BANKING ON CORPORATE

CHALLENGING DISSENT PROCEEDINGS

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Nobody can be an expert at absolutely everything, despite what my web bio may suggest. Aside from being impossible, it wouldn't leave any time for just relaxing — or "executive time" in the language of the U.S. president's calendar. Further, sometimes, expertise in one area may be thought to translate well to complementary fields, but the reality can be otherwise. It's like Henny Youngman's old line about his brother in law joining the army. His expertise in karate might have been considered helpful in a military unit, but he killed himself the first time he saluted. I have written about dissent previously, but several recent decisions have raised the issue again and highlighted challenges in dissent proceedings.

The most recent is the decision of the Supreme Court of *Yukon in Carlock v. ExxonMobil Canada Holdings ULC*, in which the court considered the dissenting shareholders' dissent from the corporate arrangement under which ExxonMobil Canada Holdings ULC acquired all the shares of InterOil Corporation. That arrangement has a well-known history. Briefly, the court approval initially given was overturned by the Yukon Court of Appeal on the basis that a high level of shareholder support for the deal was not sufficient to establish that the arrangement was "fair and reasonable" in view of the procedural "red flags" identified, including that the fairness opinion provider was paid a success fee, the fairness opinion did not address the value of one element of the consideration and did not include detailed analysis and the involvement of the conflicted CEO in board processes.

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What is notable about the dissent decision is the focus of the court on the InterOil board's process leading up to the arrangement. InterOil, whose assets consisted essentially of liquefied natural gas licences in Papua New Guinea, provided diligence access to four large companies, three with significant LNG interests in PNG. That process resulted in multiple offers, an agreement with one and a topping bid by ExxonMobil. When the Yukon Court of Appeal overturned the approval, InterOil's response was to implement procedural improvements, including a detailed fairness opinion from an advisor who was paid a fixed fee and recusal of the conflicted CEO. InterOil's board did not commence a fresh sale process. The same transaction terms were put to the shareholders, who approved them even more heartily by 90 per cent.

The Yukon court, faced with very different discounted cash flow valuations of InterOil's shares in the dissent application, identified some of the differences, but it ultimately did not give deference to the fact that 90 per cent of the company's shareholders (including the former CEO, who has initially challenged the deal) approved, because that process was considered flawed, and accepted the dissenters' valuation.

In so doing, the court took a different path than the Delaware Supreme Court in late 2017 in *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, which held that persuasive evidence would be required to overcome embracing a value other than that endorsed by the shareholders in arm's length deals. That court noted that dissent cases had become battles of expert valuators who tailored their views to the objectives of their clients.

That dynamic is reflected in the recent Ontario Superior Court decision in *Aquam Corporation v. Richard Coffey*. That case involved a dissent by two common shareholders from a recapitalization undertaken to implement a preferred share financing for the financially strained company. The court was presented with two significantly different expert valuations, and the decision is marked by the challenges that these cases present. The court noted, for example, that there is agreement that the goal is to determine "the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in money or money's worth," but that repetition of the principle was of limited guidance. There was agreement that dissenting shareholders are not entitled to factor synergies from the transaction from which they're dissenting but disagreement over what was a synergy. The judgment includes comment about being "bogged down" by reading the expert reports, not made much better by the valuators' testimony, that the positions presented by both were reasonable, and noted that some elements are by their nature largely infused by professional judgment. Ultimately, the court reached a compromise outcome in that case.

So, we sit now with a recent Canadian decision that does not reflect deference to significant shareholder perspectives, a decision from the influential Delaware court embracing the opposite and an Ontario decision reminding us of the challenges in these cases. Given that, as noted, my web bio indisputably confirms my corporate law expertise, I can advise with assurance that either the Delaware or Yukon courts' approaches will apply; or somewhere in the middle.

Neill May is a partner at Goodmans LLP in Toronto focusing on securities law. The opinions expressed in this article are his alone.