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# Embarrassing behaviours and corrective disclosures

**By Neill May**

I think it is a certain sign of my age that when thinking about the proliferation and ubiquity of social media my thinking has evolved from initially worrying about the creation of a permanent record of embarrassing personal choices to then becoming concerned that it may actually be more damning to have absolutely no record of any embarrassing activity, proceeding finally to the realization that I'm too "mature" to be a good judge of what, in 2016, is embarrassing.

Securities law is moving along the same arc, adapting to changing technologies and, equally and perhaps more importantly, evolving behaviours. This development is clearly reflected in the recent decision of the Ontario Superior Court of Justice in *Mask v. Silvercorp Metals Inc.* The facts of that case touch on many issues of contemporary relevance for followers of Canadian capital markets activities: a resource issuer, publicly traded in Canada but whose property interests are located entirely in distant geographic areas, relying on local experts in those jurisdictions, and finding the trading in its securities affected by commentary disseminated by external sources, including short-sellers.

From March 2010 to early September 2011, Silvercorp released periodic public reports about certain of its Chinese mining projects, including two technical reports prepared by BK Exploration, a two-person Chinese technical firm. The company came to be targeted by short-sellers, with anonymous postings appearing on the Internet questioning Silvercorp's reported mineral estimates ("too good to be true"), as well as its financial reporting. Not surprisingly, the market price for Silvercorp's shares declined. Then, on Sept. 13, 2011, a lengthy anonymous posting was made questioning the use of BK and alleging that Silvercorp had overstated the quantity and quality of its mineral assets and engaged in questionable sales to related parties, which caused the company's share price to drop by 20 per cent.

The next elements of the narrative, paralleling my comments about the potential perils of social media, are a reminder that those sensitive to embarrassment should stay away from litigation. The B.C. Securities Commission got involved, calling Silvercorp's responses to the posting "incomplete or inadequate" and suggesting that the company engage a "recognized" technical firm (which Silvercorp proceeded to do, hiring AMC Mining to the apparent satisfaction of the regulator). The short-seller itself didn't escape, among other things having his conduct described by the regulator as "unsavoury" and "morally unsupportable" (though short of fraud, so the short-seller was left with his $2.8 million, which may have helped soften any embarrassment).

The plaintiff shareholder's own approach was somewhat unusual. It sought leave to commence an action for secondary market misrepresentation, and to certify a class action, on the basis of the differences between Silvercorp's earlier disclosures and the report eventually prepared by the new technical adviser, AMC. Oddly, when an AMC representative testified that there was no material discrepancy, and provided reasons to reconcile the differences, the plaintiff shareholder did not respond (this was ultimately central to Silvercorp's victory). Actually, this is just part of the oddity; though it was not pivotal to the court's conclusions, at one point the plaintiff responded that he had no views on the merits of his own action. I'm all in favour of managing expectations, but you have to pick your spots.

What is interesting about the case, as mentioned, is how it adapts securities laws to modern technologies. In actions for secondary market misrepresentation, the court must determine if a misrepresentation is made, when it was made, and when it was publicly corrected. What is notable in this case is the court's determination that if there had been a misrepresentation (in other words, if Silvercorp's public disclosures had been misleading), it would have been publicly corrected by the anonymous posting that triggered the market price drop. There are, predictably, other "modern era elements" of the case. For example, the B.C. Securities Commission's involvement in the first place was spurred by anonymous Internet postings. The court in *Silvercorp* also confirmed that, even in an era of immediately available information, and an expectation of same, the legal obligation to make timely disclosure of material changes is not an obligation to provide running commentary on the company's progress, and further that a downward trend in the performance of a business, without more, is not a disclosable material change in its own right.

I take some consolation in the expectation that, if I am embarrassing myself, I am doing so on a consistent basis and so surprising nobody. There is also the comfort that whatever today's embarrassment is, it will be forgotten and completely overshadowed by tomorrow's. **CL**

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