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Ugly corporate opinion questions

By Neill May

There is the old Rodney Dangerfield joke, where he is told by his psychiatrist that he's crazy, asks for a second opinion and is told that he's ugly, too. That makes opinions seem simple. I expect that most corporate lawyers would think the same about corporate legal opinions. They would be mistaken, in my opinion.

Certainly, there are routine corporate and commercial legal opinions that solicitors are accustomed to seeing and delivering. Those are confusing only to the extent that counsel continue to debate what should be well-settled points in those documents, and because, curiously, clients rarely ask why it is in their interests to get long written opinions that are substantially devoted to telling the client what advice counsel is *not* providing.

Other opinions are trickier, because they address questions that mix fact and law. A common example of this concerns the requirement to disclose material information. Clients often ask counsel if they have a duty to disclose a given event, and they get told yes *provided that* the event is material. Probably not a satisfying response. Finally, there are perennial legal questions that are subjective, difficult, and vague but often involve core concepts; these are more challenging for legal opinions. The recent Ontario Securities Commission decision *In the Matter of Future Solar Developments Inc.* addressed three of these difficult, fundamental concepts.

First was the question of whether Future Solar, its president, and the other respondents, in their efforts to obtain funding for the company's business, were engaged "in the business of trading in securities" and therefore were required to be registered. The respondents had sought investors in China who were interested in migrating to Canada under government-sponsored initiatives to support immigration by investors in Canadian businesses. They engaged immigration consultants to identify prospective investors, and travelled to China a number of times to speak and finalize deals with investors. Future Solar's web site included statements promoting investment in the business, and a company brochure had representations about the expected investment return and plans for a future exchange listing and IPO. Whether activities such as the making of promotional statements, meeting with prospective investors, and engaging consultants that could be seen as akin to a sales force constitute engaging in the business of trading is, predictably, unclear. The OSC panel concluded that the company and its principal were not required to register, because they were pursuing legitimate business interests and their fundraising was adjunct to those activities and not akin to a registered dealer selling securities as its primary business. Drawing that line in practice, particularly where the OSC panel also referred to Future Solar's president's trustworthiness and governmental recognition for his business promotion activities, is challenging.

Second was the question of whether a distribution outside of the province is subject to the restrictions of our securities laws. The OSC panel referred to previous decisions where Ontario laws were applied where there were indicia of a sufficient connection to the province. Those indicia, which applied to Future Solar, included that the company was incorporated and had its registered and operating offices and bank accounts in Ontario, and that its directing mind was an Ontarian. However, the panel concluded that Ontario's securities laws did not apply, distinguishing previous cases where there was evidence of high-pressure salesmanship or fraudulent conduct that would bring Ontario capital markets into disrepute.

Third was the question of whether the Chinese investors were members of the "public" vis-à-vis the company. Some of them were not "accredited investors" and had no other relationship to Future Solar, and so the company sought to rely on the prospectus exemption for distributions by private issuers to persons that are not "the public." The presumed logic of this exemption is that persons who are, relative to the issuer, not members of the public do not require the protections of a prospectus. The panel concluded that because the proposed distribution was to a group that fell within a defined category (in this case, wealthy investors seeking to migrate to Ontario), the distribution was not to "the public" at large.

The factors relied upon by the panel are difficult to factor into a corporate legal opinion. The registration question turns on considerations such as whether or not the business activities are legitimate, and whether the fundraising is adjunct or primary. The outbound distribution question, even whether there are sufficient indicia of connection to the province, depends on whether there is conduct that would bring the market into disrepute. And the prospectus exemption issue focuses on whether the solicited investors fall into a defined group. In my experience, nobody weeps for the legal opinion giver, but these types of issues will tend to result in opinions along the lines of "your conduct is not in violation of the law provided that it's legal." That is as valuable to a client as the more definitive opinion that I would be very comfortable to give, channelling Mr. Dangerfield, that I am both crazy and ugly. **CL**

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