OPINION

The subsidiary entity

Recent decisions on piercing the corporate veil exemplify how doing the right thing can be wrong

FACED WITH two alternative paths, Path A and Path B, you might be confused to find that Path A is wrong and that Path B is also wrong. If you think that both cannot be wrong, well then, you may be wrong. This is less a bastardization of Tevye in Fiddler on the Roof than a damned-if-you-do and damned-if-you-don't moment. This conundrum is apparent in a recent decision about whether parent corporations might be legally responsible for the actions of their subsidiaries in remote jurisdictions.

The Supreme Court of Canada is set to release a decision where Nevsun Resources Ltd., a Canadian company, has been sued for complicity in forced labour, slavery and torture of workers at its subsidiary's Bisha mine in Eritrea. Nevsun holds an indirect majority interest in the Bisha Mining Share Company, the balance of which is owned by an arm of the Eritrean government. Eritrea's national service program and labour practices have been very widely criticized and condemned. The case turns in part on technical issues such as whether customary international law applies to private actors, but it also turns on questions of duty in tort and what Nevsun's management knew about the treatment of employees at its mine.

Pending the release of the Nevsun decision, a good example of the damned-if-you-do problem was the U.K. Court of Appeal judgment in Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc. In that case, Zambian nationals made a civil claim in the English courts against both U.K.-based Vedanta and its Zambian subsidiary KCM for damages caused by waste discharged from a copper mine operated by KCM. The court determined that the claimants' case could proceed in the English courts, even though the alleged tort and harm occurred in Zambia.

What is notable is the court's analysis of when a parent corporation can be said to have a duty of care to persons affected by its subsidiary's actions. The court concluded that a parent company would owe such a duty if the claimant could demonstrate "additional circumstances" not just where the parent corporation effectively controlled the subsidiary's operations on the ground or even where it simply had "superior knowledge" of the subsidiary's operations but where it had drafted corporate policies related to the plaintiffs' claim.

> "A parent company would owe such a duty . . . where it had drafted and violated policies related to the plaintiffs' claim."

Specifically, the court determined that the claimants (local villagers, not employees of KCM) had an arguable case in part because Vedanta had (i) published a sustainability report speaking to its oversight over its affiliates, (ii) made public statements asserting its commitment to addressing environmental risks at KCM and (iii) provided financial support, as well as health, safety and environmental training, to KCM.

There lies the conundrum. A duty of care may be found where the parent corporation develops policies for responsible conduct, provides training to implement those policies and makes public statements concerning its commitment to achievement of its policies' objectives. One can easily foresee the potential adverse consequences to issuers not providing such guidance and support.

The Vedanta decision merely determined that there was a triable issue. But the case itself appears to be one of an increasing number of claims brought by citizens of foreign countries against parent corporations. In Canada, a claim by Indigenous Ecuadorian villagers seeking to enforce a judgment against Chevron made it all the way to an (ultimately denied) leave application at the Supreme Court. And although the Ontario Court of Appeal declined to pierce the corporate veil in that case, the court suggested that the rules for parent corporation responsibility can and will evolve.

For now, corporate parents are left with the challenge of acting responsibly and being seen to do so while not being responsible or being seen to be so. That is mildly facetious, but the point is that the challenges are clear.

The separate corporate personality was one of the more powerful (and few retained) lessons that I absorbed in law school, and its continuing re-examination in a global economic marketplace is fascinating. What is comforting, at the same time, is that some of the other valuable lessons from my legal education endure, most importantly that when you're ill, reach for the carbolic smoke ball, and always filter ginger beer for snails before ingesting. At least those principles are sound — for now. CL

Neill May is a partner at Goodmans LLP in Toronto focusing on securities law. He can be reached at nmay@goodmans.ca. The opinions expressed in this article are his alone.

© 2019 HAB Press Reprinted with permission.