BY NEILL MAY

A salt on enforcement initiatives

I think it is fair to assume many securities lawyers sometimes wonder whether litigation of securities law issues — perhaps if not generally then at least in regulatory proceedings — could or should be done by securities practitioners rather than litigators. Reality may occasionally intrude, in that litigators are as a species better at legal presentation and persuasion, but I am positive there is at least a minority of securities lawyers who continue to believe they could do the job. I am certain of this because, not being objective about myself, being blessed by not having to listen to myself speak, and letting my desires cloud my rational judgment, I know that minority consists of at least one person. I have never done it though, and it is probably for the best, and that is my point here: You may wish to take my perspectives on litigation matters with a proverbial grain of salt.

My perspective on enforcement matters, themselves a subset of litigation, is particularly suspect, given (as I suspect is the case for many fathers of young families) I was slow to realize in the family hierarchy I was not part of the police and court system but am in fact one of the habitual offenders who requires constant and repetitive supervision. As I finally get to my topic, then (a concise preamble being a mark of a great litigator), maybe two grains of salt are in order.

The Ontario Securities Commission recently announced it is proceeding with a series of enforcement initiatives that deal primarily with matters relating to the nature and degree of co-operation provided to the regulators by those being investigated for securities offences. The initiatives include:

(i) a program for no-contest settlements, under which the party makes no admissions concerning its conduct or liability;

(ii) a program for no-enforcement agreements, under which it is agreed (as the description implies) that no enforcement action will be taken;

(iii) published guidelines outlining other forms of "credit" that might be earned by a party for co-operation with the authorities (which would presumably reward the different types and degrees of co-operation provided), describing what the regulators consider to be co-operative (and non-co-operative) conduct, and establishing procedures for self-reporting and other forms of co-operation.

To any casual observer of legal dramas on television, the concept of negotiating legal outcomes with the authorities will be familiar and almost intuitive. It may be so almost to the point it is unclear as to why there would be any issue. But in reality there are critical and interesting questions as to how these initiatives will function in practice, and in particular how the guidance as to the regulator's expectations will be applied. The obvious example involves a party who, subsequently accused by the regulator of misconduct, was uncertain at the time of alleged misdeed whether to self-report. This person may have been uncertain as to whether or not there was illegal conduct, any subsequent actions that might be considered unco-operative and more generally whether in reporting to a regulator there is some factor that will cast the conduct as not fully co-operative. The characterization of the relevant conduct, and subsequent actions, always seems more clear in hindsight (particularly through the prosecuting authority's lens). This is the basic tension that commonly arises in negotiations with any prosecutorial authorities.

The more interesting practical example arises where unco-operative activity becomes the focus of the analysis, or of the proceeding. The guidelines (not surprisingly) speak to reporting fully and promptly, providing all necessary documentation, taking prompt and appropriate corrective action on discovery of a breach by others or a failure of systems, and similar standards — all of which are unqualified (other than whatever wiggle room is implied by terms such as "appropriate" or "prompt"). There is a detailed code of expected behaviour. There have been high-profile cases south of the border where parties being investigated were ultimately found to have obstructed justice, or something similar, for not co-operating with authorities, even where the underlying offence was never legally proved. Presumably others have experienced outcomes influenced by the threat of similar enforcement action. Intuitively this is a predictable and understandable outcome. Unco-operative behaviour is suspicious (I learned this from television as well).

Securities offences are difficult to prove for many reasons — complexity, limited paper trail, inter-jurisdictional issues, etc. — so when there is evidence of an offence compounded by obstructive behaviour, suspicion results. So when a regulatory agency, with all of its expertise and authority, details what is good conduct and what is not it's not hard to see how you might end up with punishment focused as much or more on a party's unco-operation than on the underlying offence. But it is an odd result, to say the least.

Maybe two grains of salt weren't enough. I'm just conscious of the health effects of undue salt consumption. And, quite possibly, as an amateur litigator I'm not worth my salt.

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