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I coulda been a litigator

By Neill May

I suspect many corporate solicitors believe that they could litigate corporate disputes as well as or better than litigators, because of their assumed deeper understanding of the details and practicalities of corporate laws and transactions. In my own case, that occasional and profoundly flawed conceit gets resoundingly pierced when I recognize my own amateurish reactions when reading detailed court decisions.

For example, my initial reaction is always disappointment that the headnote ruins the suspense (not that the decisions generally sustain suspense even if the headnote is skipped — the whiff of failure is likely apparent to the losing litigant from the outset and only gets stronger as the pages turn). I also find myself persuaded by whatever argument I happen to be reading (which doesn't speak well for my potential as a judge either). A further amateurish impulse to which I must admit is worry about the feelings of an overturned lower court judge, which clouds my focus on the substance of the dispute. And finally, related to my point about suspense, I am often undecided about whether I would prefer an outcome that aligns with my understanding or a "surprise" that runs contrary to everything I've ever told clients.

The court decisions in *Jaguar Financial Corporation v. Alternative Earth Resources Inc.* touched on each of those dynamics (and in the very trendy context of a potential proxy contest), with the additional element that confounds amateur litigators that court decisions often seem meaningfully affected by the courts' sense of the disputing parties and their conduct. In that case, Alternative Earth Resources Inc. was considering a potential acquisition (the Black Sea transaction). One of AER's directors had a disclosable (and disclosed) interest in the proposed transaction, and other members of the board were slated to continue as directors post-completion of the transaction.

At trial, the British Columbia Supreme Court found that all of AER's directors had material interests in the transaction because of their employment interests and because the conflicted director had done a presentation on the deal for the full board. The BCSC further concluded that the Black Sea transaction was not fair and reasonable to the company, and that AER's conduct in pursuing the transaction was oppressive, and enjoined AER from completing the deal without shareholder approval. When AER subsequently abandoned the Black Sea transaction, Jaguar Financial Corp. disclosed its intention to initiate a proxy contest, and AER engaged a proxy solicitor to advise it. Jaguar went back to court, and the BCSC made further orders on the basis that AER's disclosures and conduct (including the engagement of the proxy solicitor firm) were not consistent with its prior orders.

The British Columbia Court of Appeal reversed many of the Supreme Court's conclusions, and in so doing made determinations that align with general understandings on the key points. For example, the appeal court determination that all AER directors did not have material interests in the Black Sea transaction rested on two conclusions. First, just because the rest of the board heard a presentation from the director who was, and who properly declared, his conflict, does not mean the rest of the board has a material interest in the transaction. Second, the exception from the material interest rule for matters relating to a director's compensation for service as such was broadly construed, so the prospect of their continued service did not automatically conflict the relevant directors.

These conclusions, in particular the first, conform with the statutory provisions and (in my experience) typical approach that directors who declare conflicts can participate in discussions provided there is a forum for non-conflicted board members to exercise independent judgment (in this case, there was a special committee).

The appeal court also overturned the lower court's conclusions concerning oppression. In so doing, it commented that Jaguar did not have a reasonable expectation that

(i) AER would not postpone its shareholder meeting as it was entitled to do,
(ii) AER would not enter into a transaction consistent with its recently shareholder-approved mandate despite some press releases that indicated a narrower focus,
(iii) AER would not enter into a transaction that would dilute existing shareholders, or
(iv) that disclosures beyond those which were demonstrated to be "material" (the trigger for public disclosure obligations) were required.

More generally, the BCCA approved the proposition that where the complaint relates to conduct that adversely affects the corporation (such as dissipation of resources on a proxy solicitor) and not the individual interests of a shareholder, the matter must be addressed as a derivative action and not through a claim for oppression. The court did not accept that the harm to Jaguar of reduced incentive to initiate a takeover bid cleared this threshold.

My final amateurish thought about court decisions is that it wouldn't kill judges to include the odd joke on occasion, just to spice things up, or perhaps a periodic personal observation to make the judgments more relatable, but I fear that is too much to hope. Perhaps my next unrealized multi-million-dollar enterprise will be an app for interpreting and personalizing court decisions, generating digestible pop-ups like "What the judge means here is that the defendant is a complete schmuck" or "This is where the judge would have really enjoyed hearing from a securities lawyer who probably thinks he could litigate." **CL**

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