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Disclosure decisions gone wrong

By Neill May

Is it ironic to ask if there truly is no such thing as a dumb question? Certainly, in marriage there are dumb questions, as I continue to awkwardly learn. And keener bingo, which used to be and I hope still is a core feature of an engaging law school experience, wouldn't be the same were there not the odd stupefying query. Finally, in a fake news era, where truth is malleable and often a function of repetition and volume, the wisdom of any question can be debated. What is difficult to argue, however, is that, once asked, a dumb question cannot be unasked (though I wouldn't put it past Kellyanne Conway to try).

The annals of unfortunate questions are deeper for the experience of Pretium Resources Inc. reflected in the recent Ontario Superior Court decision in *Wong v. Pretium Resources Inc.* Pretium had conducted a mineral exploration program at its Brucejack property and hired a well-known consultant to review the results and to produce a mineral resource estimate. That estimate was used as the basis for a feasibility study, which concluded that Brucejack contained economically recoverable mineral reserves capable of supporting a successful mining operation. To support that underlying estimate, Pretium hired a second consultant to conduct milling and testing of a bulk sample from the property. Unfortunately, capacity at a mill couldn't be timely secured, so, while waiting, the consultant conducted tests on a small part of the bulk sample using the "sample tower testing method." This method is less reliable because it depends on the representativeness of the sample(s) used.

The sample tower did not support the underlying mineral estimate (and by extension the feasibility of the project) — so much so that the second consultant advised that there might be no point in proceeding with the fuller analysis. The consultant urged Pretium to publicly disclose the results of the study over a three-month period in the summer of 2013. Pretium concluded that the consultant's concerns were premature and unreliable due to the unreliable testing method and that it, therefore, had no disclosure obligation. The consultant ultimately resigned in October of that year. Pretium announced the resignation in a press release, disclosing the reasons for the consultant's withdrawal and its own views as to why the concerns were unfounded.

The funny thing is that Pretium turned out to be right. When the mill tests were completed, the results were positive and confirmed the validity of the mineral resources estimate with room to spare. The plaintiff, however, likely didn't see the humour, having purchased shares in 2013 and suffered losses when the share price sank after the October press release.

The court's decision was not on the merits but rather involved an application for leave to commence an action for secondary market misrepresentation. Pretium had to convince the court that the plaintiff's case had no reasonable possibility of success. (Ironically, this is also a core element of dumb questions like "Sweetie, I know I've been away for a week, but can I miss your mother's birthday party to play poker?")

It is beyond my competence to comment on the leave standard (in this case, the court granted leave). What is interesting (and daunting) is the disclosure dilemma. One of the factors cited by the court was that Pretium itself had publicly announced its engagement of the second consultant, which it described as "reputable" and a "recognized expert." This is a classic disclosure conundrum — earlier disclosures help define an issuer's disclosure standard, so there is a cost (in the form of a low threshold) to an overbroad approach. For an issuer seeking to strike the right disclosure standard, the challenge is vexing. The court (it must be remembered in the context of a leave application) comments that the consultant's concerns were not so wrong-heading that a reasonable investor wouldn't want to know. The reasonable investor would want to know the test is obviously difficult for issuers and their advisors accustomed to dealing with investors who want to know every detail (regardless of materiality) — not to mention that with increasing liability exposure issuers can be criticized or worse for making premature disclosure.

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This is what led me to think about dumb questions. It's likely that Pretium wishes it hadn't authorized the sample tower test in the first place. Clearly, however, executives and directors are duty-bound to ask questions and inform themselves, and in so doing, they will sometimes get bad answers. My instinctive professional response to this is that when there are dumb questions posed — and, occasionally, unfortunate answers received — the market will continue to see long lawyerly disclosures. Will that result aggravate non-lawyers? It may well do so, depending on the circumstances, which are subject to change based on factors beyond my control, but there can be no assurances whatsoever in this regard. Reasonably, probably. **CL**

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