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Don't Make Clients Dig for the Truth: The Importance of Candor for Professional Service Firms

All professionals deal with difficult clients from time to time. Difficult clients are often characterized by an aversion to receiving negative opinions and a refusal to heed the counsel of the professionals they have retained. A natural temptation when dealing with such clients might be to stop giving negative opinions to them and to instead focus on simply completing the tasks which the client has instructed. However, as the recent decision in *Western Troy Capital Resources Inc v Genivar Inc* demonstrates, in order for professional firms to avoid potential liability, they must ensure that they state their negative opinions clearly to their clients, especially in circumstances where a professional believes that the work which they are being retained to complete is futile.

In the summer of 2008, Genivar Inc. (“Genivar”), a professional services firm, was retained by Western Troy Capital Resources Inc. (“Western Troy”), a public mineral exploration company, to prepare a feasibility study for a potential copper and molybdenum mining project. A sharp fall in commodity prices in 2008 eventually resulted in the project being put on hold. In 2010, work on the feasibility study was resumed. Ultimately, the parties entered a Revised Services Contract in July 2011.

Genivar’s project lead, Mr. Giard, had a contentious relationship with the head of Western Troy. He testified that he felt bullied. As a result, he adopted a defensive posture in relation to Western Troy. This included a failure to be completely forthcoming about his negative views on the project. For example, prior to entering the Revised Services Contract with Western Troy for the purposes of continuing work on a feasibility study, Mr. Giard circulated an internal email to colleagues at Genivar which described the resource deposit as “economically marginal”. This opinion was not shared with Western Troy.

Ultimately, in the spring of 2012, after the investment of significant additional capital into the project, an outside consultant was hired to audit the reliability of resource grade data which had initially been obtained in 2008. The result of the audit was the discovery of a significant drop in the resource grade of the copper and molybdenum deposit located on

Western Troy's property; this drop was sufficient to render the project economically unfeasible.

In the ensuing lawsuit, Western Troy sought damages relating to the nearly \$3 million it had spent on the project. Western Troy alleged that had Genivar informed Western Troy that the project was not economically feasible earlier in their engagement, Western Troy would not have invested such an extensive amount of capital in the project.

Genivar defended itself primarily by arguing that Western Troy was determined to receive a positive outlook for the project, and that it had ignored Genivar's reservations about the feasibility of the project. Mr. Giard testified that whenever he attempted to raise his opinion that the resource deposit could not support the project, he was met with opposition to his view by Western Troy. According to Mr. Giard, he eventually "gave in" to Western Troy's confidence about the resource deposit and decided to demonstrate that the project was not viable by simply completing the work requested by Western Troy.

In his decision, Justice Mew granted judgment in the amount of \$1,250,000 in Western Troy's favour. Justice Mew found that Mr. Giard and Genivar were at fault for "failing to clearly and unequivocally state their disagreement" over certain assumptions being made by Western Troy in relation to the preparation of the feasibility study. Justice Mew found that Mr. Giard had not effectively communicated to Western Troy his concerns about the economic viability of the resource deposit prior to entering the Revised Services Contract. Justice Mew did not find Mr. Giard's claim that this was as a result of intimidation on the part of Western Troy to be "an adequate excuse."

Justice Mew went on to find that Genivar was also liable for negligent misrepresentation, noting that silence and half-truths can amount to actionable misrepresentation in circumstances where the information omitted was shown to be material in the sense that it would have been likely to have influenced the client's conduct or affected the client's judgment.

Justice Mew concluded that "poor communication" and "a lack of direct frankness" on the part of the defendants was sufficient to support a finding of negligence against them, and that "wasted time, money and opportunity" had resulted from the defendants' negligence such that Western Troy was entitled to \$1,250,000 in damages.

As this case demonstrates, it is critically important for professional service firms to be forthcoming about any reservations they may have regarding the work they are being employed to undertake. This decision should serve as

motivation for all professionals facing the uncomfortable prospect of raining on their clients' parade to clearly and unequivocally state their professional reservations or face the consequence of being found negligent by failing to do so.