

## Outlook 2020: Ontario and British Columbia Regulatory and Legislative Updates, Jurisdictional Considerations, and COVID-19 Updates

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This article provides a general overview of the Ontario Securities Commission's Statement of Priorities for 2020-2021 and the update to the British Columbia *Securities Act*. This article further outlines the broad view that Canadian regulators have taken on jurisdiction, along with updates on how COVID-19 has impacted the securities landscape.

### Update on the Ontario Securities Commission's Focus for 2020-2021

We anticipate that the Ontario Securities Commission ("OSC") will be releasing its Annual Report for 2020 in the coming weeks. Until the Annual Report is released, the OSC's 2020-2021 Statement of Priorities ("Statement") remains the guide to the OSC's focus over the coming year.<sup>1</sup>

The underlying focus of the Statement is on investor protection and maintaining confidence in fair and efficient capital markets. The OSC sets out four goals: (1) promote confidence in Ontario's capital markets; (2) reduce regulatory burden; (3) facilitate financial innovation; and (4) strengthen the OSC's organizational foundation.<sup>2</sup> The OSC is implementing various initiatives to accomplish these goals. To promote confidence in Ontario's capital markets, regulatory reforms to NI 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* will take effect through a phased transition period from June 30, 2021 to December 31, 2021.<sup>3</sup> Under the amendments, registrants will be required to "address material conflicts of interest in the best interest of the client; to put the client's interest first when making a suitability determination; and to do more to clarify for clients what they should expect from registrants."<sup>4</sup>

To facilitate financial innovation, the OSC created an Office of Economic Growth and Innovation. The role of this office is to collaborate with businesses and other regulators to support creativity, including by promoting technology to reduce costs and increase innovation in financial services.<sup>5</sup> To strengthen the OSC's organizational foundation, the OSC continues its initiative to implement SEDAR+ (the Canadian Securities Administrators' National System). The redevelopment of SEDAR+ is intended to result in improved functions and more efficient service delivery to market participants.<sup>6</sup>

## Update on the British Columbia Securities Act Amendments and Recent Impacts on Market Participants

The British Columbia government has passed an Order in Council proclaiming into force most of the amendments outlined in the *BC Securities Amendment Act, 2019* (“Amendments”). The Amendments are extensive and came into force on March 27, 2020.<sup>7</sup> While the practical implications of the Amendments are yet to be fully realized, we expect that the Amendments will result in various challenges in the coming years.

Of particular significance, the Amendments provide the British Columbia Securities Commission (the “BCSC”) with new enforcement, compliance, investor protection, and sanction collection tools. Many of the Amendments also provide the BCSC with the strongest powers among securities regulators in Canada to address misconduct in the financial markets. The key Amendments include:

- Expansion of the BCSC’s powers to issue preservation orders (freeze orders, disposition orders, etc.) against property transferred to a family member or third party. Specifically, the Amendments expand the BCSC’s powers to apply retrospectively to any property that was transferred to a family member or third party in a non-arm’s length transaction. Notably, the BCSC will be able to issue such preservation orders prior to issuing an Investigation Order, an Enforcement Order, or an Order for Compliance.
- Granting investigators enhanced powers to enter a business premises, conduct searches of electronic systems on that premises, and direct persons “in charge of a place” or even “in the place” to provide any and all assistance that the investigators demand to fulfill the purpose of the compliance audit or investigation. While COVID-19 has likely curtailed the practical impact of the BCSC’s newly enhanced powers to enter a business premises, we anticipate this Amendment will provide significant opportunities for *Charter* challenges in the future.
- The ability of the BCSC to seek an order from the Supreme Court of British Columbia that a family member or third party who received property undervalue, from a person subject to a disgorgement order, would be jointly and severally liable to the BCSC in an amount equal to the lesser of:

- a. The undervalue benefit received by the family member or third-party recipient; or
- b. The amount specified in the disgorgement order.

- Financial sanctions when there are assets to collect, including seizing Registered Retirement Savings Plans, and asking the Insurance Corporation of BC to refuse to renew driver’s licenses and license plates until financial sanctions are paid to the BCSC.

Summarily, the Amendments can be seen to:

- Increase maximum fine amounts (now \$5 million) and jail terms (now five years) for committing an

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- offence under the British Columbia *Securities Act*;
- Expand the BCSC’s investigative powers, including powers to obtain information;
- Strengthen obligations and sanctions relating to records;
- Add an ability to order administrative monetary penalties without a hearing for contraventions of regulations or decisions; and
- Add protection for whistleblowers.<sup>8</sup>

The March 2020 updates to the BC *Securities Act* have thus been significant and Cassels continues to work with the BCSC to learn about how the new updates will affect market participants.

## Jurisdiction Considerations in Securities Decisions

Canadian regulators, and in particular the OSC and the BCSC, continue to take a broad view of jurisdiction. While provinces cannot legislate extraterritorially, the globalization of securities markets and market participants’ ability to conduct their business inter-provincially and internationally poses the jurisdictional issues in question. Particularly, regulators are increasingly faced with the issue of whether they can establish a “real and substantial connection” for market participants conducting business in a particular province: if this connection is established, the legislation of that particular province applies to the market participant whether or not they were physically operating from a particular jurisdiction.

The recent decision of *Berger v Saskatchewan (Financial and Consumer Affairs Authority)*<sup>9</sup> provides helpful guidance on identifying certain factors that ought to be considered in determining a “real and substantial connection.” In *Berger*, the Court of Appeal for Saskatchewan found that the Financial and Consumer Affairs Authority (“FCAA”), the tribunal tasked with administering the provincial *Securities Act*, erred in failing to apply the “real and substantial connection” test to determine whether it had jurisdiction over a non-resident securities dealer charged with trading in securities without being registered. The tribunal had originally determined jurisdiction based on residency, which the appellate court found to be “legally faulty.”<sup>10</sup> The appeal court made it clear that the question for a hearing panel operating under the *Securities Act* will be whether there is a sufficient connection between the province and the matter before it to ground provincial jurisdiction. That question will have to be answered with reference to the full slate of relevant factors including:

1. The nature of the modern securities industry;
2. The particular provision of the legislation in issue;
3. The nature of the impugned conduct; and
4. The particulars of the surrounding circumstances.<sup>11</sup>

While jurisdiction was at the centre of *Berger*, it was not at issue in two settlement agreements approved by the OSC in 2019 despite the international nature of those matters relating to foreign exchange (“FX”)

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trading businesses. The settlements related solely to the failure to have adequate controls and supervision systems, and to promote a culture of compliance in currency trading businesses. The financial institutions agreed to make voluntary payments totaling approximately \$25 million and to conduct an internal audit of their respective compliance with a global code for such currency trading and institute any necessary changes.

We expect to see the OSC continuing to broadly apply its jurisdiction. Significantly, the OSC's director of enforcement has released a statement indicating that the regulator is not finished looking into foreign exchange markets, where currencies are bought, sold and swapped, and will be reviewing the largest derivatives dealers in the province to assess their compliance with foreign exchange trading.

## COVID-19 Updates to the Securities Landscape

### Canadian Securities Regulators Provide Regulatory Relief Amidst Global Pandemic

The Canadian Securities Administrators ("CSA") has made new changes to its policies to support reporting issuers overcome the many challenges associated with the COVID-19 pandemic. Here are three key ways that COVID-19 has changed CSA regulations:

#### **1. Filings**

On March 18, 2020, the CSA issued a notice stating that securities regulators will provide a 45-day extension for periodic filings required to be made on or prior to June 1, 2020.<sup>12</sup> This relief applies to reporting issuers, investment funds, registrants, certain regulated entities and designated rating organizations. The notice covers financial statements, management's discussion and analysis, management reports of fund performance, annual information forms, technical reports, and other ancillary documents.

#### **2. Annual General Meetings**

The CSA has authorized reporting issuers that have already mailed and filed their definitive proxy materials to notify securityholders of a change in the date, time, or location of their Annual General Meeting ("AGM"), including changing from an in-person meeting to a virtual meeting, by way of press release.<sup>13</sup> The CSA clarified that a reporting issuer does not need to mail out its soliciting materials or amend its proxy materials if it takes all reasonable steps necessary to inform intermediaries, transfer agents, proxy service providers, and other parties involved. However, the CSA confirmed that issuers must comply with their constating documents and all other applicable corporate laws.<sup>14</sup>

For reporting issuers that intend to conduct a virtual or hybrid AGM, the CSA emphasized the importance of

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notifying all stakeholders of such plans in a timely manner and disclosing clear directions on the logistical details of the virtual or hybrid AGM, including how they can remotely access, participate in, and vote at such AGM.<sup>15</sup>

The CSA encouraged reporting issuers involved in proxy contests, holding special meetings for merger and acquisition transactions, or obtaining securityholder approval for transactions under *Multilateral Instrument 61-101 Protection of Minority Securityholders in Special Transactions*<sup>16</sup> to contact their principal regulator to discuss what steps would be appropriate in those circumstances.

### **3. Disclosure Obligations**

Under Canadian securities law, an issuer is required to disclose risk factors relating to the company's business in its annual information forms. Similarly, an issuer's management's discussion and analysis must disclose the risks that management anticipates will materially affect the issuer's future performance. While COVID-19 has impacted all companies, its long-term effect on businesses' performances will be difficult to predict.

The CSA issued guidance discourages issuers from using broad and generic language to describe the impact they expect COVID-19 to have on their companies. Instead, the CSA encourages companies to carefully consider and report on how COVID-19 could impact their business, specifically in terms of cash flow, consumer demand, business operations, and possible supply chain disruptions.<sup>17</sup>

## **Looking Forward**

The regulatory relief and guidance provided by the CSA in respect to filings, annual general meetings, and disclosure obligations are welcomed support to issuers as they navigate the COVID-19 pandemic.

The CSA's endorsement of, and guidance regarding, virtual and hybrid AGMs is especially helpful in addressing physical distancing measures prohibiting large gatherings.

Given the benefits of virtual annual general meetings, such as increased shareholder accessibility and participation, reduced costs and carbon footprint, and the rapid pace at which the necessary technological infrastructure is being improved and adopted, we expect that regulators will continue to encourage the use of virtual and hybrid AGMs in the future.

That said, there are certain concerns that regulators will have to address, including the ability of chairpersons to covertly obstruct the participation of dissenting shareholders through electronic means, navigating the impact of technological issues that will inevitably occur, and ensuring the security and reliability of online voting.

<sup>1</sup> OSC Notice 11-789, "Notice Statement of Priorities for Financial Year to end March 31, 2021" (Notice 11-789). Every year, the OSC is required to set out its proposed priorities in connection with the administration of the Ontario *Securities Act*, the regulations and the rules.

<sup>2</sup> *Ibid* at p. 3.

<sup>3</sup> NI 31-103, *Registration Requirements, Exemptions, and Ongoing Registrant Obligations*.

<sup>4</sup> Notice 11-789 at p. 9.

<sup>5</sup> *Ibid* at p. 14-15.

<sup>6</sup> *Ibid* at p. 16-17.

<sup>7</sup> BCSC, "Act, Regulations & Rules", online: <<https://www.bcsc.bc.ca/securities-law/law-and-policy/act-regulations-rules>>.

<sup>8</sup> BC Reg 45/2020.

<sup>9</sup> 2019 SKCA 89 [*Berger*].

<sup>10</sup> *Ibid* at para. 64.

<sup>11</sup> *Ibid* at para. 63.

<sup>12</sup> CSA, "Canadian Securities Regulators to Provide Blanket Relief for Market Participants Due to COVID-19", March 18, 2020, online: <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1877>>.

<sup>13</sup> CSA, "Canadian Securities Regulators Provide Guidance on Conducting Annual General Meetings During COVID-19 Outbreak", March 20, 2020, online: <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1879>>.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid*.

<sup>16</sup> MI 61-101, "Protection of Minority Securityholders in Special Transactions".

<sup>17</sup> CSA, "Canadian Securities Regulators Remind Issuers of Importance of Disclosure in Financial Reporting", May 29, 2020, online: <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1910>>.

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