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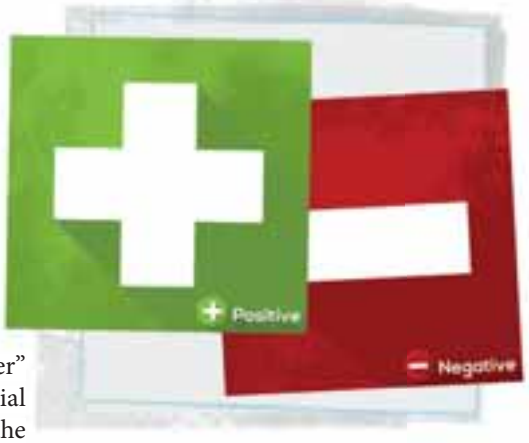
Promoters and other contronyms

By Neill May

In grade school, many of my pals called me "NIM" because of my initials. So, naturally, when we first started to learn about contronyms (words with opposite meanings), it sounded to me like a group of people opposed to me. That wouldn't have bothered me as a kid. These days, I would react more like the great line from *Catch-22*, to the effect that just because you're paranoid doesn't mean that people aren't out to get you. It doesn't help that my nickname has morphed to "Nil," given to me by my daughter as a rough estimation of my value. In any event, I got to thinking about contronyms again in light of the recent Ontario Court of Appeal decision in *Goldsmith v. National Bank of Canada*.



The case focused on the meaning of the term "promoter" under securities laws. I think of promoter as a contronym because it has a positive connotation (in the sense of a supporter or cheerleader) but also negative connotations in some cases (for example, in the case of high-pressure vendors of penny stocks). It is an important concept in securities law because a "promoter" of an issuer is exposed to potential liability for misrepresentations in the issuer's public disclosures (including prospectuses and other disclosure documents).

The *Goldsmith* case concerned alleged misrepresentations in public documents released by Poseidon Concepts Corp. Poseidon was created through a reorganization of a predecessor that separated its two businesses: Poseidon ended up with a tank rental business and a separate company ended up with an oil and gas exploration and production business. Poseidon went on to successfully complete a public offering, but its success was short-lived. Within a year, the company revealed that it had materiality overstated revenues and accounts receivable and it filed for creditor protection.

The plaintiff argued that National Bank should be considered to be a promoter of Poseidon and therefore liable for those misrepresentations, because the bank had provided loans essential to the company's liquidity during the reorganization (and had as lender consented to the reorganization) and its subsidiary had provided financial advice to the company through its reorganization. This highlights the significance of the point: If lenders and advisers can, in the course of their normal activities, have liability for misrepresentations by their borrowers/clients, that may well profoundly change how they do business.

The Court of Appeal concluded that the activities of National Bank were not such as to make it a "promoter," based on the language, context, and purpose of applicable securities laws. The language of the Ontario Securities Act (like other Canadian statutes) defines a "promoter" as a party that ". . . takes the initiative in founding, organizing or substantially reorganizing the business of an issuer." The court concluded that:

- taking "the initiative" means more than simply influencing decisions or participating in discussions with the decision-makers;
- looking at the statutory context, the other parties with potential liability for continuous disclosures are persons like directors and officers "who exercise meaningful control over a reporting issuer's business"; and
- adoption of a broad meaning to the term "promoter" would be contrary to the purposes of securities legislation, such as fostering fair and efficient capital markets, and deterring misconduct, by imposing potential liability on the ordinary, everyday activities of advisors, lenders, and similar parties.

In short, the court held that a "promoter" is a central or controlling figure, using language like "driving force," "driving role," at the "very heart of the issuer," and wielding influence comparable to a director or officer. Advisers and lenders can certainly be assertive and influential with respect to, and involved throughout the process of, the organization or reorganization of an issuer, but following *Goldsmith* would have to take on a central decision-making and vital directing role beyond the customary scope of services and functions for those parties to become subject to potential liability.

The complexities and subtleties of these concepts can make them difficult to neatly apply. What should be less complex would be to come up with a new word that is more positive-sounding for me personally than contronym. If I stick with my old initials-based nickname, and want to come up with a supportive word, I'm thinking that NIMphomaniac could work. If forced to stick with my daughter's newer "Nil" formulation of my name, I think that I could communicate a "can-do" sentiment, along the lines of "Who gets it done? Nildoes!" but I worry that would be mispronounced. 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.