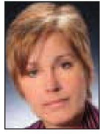
Business Law FOCUS

How to win the battle of the experts



HELEN DALEY

In business-related litigation — particularly cases brought under the *Ontario Business Corporations Act* (OBCA) or its federal equivalent — expert business or share valuation evidence will be critical to your case. But there are pitfalls typically associated with leading expert evidence in commercial disputes.

In *Regina v. Mohan*, [1994] 2 S.C.R. 9, Justice Sopinka articulated the four criteria necessary to the admissibility of expert evidence: (a) relevance; (b) the necessity of the evidence to assist the trier of fact; (c) the absence of any other exclusionary rule; and (d) the presence of proper professional qualifications.

Justice Binnie noted in *R. v. J.J.*, [2000] S.C.R. 600, that "expert evidence should be scrutinized at the time it is proffered and not allowed too easy an entry." This gatekeeper function has recently become quite robust, as trial judges demonstrate a willingness to exclude expert evidence which does not meet the *Mohan* test. This result occurred in *Dulong v. Merrill Lynch Canada Inc.*, [2006] O.J. No. 1146 and in *GMIC Inc. v. Ola, et al.*, a Feb. 10 ruling by Justice Penny on a voir dire. These decisions show the need to ensure that one's expert's report and proposed testimony do not contain any content or stray into areas which are inappropriate under *Mohan*, providing grounds for a sustainable objection.

Long before you seek to have your expert's evidence accepted at trial, you will have given critical thought to two things: first, in what precise professional area you are asking the court to qualify your witness as an expert, and second, how that expertise is relevant to the facts in issue.

For example, in an application under s. 188 of the OBCA in which dissenting shareholders are seeking to have their shares purchased at fair value, the above two questions might be answered in the following way: counsel is seeking to qualify the witness as an expert in business valuation, and the opinion to be given will be the fair value of the applicant's shares in the respondent's business. The evidence is relevant to a fact in issue in the application, as s. 188(13) of the OBCA contemplates a proceeding "to fix the fair value of the securities" of the dissenting shareholder.

Regardless of the context in which you are leading expert evidence, ensure that you can articulate in the clearest possible terms how the witness's professional credentials (the area in which he or she is to be qualified as an expert) enable him or her to offer an opinion directly relevant to a material fact before the court.

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As to the second *Mohan* factor, necessity, the decisions have interpreted this criteria to mean that the expert witness provides information likely to be outside of the experience and knowledge of the trier of fact.

In a business law context, one should be alert to the differences between related professional credentials. While both a chartered accountant and a chartered business valuator may be qualified to offer admissible expert opinion on share value, it is arguable that the chartered business valuator's training and qualifications enable him or her to offer a more precise analysis of the business, and therefore a more reliable opinion. Bear in mind that the incrementally better qualified expert will, all things being equal, have an advantage over the opponent at trial.

Always keep in mind when considering the *Mohan* test that the court will perform a critical analysis of the proffered expert evidence and not a superficial one. *Ola* is an excellent example: the proposed expert witness was tendered on the basis that he had many years of experience in the title insurance industry and hence could opine as an expert about that industry's practice. While superficially that may have sounded relevant, the court found that none of the fact witnesses at trial had relied on industry practice, hence it was not necessary to receive expert evidence on that subject — it was not relevant.

It is under the third criteria, the absence of any other exclusionary rules, that an expert's objectivity may be challenged. While business valuators may appear independent of the parties retaining them, be aware that objectivity can be undermined if, for instance, they have consistently made factual assumptions about the business that favour the position of their clients.

Further exclusionary rules include that expert evidence may not be led on questions of domestic law; and that an expert may not opine on the so-called "ultimate question" before the court.

My final piece of advice: plan your expert evidence as though you anticipate a thorough voir dire and a challenge on all four *Mohan* criteria, since the court will no longer simply allow questionable expert evidence in, and use those factors to evaluate its weight. ■

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Structuring investments in the Middle East

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Middle East countries have some of the fastest growing economies in the world. Some have shown outstanding GDP growth rates over the past 10 years. In spite of political instability in the region, revenues generated by oil and gas trade and the resulting accumulation of wealth and a growing middle class open a number of opportunities for Canadian businesses. These governments are looking to attract foreign direct investment and expertise from around the world in various sectors, including construction, education, health care and infrastructure.

When establishing a business and making investments in the Middle East, Canadian companies should consider the following legal issues, which refer (where appropriate) to the United Arab Emirates (UAE) (rather than covering the entire Gulf Co-operation Council (GCC) which includes Bahrain, the Kingdom of Saudi Arabia, Kuwait, Oman and Qatar). The UAE represents an obvious hub through which Canadian businesses can run their regional operations and make investments in the Middle East, and the UAE has historically accounted for most of Canada's trading activity in the GCC.

Local ownership restrictions

Many Middle Eastern jurisdictions impose requirements under local company laws which restrict the level of foreign ownership of companies. For example, most companies incorporated in the UAE under local law must have at least one or more UAE nationals as shareholders, whose shareholding in the capital of the company must not be less than 51 per cent.

As a result of these restrictions in the UAE and comparable restrictions in other Middle Eastern jurisdictions, investments by foreign entities in the Middle East are typically structured as minority investments. Investments must be structured to address the legal risks associated with minority ownership. Canadian businesses need to understand:

(1) what legal provisions exist under local law in the Middle East which provide for the protection of minority shareholders; and

(2) what additional protections can be incorporated into the legal documentation governing the relationship between Canadian investors and their local partners.

Key document protections and contractual arrangements

The comprehensive protections referred to in item (2) above will typically be incorporated into a shareholders' agreement or a similar document (for example, an investment agreement or joint venture agreement) and the related documents of the local company. These protections would include, among others, comprehensive veto rights, clearly defined information rights, higher percentage voting thresholds for certain resolutions and a governing law of an acceptable jurisdiction.

In order to deal with the restrictions imposed on foreign ownership in the Middle East, a

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‘Free-zones’ permit 100 per cent foreign ownership

Structuring

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market practice has evolved over the years for foreign investors to enter into additional contractual arrangements (for example, trust arrangements, nominee agreements, powers of attorney or license agreements) with the objective of giving the foreign investor sole control over the local company at both the management and shareholder level.

A key risk associated with these arrangements is that they would likely contravene the concealment laws in place in most Middle Eastern jurisdictions which prohibit such arrangements. That being said, there is some uncertainty as to whether the competent authorities would actually choose to enforce these laws, given that these arrangements are common practice in most Middle Eastern jurisdictions and have been a key factor to attracting foreign investment to those jurisdictions. For example, in the UAE, a concealment law has been passed but the enforcement of the law is currently suspended.

Free-zone and offshore companies

Because of the ownership restrictions under local laws in the Middle East, some foreign entities have opted to establish their operations and make investments in certain designated “free-zones” in some GCC countries, which generally permit 100 per cent foreign ownership. However, incorporating in a free-zone may preclude entities that are established and/or licensed within the free-zones from conducting business and having operations outside of these areas.

Accordingly, Canadian businesses exploring the feasibility of establishing a presence in a free-zone need to consider whether any restrictions exist that may affect their proposed business activities.

Canadian investors must keep in mind that any legal protections they have as investors are determined by the law of the jurisdiction in which the company they invest in is established. A number of private equity investments in the Middle East have been structured, when possible, through the use of an offshore company (such as the British Virgin islands or Cayman Islands). This means they have not invested directly in the operating businesses which were established under local law.

These steps have been taken on the basis that private equity investors would avail themselves of the benefit of a legal regime which (i) provides them with rights as shareholders which are more analogous to the rights they would have under the laws of certain Western European and North American jurisdictions in which they are accustomed to doing business, and (ii) provides these investors with more certainty in how the law will be interpreted and applied by the courts or other competent authorities.

Directors’ duties and liabilities

Canadian businesses which appoint directors to the boards of Middle Eastern companies need to understand that they are subject to regimes which do not necessarily have directors’ duties comparable to those that exist in Canada. This may expose directors of Middle Eastern companies to personal liability and possibly even criminal sanctions, including imprisonment. Therefore, Canadian businesses contemplating appointing a director to a local company in the Middle East must ensure they comprehend the scope of the responsibilities of directors under local law.

Prior to making investments and establishing a presence in the Middle East, Canadian businesses will need to invest time to not only understand the local legal framework, but also the acceptable market practices in these jurisdictions and what foreign investors must do to address the requirements of Middle Eastern laws. ■

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