BANKING ON CORPORATE

BY NEILL MAY

All's fair, whatever that means

Many of us become experts on what is "fair" at a very, very early age. The common expression of this expertise, of course, is oriented toward what is "not fair." Fairness opinions in the M&A world, rendered by financial advisers to company boards as to the "fairness" of a proposed transaction, bear certain similarities to the protestations of an aggrieved toddler.

One critical parallel — though the work done to analyze the fairness of a corporate deal is obviously more detailed than a child's assessment of the equities of his or her treatment — is the fairness opinion itself is often not much more complex. In fact, fairness opinions are often very conclusory in nature. It is this characteristic of fairness opinions that drew some judicial commentary in the recent decision of the Ontario Superior Court in *Re Champion Iron Mines Ltd.*

"Fair" is not a simple concept. Put aside that the same word can mean light-skinned, ample, sunny, and a competitive exhibition of farm products (this is the type of thing that makes me marvel at how people so capably learn English as a second language). In an M&A transaction, financial advisers are often engaged by corporate boards to advise them as to whether the proposed deal is "fair." This is completely understandable. Having financial experts analyze a transaction to make sure it is commercially reasonable from a financial point of view is clearly helpful.

Additionally, in one of those subtleties that people in the M&A world take for granted until they stop to consider them, fairness opinions are addressed only to the board and clearly state they may not be relied upon by shareholders but are invariably prominently included in or with the disclosure documents sent to shareholders to help them make their decisions. Regardless, the fact the board arranged for the analysis to be undertaken and for the opinion to be provided helps support the board's process and decision.

But details of whatever work is undertaken to support a conclusion that a proposed transaction is "fair" (or "not fair") are often not included in the text of a fairness opinion, the substance of which is often simply described as "we're smart, it's fair" (shorthand for an opinion which describes the adviser's qualifications and conclusion, without description of the analyses undertaken).

Re Champion concerned a corporate "arrangement," a statutory concept in corporate law that requires a court to assess whether the proposed transaction is fair and reasonable. In that case, the court approved the arrangement on the basis of other evidence (including the terms of the arrangement and overwhelming support of the shareholders voting), but placed no weight on the fairness opinion rendered and did not admit it in evidence. The court noted the text of the opinion included no "number-crunching" that could inform a shareholder as to the analysis undertaken, and that it did not qualify as "expert evidence" because it did not state the reasons for its conclusion.

Whether the *Re Champion* decision will affect the form of fairness opinions going forward remains to be seen. The court's commentary on the fairness opinion may have been influenced by other factors in that case, reflected in its additional comments to the effect the court process for arrangements should not be treated as a rubber stamp. Courts' reviews of arrangements focus on process considerations (such as disclosure to shareholders, conflicts of interest, dissent rights, and similar), which one might expect would be straightforward and apparent but which are often not, so the court's effective request for proper time to consider and analyze arrangements is reasonable and appropriate.

Re Champion raises the question of who the audiences are for fairness opinions, and whether they need to understand the adviser's analysis or whether the conclusion is enough. But that case is not the first time a tribunal has raised issues relating to fairness opinions. In an Ontario Securities Commission decision in 2009 concerning the then-proposed acquisition of Lundin Mining Corp. by HudBay Minerals Inc., the OSC commented (in *obiter*) on matters relating to fairness opinions' authors.

Financial advisers naturally value their reputations greatly, and in my experience take fairness opinions very seriously. But that case noted concerns about the conflicts to which advisers may be subject, particularly that fairness opinions prepared by advisers receiving a success fee are not of assistance to directors in discharging their obligations. This commentary has sometimes been described as the "Investment Bankers Relief Act of 2009" because it suggested boards should hire bankers separately for the two functions: transaction assistance and fairness opinions.

So at the end of the day we have the comments of the judge, that leave a bit of uncertainty that we must bear, so what is left but to eat a fair amount of fudge, on a fairly fair day at the county fair? CL

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