;
- (b) the Alberta *Securities Act*, S.A. 1981, c.S-6.1;
- (c) the Saskatchewan *Securities Act*, S.S. 1988, c.S-42.2;
- (d) the Manitoba *Securities Act*, R.S.M. 1988, c.S-50;
- (e) the Ontario *Securities Act*, R.S.O. 1990, c.S.5;
- (f) the Quebec *Securities Act*, R.S.Q., c.V-1.1;
- (g) the New Brunswick *Securities Fraud Prevention Act*, R.S.N.B. 1973, c.S-6;
- (h) the Nova Scotia *Securities Act*, R.S.N.S. 1989, c.418;
- (i) the Prince Edward Island *Securities Act*, R.S.P.E.I. 1988, c.S-3; and
- (j) the Newfoundland *Securities Act*, R.S.N. 1990, c.S-13.

33. A single English version of the Prospectus was filed in each province except Quebec; a French version translated from the English was filed in Quebec. Each provincial securities commission issued a receipt for the relevant filing with it.

34. Also on June 10, 1997, Trelleborg BV issued international disclosure documents for private placement sales of Boliden shares outside Canada. Such documents in all instances met relevant legal requirements of jurisdictions in which international sales were conducted.

35. The Individual Defendants signed the Prospectus, but before they did, they conducted investigations to ensure it met appropriate standards of disclosure and accuracy. These investigations comprised oral and documentary inspections and enquiries conducted at formal meetings and discussions in Canada and abroad, as well as site visits to Boliden's principal international operations including the Aznalcollar/Los Frailes mine. The Individual Defendants were assisted in their efforts by local management and employees, legal counsel, outside accountants and environmental and other experts retained to report on financial, operational and environmental aspects of Boliden's international operations. The Individual Defendants performed their investigations by reference to a preliminary prospectus given them for that purpose and on which the Individual Defendants were invited to, as they did in fact, comment.

36. The Individual Defendants' investigations provided them reasonable grounds to believe, as they did, the Prospectus did not misrepresent through omission or otherwise any material fact within the understanding of such terms in relevant securities legislation. Their investigations, in particular, disclosed no concerns about the stability of the Aznalcollar tailings dam.

37. When the IPO closed on June 17, 1997, Trelleborg BV had sold 55% of its common shares in Boliden by instalment receipts sold to persons in Canada, the United States and Europe.

E. Tailings Dam Failure

38. On April 25, 1998, the Aznalcollar tailings dam failed without prior warning. In the early morning hours, a 700m section of the eastern wall slid as many as 60m horizontally causing the dam to breach at the point of greatest displacement, releasing a large quantity of water and tailings into the adjacent countryside. The height of the failed eastern wall was at that time <90% of the 1978 design maximum, and the tailings pond was filled to less than 50% capacity.

39. The Corporate Defendants, including Boliden and Boliden Apirsa, responded by immediately arranging and conducting clean-up efforts. They also commissioned the engineering firm Eptisa Servicios de Ingenieria SA ("Eptisa") to investigate the cause of the failure.

40. Eptisa collected extensive data from the failure site and, aided by an international panel of experts in analysing this data, attributed the cause of the slide to a horizontal fracture plane in the clay substrate 14m beneath the dam wall. According to Eptisa, the clay slowly fractured beneath an enlarging underlying section of the eastern wall over a possible period of ten years or more. The wall then slid when the fracturing progressed sufficiently to have diminished the clay's sliding resistance below a critical threshold.

41. This "progressive fracturing," technically so-called, eluded detection by any party concerned. The fracturing eluded detection because Intecsa and Geocisa overlooked or otherwise failed to account for two geotechnical factors critical to calculating the dam's stability: the clay's brittle character, and undissipated interstitial ("pore") water pressures generated in the clay by the weight of the dam walls and tailings.

42. On Eptisa's understanding—an understanding independently confirmed by subsequent expert analyses—undissipated pore pressures prevented the clay from consolidating fully beneath the dam wall, thereby reducing, in direct relation to their presence, the clay's sliding resistance. The clay, under these conditions, could not withstand horizontal pressures exerted on it and, being of a brittle constitution, progressively fractured along an expanding horizontal plane. Dam failure ultimately followed.

43. Whatever Intecsa's final responsibility for the accident, and regardless the nature of its engineering oversight, negligent or otherwise, Intecsa was apparently unaware and in any event did not indicate a failure plane could develop as such in the clay beneath the dam wall.

44. Geocisa, which adopted Intecsa's engineering assumptions, was likewise apparently unaware and likewise did not indicate a failure plane could develop as such. To the contrary, Geocisa gave credible assurances the dam wall was stable and confirmed these assurances by

asserting that data recording dam wall movements verified the wall's stability. In its March 1998 monitoring report, Geocisa stated:

The main conclusion derived from the instrument warning data, as obtained during this [1997] year, is that the dam is behaving correctly and in agreement with the design expectations. The information recorded to date does not reflect any symptoms of general instability and the safety of the dam is sufficient. *(translated from Spanish)*

45. Nor was progressive fracturing otherwise detectable. A technical engineer who visually inspected the eastern wall of the dam only hours before it failed noted in his report, "Nothing out of the ordinary can be observed." *(translated from Spanish)*

46. The dam wall was of uncommonly good construction and its structural integrity was sound. Except for the breach in the dam at the point of greatest horizontal displacement, the dam wall slid as an intact, rigid body, admitting only small internal deformations in the entire 700m length of the failure cross-section.

47. Following the tailings dam failure, a Spanish Court conducted an investigation to determine if any party responsible for designing, constructing or approving the dam should bear criminal charges for the accident. In a judgment rendered December 22, 2000, the Court, applying a gross negligence standard, found no cause for criminal liability. It stated:

- (a) the dam failure resulted from the clay's fragility and corresponding risk of progressive failure, and from the high water pressures in the clay foundation;
- (b) only the best scientific techniques corresponding to the most advanced state of the art could have detected such phenomena in 1996; and
- (c) studies Geocisa consulted in 1996 for dams built on clay soils, and legislation in force for dam projects in 1996, did not consider these phenomena.

48. The Court's expert report noted the difficulty of detecting progressive failure, saying: "A worrying feature of progressive failure is that it leads to abrupt instabilities with no clear signs of warning of an imminent accident." *(translated from Spanish)*

49. Appeals taken subsequently on the Spanish Court's judgment were dismissed March 5, 2001. Further appeals to a higher court were then launched and remain currently outstanding.

F. Applicable Law

50. The Individual Defendants say that the law applicable to each transaction whereby a Plaintiff purchased securities under the IPO is the law of the jurisdiction in which those securities were purchased.

G. Defences to Liability

51. The Individual Defendants plead the limitation provisions in the Acts named in paragraph 32 above and say this action is time-barred in Alberta, Saskatchewan, Manitoba, Quebec, Nova Scotia, Prince Edward Island and Newfoundland.

52. The Individual Defendants deny that the Quebec *Securities Act* gives any benefit of deemed reliance and deny that any Plaintiff relied on any misrepresentation the Plaintiffs allege, which allegations the Individual Defendants deny.

53. The Individual Defendants also deny that the New Brunswick *Security Frauds Prevention Act* gives a right of action as alleged or at all.

54. The Individual Defendants say that any Plaintiff who purchased Boliden securities

- under international disclosure documents mentioned in paragraph 34 above, or
- after the IPO closed on June 17, 1997, or
- from the secondary market

has no cause of action in respect of any securities so purchased.

55. The Individual Defendants also say that any Plaintiff who sold Boliden securities before the tailings dam failed has no cause of action in respect of securities thus sold.

56. The phenomenon responsible for the tailings dam accident—progressive fracturing—constituted a latent defect that at all times remained undiscovered and undiscoverable by any party concerned.

57. Alternatively, if progressive fracturing was discoverable, it was discoverable by only the most technically sophisticated and financially prohibitive of means given the nature and broad scope of the worldwide operations for which Boliden was responsible. The Individual Defendants therefore say that progressive fracturing was in all cases undiscoverable within any practical definition of that term (hereafter “undiscoverable”).

58. The Individual Defendants say that an undiscovered, undiscoverable latent defect does not comprise a “fact” or a “material fact,” and that omitting to disclose such defect does not comprise a “misrepresentation” under applicable securities legislation. The terms “fact,” “material fact” and “misrepresentation,” or any similar such terms, comprehend only those facts the discovery of which is practically feasible considering the operations and persons concerned.

59. The Individual Defendants additionally say that the undiscoverable latent defect called progressive fracturing constitutes one of many risks to which a mining operation is inherently subject. The Prospectus expressly disclosed these risks, and this disclosure expressly encompassed progressive fracturing. The Individual Defendants rely, accordingly, on the following statements taken from the Prospectus:

Mining Risks and Insurance

The mining operations of Boliden are subject to risks normally encountered in the mining business. Such risks include environmental hazards, industrial accidents, labour disputes, *unusual or unexpected geological formations or pressures*, rock bursts, cave-ins, flooding and periodic interruptions due to inclement or hazardous weather conditions. *Such risks could result in damage to, or destruction of, mineral properties or production facilities, personal injury, environmental damage, delays in mining, monetary losses and possible legal liability.* Although Boliden maintains insurance within ranges of coverage consistent with industry practice, no assurance can be given that such insurance will be available at economically feasible premiums. Insurance against environmental risks (including potential liability for pollution or other hazards as a result of disposal of waste products occurring from exploration and production) is not generally available to Boliden or to other companies within the industry. *To the extent that Boliden is subject to environmental liabilities, the payment of such liabilities would reduce the funds available to Boliden. If Boliden is unable to fund fully the cost of remedying an*

environmental problem, Boliden might be required to suspend operations or enter into interim compliance measures pending completion of the remedy. (Prospectus, p. 78; emphases added)

Forward-Looking Statements

The forward-looking statements made in this prospectus are based on assumptions and judgments of management regarding future events and results. *These assumptions and judgments may prove to be inaccurate as a result of a number of factors, many of which are beyond the control of Boliden, and Boliden's actual results may differ materially from the results contemplated in such forward-looking statements. The principal factors that may negatively impact the accuracy of these statements are discussed above. (Prospectus, p. 81; emphases added)*

60. If failing to disclose an undiscovered, undiscoverable latent defect does constitute a misrepresentation of material fact, and if having disclosed the risk of such defect provides no answer to such—both of which the Individual Defendants deny—the Individual Defendants rely for their defence on investigations they performed before signing the Prospectus. These investigations provided the Individual Defendants reasonable grounds to believe, as they did in fact believe, the Prospectus did not by omission or otherwise misrepresent a material fact.

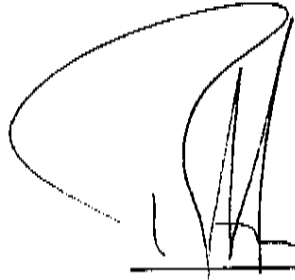
61. The Individual Defendants' investigations provide a full defence to any charge of liability brought against them, and they accordingly plead applicable Securities Act provisions including:

- (a) the British Columbia *Securities Act*, s. 131(7);
- (b) the Alberta *Securities Act*, s. 168(6);
- (c) the Saskatchewan *Securities Act*, s. 137(6);
- (d) the Manitoba *Securities Act*, s. 141(c);
- (e) the Ontario *Securities Act*, s. 130(5);
- (f) the Quebec *Securities Act*, s. 220(1);
- (g) the Nova Scotia *Securities Act*, s. 137(5);
- (h) the Prince Edward Island *Securities Act*, s. 16(5); and
- (i) the Newfoundland *Securities Act*, s. 130(5).

62. The Individual Defendants furthermore specifically put at issue every allegation in paragraphs 36 and 37 of the Further Amended Statement of Claim as fabricated, untrue, immaterial or irrelevant, and for greater clarification state:

- (a) the Plaintiffs' allegations regarding seepage are wholly misplaced—as various experts and a Spanish criminal court consistently state, seepage had nothing to do with the tailings dam failure;
- (b) the Plaintiffs' allegations regarding structural infirmities in the dam wall are likewise wholly misplaced—the wall, as stated in paragraph 46 above, was structurally sound with not a single expert having found a single “structural infirmity” of the nature the Plaintiffs allege.

63. Finally, if the Prospectus contained any misrepresentation whatever, and if the Individual Defendants' investigations were inadequate to relieve liability for such—all of which the Individual Defendants deny—the Plaintiffs suffered no damage arising from any such misrepresentation.



Counsel for the Individual Defendants Alex
G. Balogh, Robert R. Stone and Frederick
H. Telmer

Dated: October 29, 2001

This STATEMENT OF DEFENCE is delivered by Hordo & Bennett, Barristers and Solicitors, whose place of business and address for service is 1801-808 Nelson Street, Box 12146, Nelson Square, Vancouver, British Columbia V6Z 2H2. Telephone: (604) 682-5250. Fax: (604) 682-7872. Counsel Reference: R.J. Randall Hordo and Tom Clearwater.

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