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PERSPECTIVES

THE BRIGHT LINE, WHERE ADVICE ENDS AND PROMOTING BEGINS

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When does an outside adviser cross over into being a promoter of a company, with all the liability that comes with it? The Court of Appeal for Ontario recently provided some comfort on that question in the context of the Securities Act.

The plaintiff in *Goldsmith vs. National Bank of Canada*, 2016 ONCA 22, argued that the bank was a promotor of Poseidon Concepts Inc. under the statutory definition having: (i) provided a credit facility; (ii) issued a fairness opinion on a proposed reorganisation; (iii) acted as lead underwriter on an offering pursuant to the reorganisation; and (iv) because of a personal friendship between the underwriter and management at the company.

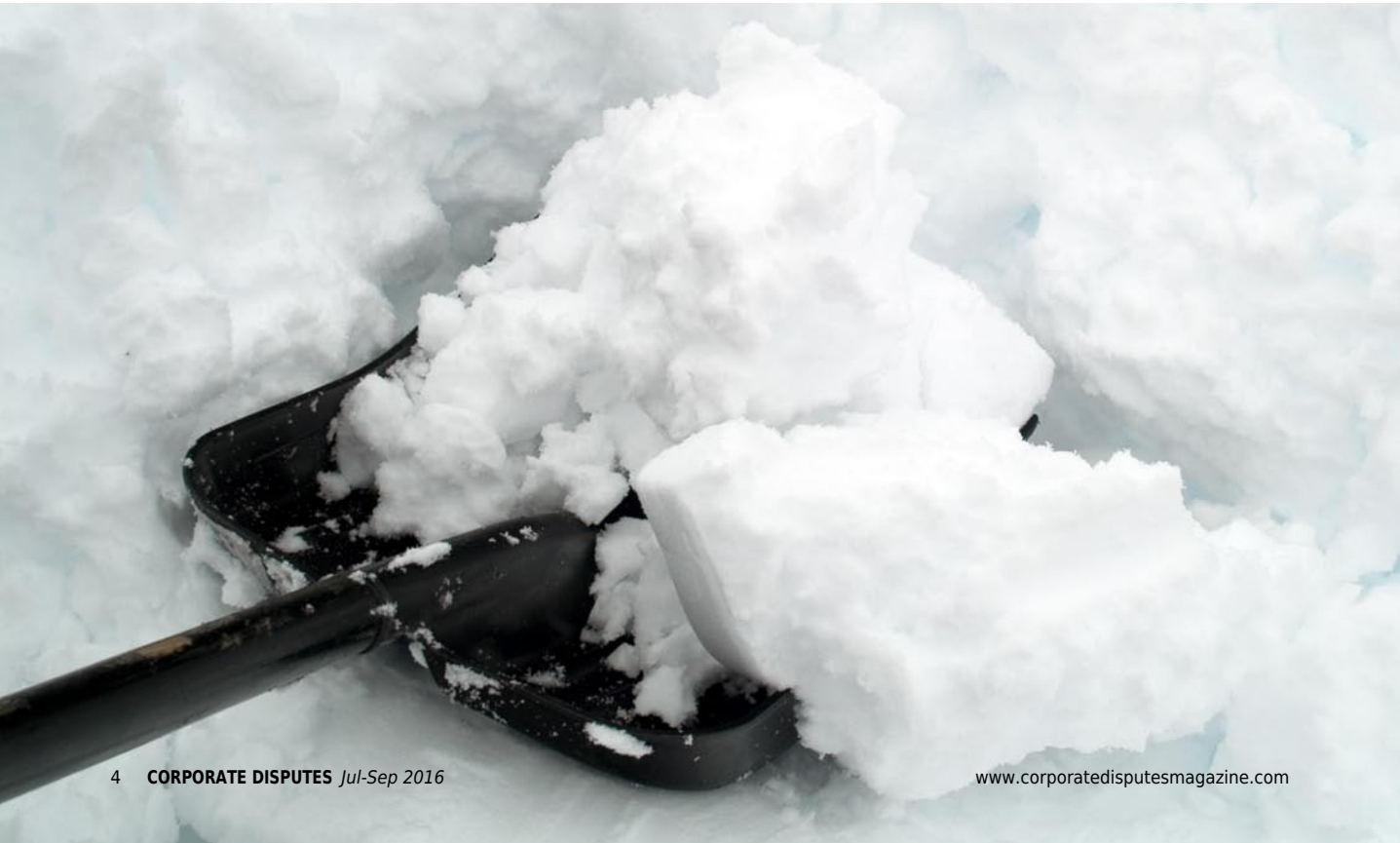
In other words, the plaintiff took the position that the bank was a promoter by virtue of having provided its client with fairly traditional banking services and because of a personal friendship between one of the bankers and the company's officer.

The *Securities Act* provides that an "influential person" may be held civilly liable for a company's misrepresentation if he or she "knowingly influenced" the release of a document containing a misrepresentation. Generally, an influential person is an insider of the company, like a control person. A promotor may also be an influential person, as someone "who... takes the initiative in founding,

organising or substantially reorganising" the company.

The plaintiff argued that "initiative" connoted influence over the decision-maker or participation in the venture; the court disagreed. Upholding the lower court's decision, the Court of Appeal held that the phrase "taking the initiative" requires active and autonomous action.

In the style of Lord Denning, Justice Belobaba in the lower court analogised to a common neighbourhood scene: "[A]fter a snow storm, I may take the initiative and shovel my elderly neighbour's sidewalk. However, if I do no more than tell my neighbour about an easy-to-use snow shovel that is now available at the corner hardware store and he goes and buys the shovel and clears the snow himself, the most I can say is that I took the initiative to provide some snow shovel advice. I cannot say that I took the initiative to shovel his sidewalk. It was my neighbour who made the decision to act on



my advice, purchase the shovel and clear the snow himself."

Justice Belobaba found that providing traditional banking service without more was not actionable promotion. The Court of Appeal agreed, holding that a promoter plays a "vital or leading role" in the company, and exercises meaningful control. Involvement in the business by providing services, even important services or support, is not sufficient. Ultimately, management and the board of directors are the decision-makers. The bank could not take its own initiative to cause any corporate action. It could and did provide advice, ideas and alternatives, but absent more the court found that the bank was not a promoter.

This interpretation, the Court held, was consistent with the origins of the "promoter" concept, which sprung from US legislation targeting mining prospectors, who would acquire a mining property, sell it into a shell corporation and then pump and dump the stock. Although holding the company at arm's length, the prospector was the promoter of the company and legislators sought to hold him liable. That is not to say that there are not circumstances where an adviser could cross over into being a promoter. The lower court held that where it could be shown that a professional adviser was at the "very heart" of the company, in that the adviser "itself took steps, directly or indirectly, to (actually) found or organise the business in question" including, for example, through funding incorporation of the business, organising the board of directors, actively managing the business or making the key business decisions, then it could be found to be a promoter. These steps are outside traditional banking and underwriting services.

"Although holding the company at arm's length, the prospector was the promoter of the company and legislators sought to hold him liable."

Absent something more, the courts are unwilling to tag banking actors with liability. CD

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