nmay@goodmans.ca

Stay tuned for a public interest message

By Neill May

One of the most frightening moments I had as a young lawyer happened after a friend of mine and I had been called to the printer to proofread a circular that was to be printed overnight (the trip to the printer is a clue as to the age of this story, though a less powerful one than the description of my part in it as a young lawyer). Having each read half of a very long document into the early hours of the morning and left it for the printer to print, my friend and I were called by a senior lawyer on the file. The senior lawyer enhanced the drama by drawing out his point. There is a typo in the circular. It is on the very first page of the document. Then came the punch line: there is an "L" missing in the word "publicly." The worst moment endured until the lawyer answered my "Which one?" question by saying it was the second one. So it could have been much worse. Still, the word "public" has scared me since.

It has occasionally scared other securities lawyers too, though for a different reason: the discretion of the securities regulators to make orders where in its opinion it is in the "public interest" to do so. The regulators' powers in this regard are broad, even more so than when first introduced. They include the power to suspend registration, prohibit trading activity, prevent service as a director or officer of any issuer, compel disgorgement, and/or order administrative penalties of up to $1 million. These penalties can certainly have a very profound impact on a person or company, and on their ability to conduct business or make a living. The concern sometimes voiced about this provision, in part due to the gravity of these remedies, is grounded in the breadth of the regulators' discretion: on the face of it, the "public interest" jurisdiction is not at all fettered.

Those fears may be fanned by what seems to be regulators' increasing reliance on its "public interest powers" (often called "s. 127 powers" in Ontario). In enforcement-type cases (turning on issues such as insider trading or disclosure), pursuit by the regulators' of public interest power remedies must be an appealing option (in circumstances where there is conduct that appears problematic but there are technical and/or practical hurdles to prosecution for breach of the statute). The same can be said of M&A transactions where public shareholders appear to be suffering an unpalatable outcome; there may be a role to be played by the public interest power.

The courts have confirmed the broad scope of the regulators' powers. Notably, the Supreme Court of Canada, in the 2001 *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* decision, stated the regulators themselves have the power to determine what factors are relevant to inform the exercise of their discretion. The court stated those factors were not limited to considering whether there was *abusive* conduct (namely, a higher standard than mere unfairness), or action in contravention of an animating principle of securities laws.

This latitude is clearly not limited to filling gaps, by which I mean pursuing remedies against parties that but for a technical glitch would be in breach of applicable securities laws. So the discretion is broad, and the public interest path does not involve (and some may say can be used to avoid, where what is really at issue is a statutory breach) a normal court process, with all of its procedures, protections, and protocols.

There is clearly some logic in providing some elbow room to regulators on matters of this nature. The dynamic nature of securities activity indicates a high probability that there will be activities that do not neatly fit within the regulatory prohibitions. Further, the regulators are populated by individuals with expertise in the industry, who should therefore have a good sense of what types of activities will undermine the integrity of the marketplace if unpunished.

Experience with the exercise of the public interest powers has to date, notwithstanding the fears mentioned, been balanced. The regulators have generally tended to enforce on a public interest basis where the relevant conduct appears to meet the high standard of "abuse," or involves activity that offends the principles (and is contrary to the achievement of the objectives) of securities laws but may not constitute a breach for technical reasons.

That is not to say that concerns about the public interest powers are unfounded. Those powers do provide for the imposition of significant remedies in circumstances where the relevant parties were in technical compliance with the law, or where the commission itself finds a person to have breached the law. At the end of the day, what is needed is continuing vigilance to see that the regulators do not overstep reasonable bounds.

I acknowledge, by the way, the irony of incorporating the concept of vigilance into a column that started with a description of an egregious typo. Particularly where the typo involved leaving one "L" out of a word where, given my first name, I have spent a meaningful part of my life adding a second "L." You have to push through those types of errors. Like they say, nothing ventured, nothing groined. CL

Neill May is a partner at Goodmans LLP in Toronto focusing on securities law, with an emphasis on M&A and corporate finance. The opinions expressed in this article are those of the author alone.

© 2015 Thomson Reuters Canada Ltd. Reprinted with permission.