BY NEILL MAY

Orange is the new law exam

I have always understood lawyers describing certain files as being "like a law school exam" to mean that those matters are so impossibly convoluted and improbable they could only have been wrought by the fecund mind of a law professor. Actually, when I think back on law school exams, I think less about my reaction to the exam questions than to the moment immediately before, a fleeting sense of puzzlement as to just how for the previous three months I consistently had managed to convince myself one more hour of must-see TV was a better investment of time than studying.

Now having spent more than a few years teaching, I occasionally also feel remorse for the pain I must have caused those marking my own test answers, and hope those doing the marking were at least momentarily amused by my transparent efforts to adapt my prepared responses to the completely unrelated questions that inevitably appeared on those exams.

Every once in a while though, a matter does come along that has so many twists it would probably make a good exam question. The events in the recent past of Partners REIT likely qualify.

The recent eventful chapter in Partners' history started with pressure from Orange Capital Corp., a New York-based hedge fund, to unwind a commercial transaction between Partners and Holyrood Holdings Ltd., a private real estate firm. Orange publicly expressed its view the transaction was a related-party transaction and therefore subject to the specific regulatory rules applicable to such deals; shortly thereafter, the Partners board terminated the transaction because of the apparently significant business relationships between Partners' interim CEO and the owner of Holyrood.

The Partners board stated that had it been aware of the extent of such dealings it would have sought security-holder approval, one of the central requirements of the rules governing related-party transactions. If this story were an exam question, this would be the most straightforward element.

Shortly after the termination of the Holyrood transaction, Orange announced an offer to acquire 10 per cent of Partners' units. Because the offer, if successful, would not have resulted in Orange holding more than 20 per cent of Partners' units, it was not required to (and it did not) comply with formal takeover bid rules. For example, the offer was open for acceptance for only nine days after its filing (formal bids must be open for a minimum of 35 days), the offer was subject to withdrawal, variation, or termination at the discretion of Orange (where formal bids are required to specify conditions, they must comply with specific rules if they are to be varied, and cannot simply be withdrawn), and did not have the detailed disclosure a formal bid is required to have concerning bid mechanics such as the timing for payment.

The Orange offer also had elements designed to provide voting power at Partners' annual shareholder meeting: unitholders were required to give Orange proxies over all shares deposited (so even though the offer was only for 10 per cent of the shares, Orange could obtain proxies over a larger number of shares) and the proxies were to continue notwithstanding a withdrawal of the offer by Orange or a withdrawal of tendered units by the unitholder. These approaches were novel in the growing field of shareholder activism.

Partners complained to the Ontario Securities Commission and, following a dialogue with the OSC, Orange varied its offer. Some of the variations were consistent with the spirit of takeover bid rules (such as an extension of time, and adoption and disclosure of payment mechanics), and others addressed proxy considerations (for example, providing for revocability).

The last segment of the exam would involve a dispute about Partners' advance notice bylaw. Advance notice bylaws and policies, which are increasingly common, create a time window in advance of shareholder meetings during which shareholders can make director nominations. Partners sought to rely on a provision of its bylaw to prevent Orange from proceeding with its nominations. The Ontario Superior Court reaffirmed the use of advance-notice bylaws and policies, but emphasized they should be interpreted in a manner that protects shareholder rights. Put differently, they can be used only as a defensive shield to ensure shareholders have proper notice of nominations, and not as a sword to frustrate nomination rights.

The common theme to these events, in addition to being evidence of increasing shareholder activism, is the strengthening of shareholder rights, through shareholders' willingness and ability to put public pressure on issuers, the OSC's preparedness to intervene and extend principles of shareholder rights beyond black-letter requirements, and the courts' similar prioritization of shareholder interests.

This unfortunately is exactly the kind of unifying theme that would have occurred to me only after I walked out of the exam. I used to take irrational comfort in the notion that the marking professor would assume my identification of such themes, either because of the general persuasiveness of my writing or my constant telepathic bombardment. My telepathy skills, frankly, have so far yielded disappointing results, but it now appears that reality can concoct pretty convoluted "exam-worthy" situations even without my telepathic interference. CL

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