

Cassels

Canadian Securities Litigation Outlook

**TRENDS TO WATCH
FOR CAPITAL MARKETS
PARTICIPANTS**

2020 UPDATE





Trends to Watch

A NEW CROP OF SECURITIES CLASS ACTIONS AND AMENDMENTS TO THE CLASS PROCEEDINGS ACT

THE SHIFTING ACTIVISM AND GOVERNANCE LANDSCAPE: EVOLVING INVESTOR DEMANDS IN THE NEW NORMAL

ONTARIO AND BRITISH COLUMBIA REGULATORY AND LEGISLATIVE UPDATES, JURISDICTIONAL CONSIDERATIONS, AND COVID-19 UPDATES

GUIDANCE FOR SPECIAL COMMITTEES AND DISCLOSURE OBLIGATIONS: A CATALYST CASE STUDY

DEVELOPMENTS IN CRYPTOCURRENCY REGULATION AND ENFORCEMENT

RECENT DEVELOPMENTS IN INSIDER TRADING CASES AND A COVID-19 CAUTION FROM THE SEC

ARTIFICIAL INTELLIGENCE ACTIVITY ON THE ENFORCEMENT FRONT

Canadian Securities Litigation Outlook – 2020 Update

TRENDS TO WATCH FOR CAPITAL MARKETS PARTICIPANTS

The Cassels Securities Litigation Team is pleased to present our fifth annual Canadian Securities Litigation Outlook. In this edition, we set out our analyses of key securities litigation developments over the past year and our thoughts on the topics and issues that we expect to see trending in the year to come.

This year, we examine seven securities litigation-related topics regarding recent trends in the area of secondary market liability and securities class actions, regulatory updates arising out of British Columbia and Ontario, including the impact of COVID-19, the shifting shareholder activism and governance landscape, recent guidance on evidence requirements in insider trading and tipping cases, special committees and disclosure obligations, and artificial intelligence activity in securities enforcement.

We will continue to monitor and report on these and other developments and trends as they unfold.

Please contact any member of the Cassels Securities Litigation Team to discuss these developments and trends, and their impacts on market participants.



A New Crop of Securities Class Actions and Amendments to the *Class Proceedings Act*

Following several years in which the number of class actions declined (as we reported in 2018 and 2019), 2019 saw the filing of the second-highest number of securities class actions in Canada since the introduction of the secondary market liability regime, largely in the cannabis space.¹ It remains to be seen whether amendments to Ontario's *Class Proceedings Act* ("CPA") that came into effect this fall, which are largely defendant-friendly, will have a chilling effect on this trend.²

CANNABIS SECURITIES CLASS ACTIONS GROWING LIKE WEEDS

Since the enactment of Part XXIII.1 of the Ontario *Securities Act* in 2006 and the creation of a statutory cause of action for secondary market disclosure misrepresentations, proposed class actions that rely upon these legislative provisions have flourished. According to statistics gathered by NERA Economic Consulting,³ there has been a fairly consistent number of new class action filings in Canada over the last decade in a variety of industries, with an average of seven or eight new secondary market class action claims being commenced each year. In 2019, fourteen new secondary market class actions were commenced, well above the six secondary market claims that had been issued in the previous year. So why the bump?

In the latter part of 2018, the Canadian government passed the *Cannabis Act*, S.C. 2018, c.16, which was designed to, among other things, regulate the production, distribution, marketing, and sale of recreational cannabis. The public markets seized upon the widespread optimism and the new opportunities that came with its legalization. Since that time, the industry has been subject to significant restrictions and oversight by securities regulators and licensing authorities. Consequently, the volatility of the market, along with the dashed dreams of many investors, has caught a number of industry players in a web of litigation.

At the time that the *Cannabis Act* was passed by Parliament in the latter part of 2018, CSA Staff Notice 51-357 was published.⁴ In that Notice, Staff advised that the disclosure of 70 reporting issuers who had been operating in the cannabis industry in Alberta, British Columbia, Ontario, and Quebec had been reviewed, and that Staff had identified industry specific disclosure deficiencies, including:



- Licensed cannabis producers had failed to provide sufficient information in their financial statements and their MD&A for an investor to understand their financial performance, especially insofar as information that related to recording growing cannabis plants at their fair value;
- Some issuers had failed to consistently comply with securities requirements for forward looking information and in their guidance for providing balanced disclosure; and
- Almost 75% of the issuers with cannabis operations in the United States had failed to provide sufficient disclosure about the risks related to their US operations.

In November of 2019 and as a consequence of significant growth and activity in the cannabis sector, CSA Multilateral Staff Notice 51-359 was published to outline the regulators' additional areas of concern.⁵ In that Notice, Staff of the securities regulatory authorities in each of Ontario, British Columbia, Quebec, New Brunswick, Saskatchewan, Manitoba, and Nova Scotia highlighted deficiencies respecting the disclosure of conflicts of interest and inadequate transparency relating to the cross-ownership of financial interests, especially in connection with mergers, acquisitions, and other significant corporate transactions. The Notice also cited examples of deficient disclosure relating to corporate governance.

Not surprisingly, these Notices also prophesized (or recorded) the battleground for securities class actions in the cannabis industry, and in 2019 and 2020, several proposed class actions alleging secondary market liability against cannabis industry issuers (and, in some cases, against their officers, directors, auditors, and underwriters) were commenced, including:

- *Miller v FSD Pharma, Inc.* (Ontario Superior Court), where the plaintiff alleged that FSD Pharma made misrepresentations in its MD&A with respect to the timing for completion of a construction project for its cannabis operations, as well as in a subsequent press release designed to correct the misrepresentation in the MD&A. The plaintiff obtained leave to proceed in 2020 and the case recently settled;⁶
- *Earle v CannTrust Holdings Inc. et al* (Ontario Superior Court), where the plaintiffs claim that public statements made by CannTrust in relation to its compliance with cannabis licensing requirements were false, after it was reported that CannTrust was illegally producing and selling cannabis from unlicensed locations, which caused a massive drop in CannTrust's share price, an OSC cease trade order, and CannTrust's ultimate application for creditor protection pursuant to the *Companies' Creditors Arrangement Act* (Canada);⁷
- *Miller v HEXO Corp.* (Quebec Superior Court), where the plaintiffs allege that HEXO made false representations in press releases and other disclosure documents about the expected revenues from a contract of cannabis supply with the Quebec government and the expected revenues to be generated in the acquisition of another cannabis producer;⁸
- *Dillon v Wayland Group Corp.* (Quebec Superior Court), where the plaintiffs claim that there were misrepresentations pertaining to the timing and cost of Wayland's expansion of its cannabis growing facility in Langton, Ontario, including the funding of that expansion and the amount of cannabis production that Wayland could achieve in 2019;⁹ and
- *Harpreet v Cronos Group Inc.* (Ontario Superior Court), where the plaintiffs allege that Cronos inflated its revenues from cannabis products by improper accounting from bulk transactions, and misrepresented those revenues in interim financial statements, in its MD&A, and in press releases.¹⁰

The cannabis sector must also still grapple with traditional product liability class actions, like *Organigram Holdings Inc. v Downton* (Nova Scotia) in which the plaintiffs allege negligent design, development, and testing of cannabis products following the discovery that the defendant's products contained pesticides that had not been authorized for cannabis use, leading to a Health Canada recall.¹¹ And in Alberta, another proposed class action (*Langevin v Aurora Cannabis Inc. et al*) was commenced in which the plaintiff alleges that a large number of cannabis manufacturers and distributors violated consumer protection laws by falsely labelling the THC and CBD content on their packaging.¹²

What's next for the cannabis industry?

Our view is that the ongoing disclosure of issuers will continue to attract intense scrutiny from regulators and participants in the public markets, especially considering the volatility of this market and the negative publicity surrounding some of the large players in cannabis production and sales. We also expect to see a surge of securities class actions against cannabis companies in the US (including Canadian companies listed

on US exchanges), which are similarly focused on disclosure deficiencies. In fact, NERA has reported that eight out of the twelve US securities class actions commenced in 2019 against cross-listed Canadian companies carried on business in the cannabis industry.¹³ This may continue until class counsel determine that this is not a fruitful avenue for potential claims, which may coincide with growing maturity and progress in the cannabis industry in respect of statutory and financial disclosure.

WHOA – WHAT ABOUT THE RECENT AMENDMENTS TO THE CLASS PROCEEDINGS ACT (ONTARIO)?

On September 17, 2020, Ontario's Attorney General announced that proposed amendments to the *Class Proceedings Act, 1992* pursuant to Bill 161 were proclaimed in force effective October 1, 2020 (these amendments only apply to claims commenced after that date and do not apply retroactively). The amendments are most notable for providing a more restrictive test for certification of a class proceeding, and in particular, that in order to be certified, a class action must propose common issues that *predominate* over individual ones, and the proposed action must also be *superior* to any other reasonably available means of resolving the claims of the plaintiff class or the conduct of the defendant (similar to certification rules in the United States). Other amendments suggest that it will be more difficult for plaintiffs to successfully prosecute class actions or related proceedings, including:

- Preliminary motions that may narrow or dispose of issues in a proceeding can be brought by defendants in advance of certification motions;
- Automatic dismissal of class actions after one year, unless certification materials have been filed by the plaintiffs or a timetable has been agreed to or fixed by the Court; and
- Tolling period for limitations periods has been amended to allow for limitation periods to run against class members once they are no longer actively involved in the class action.

On the other side of the coin, the amendments have clarified prior inconsistent case law relating to the three-year limitation period for proposed class actions that are commenced pursuant to Part XXIII.1 of the *Securities Act*. In particular, the amendments confirm that secondary market liability class actions will be considered to have been “commenced” upon the issuance of the originating process, and not at the time of the mandatory motion for leave to proceed pursuant to Part XXIII.1 of the *Securities Act* (to address previous cases where limitation period defences accrued after the issuance of the claim but before the motion for leave could be scheduled or heard).

What impact will all of these amendments have on Part XXIII.1 claims going forward?

Time will tell, but considering the high stakes often involved with these class actions, it is unlikely that plaintiffs’ counsel with significant, reasonable secondary market claims will be deterred. However, there may be an inclination

by class counsel to proceed with their claims in provinces other than Ontario. That said, the additional procedural hurdles that have arisen by the amendments to the CPA should at least weed out some of the more dubious claims at earlier stages and allow targeted defendants to move forward with their business without the smoke of class action proceedings looming indefinitely.



The Shifting Activism and Governance Landscape: Evolving Investor Demands in the New Normal

We will all remember 2020 as being a perfect storm of societal unrest and extreme negative economic impacts triggering a sea change to our collective perspective and approach respecting the role of government in our lives, healthcare, diversity and the natural environment.

In the early part of 2020, the COVID-19 pandemic triggered global panic, a stock market meltdown, and restrictions on travel, business and our day to day lives. Governments reacted with immediate intervention of unprecedented magnitude, in the form of unique and temporal laws designed to stave off economic collapse during the frantic search for adequate emergency medical treatments pending the discovery of a vaccine for the novel virus.

With the proliferation of social media, the world also witnessed worldwide protests and a “cancel culture” designed to end systemic racism through effective boycotts. The “Me Too” movement demanding gender equality and the eradication of sexual harassment in the workplace also continued to gain steam. Added to all of this was increased and well-orchestrated activism for the benefit of traditionally oppressed persons, including BIPOC and members of the LBGTQIA2S+ community.

And what about the efforts of Greta Thunberg, our own David Suzuki, and a host of others who have drawn much-needed attention to climate change and other environmental issues through massive rallies and online media campaigns?

As capital and financial markets begin to recover, the full economic impact of the confluence of these societal and environmental events remains to be seen. However, if one thing is for certain, it's that Canadian public companies must continue to adapt and respond to the resulting challenges and opportunities.

CONVENTIONAL APPROACHES TO DETERRING SHAREHOLDER ACTIVISM ARE INSUFFICIENT

Traditionally, companies seeking to avoid, or at least minimize, shareholder activism have been advised to be proactive, primarily through routine and critical reviews of financial performance and executive compensation policies and programs (the historical battleground underlying shareholder activism). We suggest that such a myopic approach is unwise in these different times.

A company's future and prospects can change overnight in the current era, based on social, political or other events and, most importantly, public perception of the company's response to these events. Directors and officers must closely scrutinize the company's proactiveness and leadership in addressing societal issues and ability to respond to new and evolving social issues efficiently and effectively, before any corporate blind-spots and vulnerabilities are exposed.

INSTITUTIONAL INVESTOR DRIVEN ACTIVISM ON ESG ISSUES

Sophisticated players in the public markets are clearly seeing the benefits of assertively addressing social issues (and are attuned to the dangers of not addressing them). In fact, there has been a recent trend of aggressive activism in the public markets, some of which is specifically designed to exert pressure on companies to adopt new Environmental, Social and Governance ("ESG") policies and conduct.

Recent examples include:

- RBC Global Asset Management refers to itself as a leader in "responsible investment", with a focus on companies with robust ESG policies;¹
- Calvert Research and Management refers to itself as a leader in "responsible investment" and plans to raise racial equality issues as a priority for shareholder resolutions in 2021;²
- Glass Lewis and Institutional Shareholder Services are both influencing the voting decisions of Canada's largest institutional investors with elaborate ESG screening;³
- BMO has stated that it is committed to using its capabilities as a shareholder to fight for change "from the inside", pointing to its voting record as shareholder (BMO voted 24.5% of the time against management in North America);⁴ and
- BlackRock CEO Laurence Fink warned company boards to substantially enhance their efforts to tackle climate change and said that BlackRock would be "increasingly disposed" to cast critical proxy votes tied to sustainability. Fink also indicated that BlackRock intends to sell off its positions in companies that derive more than 25% of their revenues from thermal coal production.⁵

ACTIVISM ON EXECUTIVE COMPENSATION

As a result of weak company financial performance and depressed market values driven largely by the impact of COVID-19, investors and shareholders are also taking a renewed look at executive compensation. In particular, company approaches to balancing the pendulum between rewarding management performance outright and attempting to incentivize management to achieve same are in the crosshairs of activist investors:

- In April 2020, the Shareholder Association for Research and Education (“SHARE”), a leader in shareholder advocacy, research and education for institutional investors advised that they expect shareholders of publicly held corporations will be asked to vote on how the board has decided to compensate its C-Suite;⁶
- In May 2020, Teck came under pressure from an institutional investor to replace Teck’s CEO and to sell their oil business after a 58% downturn in share value over the last year;⁷
- In June 2020, Bombardier came under fire over compensation practices after terminating 2,500 employees as the pandemic took a hit on its business;⁸ and
- Most recently, in September 2020, at a time when gold markets were surging (given its safe haven environment in times of upheaval), investors presented an open letter at the Denver Gold Forum calling for various changes to management compensation. The requested changes asked that performance criteria to hit certain pay levels be disclosed at the beginning of the year and that executive pay be tied more to long-term performance, rather than short time frames. The letter also called for more disclosure and accountability for boards, arguing that directors should have “more skin” in the game and in the absence of same, stricter term limits to serve on the board.⁹

We expect institutional investor driven activism on ESG issues and activism on executive compensation will trend into 2021. Companies which have critically reviewed policies and practices in dealing with the environment, racial and gender equality, and other societal issues, will be best insulated from shareholder activism. Companies that are unable to meet the evolving standards of “responsible investment” will be targeted by activist shareholders and may lose the ability to attract further investment.



Ontario and British Columbia Regulatory and Legislative Updates, Jurisdictional Considerations, and COVID-19

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.¹

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.²

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, 2021.³ 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".⁴

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.⁵ 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.⁶

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, 2020.⁷ 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 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 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.⁸

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)*⁹ 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".¹⁰ 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:

- a. The nature of the modern securities industry;
- b. The particular provision of the legislation in issue;
- c. The nature of the impugned conduct; and
- d. The particulars of the surrounding circumstances.¹¹

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”) 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, 2020.¹² 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.¹³ 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.¹⁴

For reporting issuers that intend to conduct a virtual or hybrid AGM, the CSA emphasized the importance of 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.¹⁵

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*¹⁶ 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.¹⁷

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.

Guidance for Special Committees and Disclosure Obligations: A Catalyst Case Study

In connection with its responsibility to protect investors by ensuring that regulated companies are meeting their disclosure obligations, the Ontario Securities Commission (“OSC”) released a decision this year which emphasized proper disclosure of related party transactions.

The purpose of disclosure of related party transactions is to ensure that shareholders (and particularly minority shareholders) are adequately informed and protected from abusive or unfair conduct that can arise in such circumstances. The OSC has now confirmed that this protection extends to disclosure obligations for special committees, whether or not the special committees themselves are legally required.

In *Re The Catalyst Capital Group Inc.*,¹ the OSC provided direction regarding special committees and the standard for disclosure required under Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (“MI 61-101”). Essentially, the OSC determined that where a special committee is formed in the context of a transaction with substantial conflicts of interest, whether legally required or not, that committee will be held to the same standards as one that the company was legally obligated to form.

Boards of directors and their advisors are aware that special committees can and often should be created, properly mandated and advised, and involved in a transaction’s early stages, so that they can effectively perform their role of protecting shareholders and assisting the board from the outset. Indeed, decisions made by a board without the benefit of necessary input from a special committee may later be rendered ineffective.

Significantly, management information circulars must include all information that is “important to enable an investor to make an informed decision”. The OSC has now interpreted this information to include full disclosure about the special committee’s processes, including any restrictions and/or limitations, because this information is considered material to shareholders’ decision-making. Any failure to do so may lead to orders that sufficient disclosure be provided, and consequent delays in holding shareholder meetings.



THE CATALYST DECISION

In December 2019, private equity firm The Catalyst Capital Group Inc. (“Catalyst”) complained to the OSC about alleged abusive or coercive conduct and disclosure deficiencies in connection with a proposed plan of arrangement (“Arrangement”) that would take Hudson’s Bay Company (“HBC”) private. The proposed Arrangement involved a group of shareholders that together owned 57% of HBC voting shares, and included a holding company owned by HBC’s Governor and Executive Chairman and his family.

The OSC granted standing to Catalyst to bring the application under section 127 of the *Securities Act* (Ontario), a power typically reserved for OSC staff. The decision to grant standing was based on several factors, including in this instance that the application raised fundamental securities regulatory issues involving compliance and minority shareholder protection.

The instrument of primary application was MI 61-101, the purpose of which is to protect minority shareholders from abusive or unfair conduct that can arise when related parties are involved in transactions. MI 61-101 requires enhanced disclosure, an independent valuation of the common shares including an assessment as to fair market value, and approval of a majority of the minority at a shareholders’ meeting.

In *Re The Catalyst Capital Group Inc.*, the OSC found that the requirements of MI 61-101 were not met and granted a temporary cease-trade order, required provision of additional disclosure, and postponed the special meeting of shareholders. In its written reasons, the OSC addressed a number of important issues that arise in the context of business combinations while providing important guidance to companies on the timing, formation, and role of special committees, and on disclosure requirements, including those that apply to transactions with significant conflicts of interest.

THE TIMING, FORMATION, AND ROLE OF SPECIAL COMMITTEES

In transactions that involve shareholder approval, such as the proposed HBC transaction, special committees are not legally required. However, where a special committee is established, the OSC determined that it will be held to the same standard as if it had been required by law: the special committee should have a robust process regardless of whether it is legally required, or not.

The OSC emphasized the advantage of a special committee’s involvement in a transaction’s early stages. Decisions made without its input can later render the committee unable to fulfill its important role – namely, considering the interests of security holders and assisting the board in deciding whether to recommend the transaction. Therefore, it is critical that the board and committee not be bound by early decisions or negotiations that occurred before special committee involvement.

In this case, the HBC board of directors initially mandated the special committee to oversee the sale of European real estate holdings. Its scope was later expanded to include the Arrangement. The OSC found that the HBC special committee was not properly mandated early enough in the process and speculated that its lack of involvement in early decisions and negotiations, at which time critical issues were being addressed, compromised its later efficacy. Given the special committee’s lack of involvement in what the OSC considered to be “critical issues”, the OSC concluded that the special committee was unable to consider alternative options, seek independent legal advice, or negotiate terms that were more favourable to minority shareholders. Further, the OSC observed that it could not know how these deficiencies affected the per-share price offered to minority shareholders.

DISCLOSURE ORDERED ABOUT THE SPECIAL COMMITTEE PROCESS

The OSC held that, because of the influence it would have over investors' voting decisions, "disclosure of [the special committee] processes and the basis for its recommendation should be subject to the same disclosure standards in a management information circular that would apply if a special committee was required".² The standard of disclosure in respect of the committee therefore remains "what is important to enable an investor to make an informed decision" and the same level of scrutiny will be applied. In finding that this standard was not met, the OSC ordered additional disclosure regarding several critical aspects of the special committee's activities.

FURTHER DISCLOSURE ORDERED

The OSC also found that the standard for disclosure under MI 61-101 was not met in respect of other aspects of the Arrangement. Accordingly, the OSC also required further disclosure about:

1. The property valuation, including limitations of appraisals, the assessor's opinion of appraisal conduct and the effect of this information on the valuation and fairness opinion;
2. Benefits that would accrue to the directors and officers as a result of the Arrangement, citing that this information was material for minority shareholders to consider; and
3. Tax benefits that would accrue to the majority group of shareholders following the Arrangement.

LOOKING FORWARD

Companies must remain aware of the risks they face when creating a special committee, even when they are not legally required to do so. Where it becomes apparent that a Board's consideration of a transaction may raise issues as to a conflict of interest, it should form a special committee as soon as possible (and as soon as conflicts of interests arise in a significant transaction).

Once formed, a voluntarily created special committee will be held to the same disclosure requirements as if it had been legally required. Accordingly, special attention should be paid to the requirements for mandatory special committees. Where disclosure requirements have not been met, sufficient disclosure may be ordered, which could delay shareholder meetings or cause other disruptions.

Developments in Cryptocurrency Regulation and Enforcement

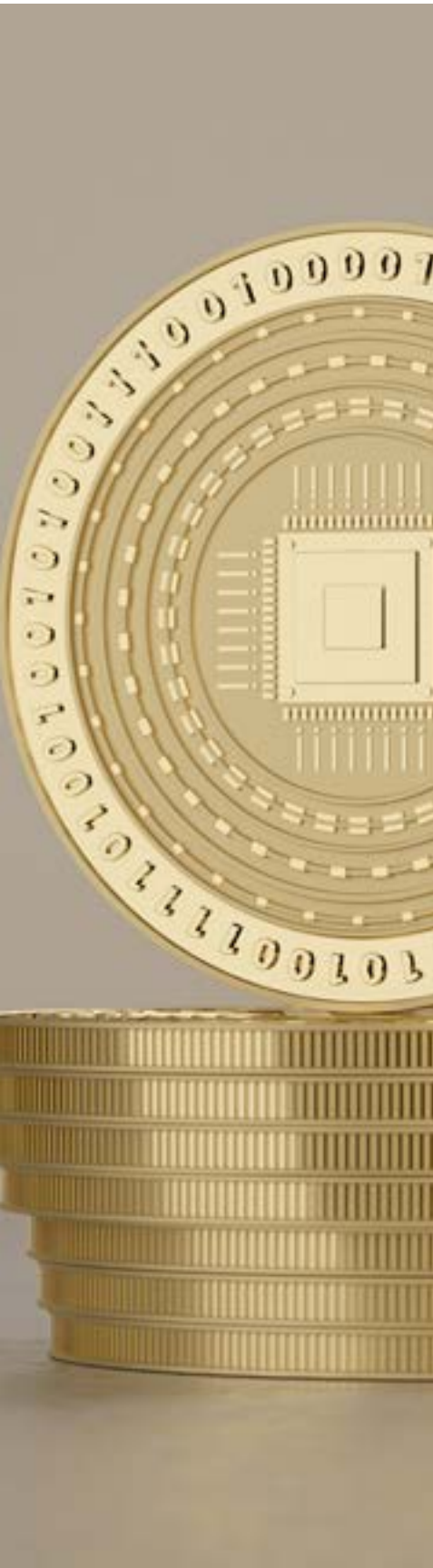
Canadian regulators continue to take a collaborative and cautious approach to regulating the cryptocurrency industry. Due to the ever-evolving landscape of the industry, regulators have taken it upon themselves to clarify the regulatory framework, to better support businesses seeking to offer innovative products, services and applications, and to protect Canadian investors. This may be a welcome approach insofar as it fosters increased stability and predictability, which will serve the industry well in the long run.

By way of example, the Canadian Securities Administrators (“CSA”) has published Staff Notice 21-327 *Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto-assets*¹ (“Staff Notice”). The Staff Notice describes situations where securities legislation will and will not apply to platforms facilitating crypto-asset transactions. In particular, it confirms that securities legislation governs not only trading in crypto-assets that are clearly securities, but also trading in contracts or instruments that are derivatives based on crypto-assets. Securities legislation will therefore apply to platforms that facilitate the trading of crypto-assets as commodities, whereby the user’s contractual right to the crypto-asset may constitute a derivative.

Conversely, the Staff Notice sets out the following conditions under which securities legislation will not apply:

- The underlying crypto-asset itself is not a security or derivative; and
- The contract or instrument for the purchase, sale or delivery of a crypto-asset results in an obligation to make immediate delivery of a crypto-asset, and is settled by the immediate delivery of the crypto-asset to the Platform’s user according to the Platform’s typical commercial practice.

Overall, the Staff Notice can be seen as a part of an ongoing effort to help stakeholders better navigate the evolving regulatory regime.



As another example and in a further attempt to foster increased transparency, reliability and security in the cryptocurrency space, amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2019* now require all dealers in virtual currency that service Canadian customers to register with the Financial Transactions and Reports Analysis Centre of Canada (“FinTRAC”). These entities are now subject to similar due diligence, record keeping, monitoring, and reporting requirements as other reporting entities. Some of these requirements include identifying all clients, appointing a compliance officer, and maintaining records of clients and transactions. In addition, any “reporting entity” that receives \$10,000 CAD or more in cryptocurrency must now identify the sender, record details of the transaction, and report the transaction to FinTRAC. In order to ensure compliance, FinTRAC is authorized to impose Administrative Monetary Penalties (“AMPs”) on any entity that does not comply and can revoke registrations where entities have failed to pay the AMPs.

COLLABORATIVE APPROACH WITH INDUSTRY STAKEHOLDERS

Wealthsimple Digital Assets Inc. has been granted permission to operate Canada’s first regulated crypto trading platform under CSA’s “regulatory sandbox”, an initiative designed to allow firms to test innovative ideas with exemptive relief from securities laws requirements.² Wealthsimple plans to operate on a beta testing basis and solicit feedback from early users to improve the platform before it transitions to normal operation. Wealthsimple’s successful application to the regulatory sandbox represents another example of the CSA’s collaborative approach to developing regulatory requirements with the input of industry stakeholders.

INCREASED ENFORCEMENT EFFORTS

On the flipside to industry collaboration, recent events indicate that provincial securities commissions are using the registration requirement to bring enforcement proceedings against, and protect investors from, fraudulent parties.

This approach was adopted by the OSC in the Matter of *Miner Edge Inc. et al*,³ where the accused is alleged to have falsely promised investors that their funds would be used to invest in a crypto mining venture. The OSC has made allegations of fraud, alongside allegations that the accused engaged in trading and distributing securities while not being registered to do so. This approach was also adopted in the Matter of *ASBC Financial and Walter Turner*,⁴ where the accused were prosecuted for having engaged in the business of trading and advising in securities of underlying crypto-assets without being registered to do so, rather than the more serious alleged infraction of defrauding an investor out of \$190,000.

The motivation to adopt this approach is likely due, at least in part, to the significantly less onerous proof requirements involved in prosecuting alleged failures to comply with the applicable registration requirements. We would expect regulators to continue utilizing this approach as the regulatory framework continues to mature and as long as it continues to serve as a uniquely efficient means of enforcing breaches of the *Securities Act* committed by actors in the crypto industry.



Recent Developments in Insider Trading Cases and a COVID-19 Caution from the SEC

Canadian securities regulators have continued to focus on insider trading and tipping investigations and prosecutions since the Ontario Court of Appeal endorsed the use of circumstantial evidence in early 2018.¹ However, a recent decision from the Ontario Securities Commission (“OSC”), released in late 2019, serves as an important reminder of the need for OSC Staff to put forward an exhaustive case when attempting to advance allegations of insider trading and tipping based entirely on circumstantial evidence.

The past year also saw the COVID-19 pandemic give rise to novel challenges for market participants and regulators in combating the increased risk of insider trading and tipping. Given the unique circumstances caused by the pandemic, regulators in the United States have warned of a surge in the number of people that may have access to material non-public information, and have reminded market participants to be mindful of their obligations to keep this information confidential and avoid any inadvertent disclosure. While Canadian regulators have yet to issue similar warnings, the same concerns remain relevant for market participants on both sides of the border during these unprecedented times.

NO INSIDER TRADING WITHOUT CLEAR, CONVINCING, AND COGENT EVIDENCE

In October 2019, the OSC released a long-awaited decision in *Re Hutchinson*, involving allegations of insider trading and tipping against Cameron Edward Cornish, a Toronto-based professional trader with over 25 years of experience.² Commission Staff alleged that Donna Hutchinson, a former legal assistant at a Toronto Bay Street law firm, communicated material non-public information about eight potential corporate transactions to Cornish, who, in turn, communicated some of that information to his friends, Patrick Jelf Caruso and David Paul George Sidders. Staff further alleged that Cornish, Caruso, and Sidders all traded based on that material undisclosed information, in contravention of the Ontario *Securities Act*.

Staff reached a settlement with Hutchinson, where she acknowledged providing material non-public information to Cornish over a four-year period. The Commission ultimately concluded that Cornish had engaged in insider trading based largely on the direct evidence provided by Hutchinson. Cornish did not appear or testify at the hearing.

Despite these findings against Cornish, the Commission did not conclude that Cornish had tipped Caruso and Sidders, and ultimately dismissed all allegations against both respondents. Staff's case against Caruso and Sidders was entirely based on circumstantial evidence. In considering the evidence, the Commission concluded that the case advanced by Staff did not rise to the necessary level of "clear, convincing and cogent evidence" that makes it more likely than not that Caruso and Sidders had engaged in insider trading. With respect to Caruso, Staff struggled to present the type of comprehensive evidence required to draw an inference of insider trading based on his trading patterns. Instead, the Commission accepted that Caruso's trades were largely consistent with his longstanding trading strategy. For Sidders, the Commission found that there was an absence of evidence of any uncharacteristic trading or suspiciously timely communications.

This decision serves as an important reminder about the need for Commission Staff to put forward a complete set of cogent and convincing evidence when advancing allegations of insider trading and tipping, especially when asking a panel to draw factual inferences based on circumstantial evidence. It also serves to narrow the wide-ranging impact of *Finkelstein v Ontario Securities Commission*, the Ontario Court of Appeal's 2018 decision that approved of the use of circumstantial evidence in cases involving allegations of insider trading and tipping.³

Re Hutchinson also follows a February 2019 decision of the OSC in *Re Cheng*, involving allegations against Frank Soave, a registered investment adviser alleged to have purchased shares of Amaya Gaming Group Inc. ("Amaya") while in possession of material non-public information, and shortly before the announcement of an acquisition that would make Amaya the world's largest online gaming company.⁴

Soave routinely received recommendations and market information from Aston Hill Asset Management Inc. ("AHAM"), a financial company that managed and administered mutual funds, private equity funds and other investment products. Shortly before the announcement of the transaction involving Amaya, John David Rothstein, an officer of AHAM, contacted Soave and suggested he buy Amaya shares based on the expected transaction. Unbeknownst to Soave, AHAM had participated in the financing of the transaction and was therefore in a special relationship with Amaya, prohibiting AHAM or any of its officers or employees from sharing material non-public information regarding Amaya.

The central issue before the OSC was whether Soave knew or ought to have known that AHAM, and Rothstein, were in a special relationship with Amaya, thereby putting Soave himself in a special relationship with the issuer and prohibiting him from trading in any Amaya shares. Based on a review of the detailed evidentiary record, the panel concluded that Soave did not in fact know that Rothstein was in a special relationship with Amaya. The panel reasoned that although Soave, as an experienced broker and registrant, was under a "higher standard of alertness", it was not unreasonable for him to believe that the information regarding Amaya came from a portfolio manager or analyst who was following Amaya closely, and making recommendations based largely on rumors or other developments regarding a potential transaction. The panel further reasoned that the factual determination was a close question, but that where the evidence permits an inference to be drawn in either direction, Staff has not satisfied their standard of proof. Accordingly, all allegations against Soave were dismissed.

The reasoning of the OSC in both *Re Hutchinson* and *Re Cheng* highlight the difficulty for Staff in asking that a panel draw an inference based on the available – largely circumstantial – evidence. Both decisions further reinforce the high burden on Staff to prove its case on a balance of probabilities, and based on clear, convincing and cogent evidence, when advancing allegations of insider trading and tipping.

SEC WARNS OF HEIGHTENED RISKS OF INSIDER TRADING DUE TO THE COVID-19 PANDEMIC

In March of this year, the SEC (Co-Directors of the United States Securities and Exchange Commission Division of Enforcement) issued a public statement emphasizing the importance of maintaining market integrity and following proper corporate controls and procedures relating to reducing the risk of insider trading and tipping in the wake of the COVID-19 pandemic.⁵

While Canadian regulators have not yet followed suit, the SEC public statement is instructive for market participants on both sides of the border, as regulators in both Canada and the United States remain largely preoccupied with the extraordinary impact of the COVID-19 pandemic and the many government-led initiatives introduced to address it. As the OSC reminded market participants in its own March update on its operations in response to the COVID-19 pandemic, investor protections and regulatory requirements remain “fully in place” and remain critical to the fair and efficient operation of Ontario’s capital markets.⁶

In this rapidly changing environment, businesses around the world have struggled to deal with the economic impact of COVID-19. Many issuers have been forced to close or significantly alter their business models in response to the pandemic and to government regulations and initiatives aimed at limiting the spread of the virus. As noted by the SEC, undisclosed material information relating to the impact of the pandemic on business performance or operations may hold even greater value now than under normal circumstances.

Quarantine restrictions have also resulted in a significant increase in remote working, presenting unique opportunities for the intentional or unintentional dissemination of material non-public information. As noted by the SEC, a greater number of people may now have access to undisclosed material information than would have had access during pre-pandemic times. Certain issuers may also avail themselves of extensions to usual filing deadlines, requiring them to secure material non-public information for longer periods of time.

To protect themselves from the threat of an insider trading investigation or enforcement action, issuers should take this opportunity to re-evaluate their internal controls and insider trading policies to ensure that they adequately address the unique issues and challenges that may arise as a result of the COVID-19 pandemic. Issuers should also take additional steps to monitor employee compliance and clearly communicate to all employees the need to remain vigilant during these troubling times.

OUTLOOK

The recent OSC decision in *Re Hutchinson* confirms that despite Commission Staff’s ability to rely on circumstantial evidence, clear, convincing, and cogent evidence is still required to prove allegations of insider trading and tipping. Trading activity in advance of significant corporate transactions will continue to be heavily scrutinized by regulators, especially given the increased risks arising from the COVID-19 pandemic. Corporations and their directors, officers, and compliance officers would be well advised to prioritize robust proactive compliance regimes to detect and prevent illegal insider trading and tipping.



Artificial Intelligence Activity on the Enforcement Front

Artificial Intelligence (“AI”) is clearly on the horizon of the regulatory landscape. Alongside the use of technology to assist with navigating the regulatory process, regulators are now digitizing their enforcement efforts. The Canadian Securities Administrators (“CSA”)¹ have approached this challenge head-on.

MARKET ANALYSIS PLATFORM

In 2018, the CSA put the capital markets on notice that they were strengthening their technological capabilities to assist in fighting securities misconduct.² The CSA confirmed they would rely on AI technology to analyze large data sets, allowing them to detect misconduct faster and earlier, through the Market Analysis Platform (“MAP”), an automated centralized solution that the CSA believed could handle the size of the current market practices.

The CSA’s 2019 Enforcement Report, released in June 2020, confirmed that it was preparing to launch the MAP in the near future.³ It has been two years since the CSA selected Kx, a division of First Derivatives plc, to build and manage the MAP platform. The Kx platform provides some insight into the CSA’s potential uses for the MAP. Kx allows for custom real-time and historical data analysis that features redundancy, alerting, and reporting for stock market analysis and algorithmic trading.⁴

EXPERTISE AND WORKING GROUPS

The role of big data and the ability to process massive datasets will allow CSA Members to focus limited staff resources on reviewing possible violative conduct in the market. The CSA have confirmed that alongside emerging technology, CSA Members will deploy dedicated teams with established new roles, including data scientists, analysts, and blockchain specialists.⁵

The allocation of these dedicated teams indicate that CSA Members are planning on relying more heavily on AI in enforcing regulatory compliance. Although the power of AI is obvious, its effective use requires experienced staff to examine and evaluate the output of the advanced analytics.

GOOD DATA = INTELLIGENCE

In November 2018, the Ontario Securities Commission (“OSC”), a CSA Member, formed the Burden Reduction Task Force (“Task Force”). The Task Force focused on implementing initiatives to keep Ontario’s capital markets competitive, but also took note of the importance of collecting good data over more data. In November 2019, the OSC released the Task Force’s report.⁶

Among other things, the Task Force’s report considered the potential use of Regulatory Technology (“RegTech”) in the OSC’s regulation of Ontario’s capital markets. RegTech is the use of machine-learning software or other technology in the management of regulatory processes. It has been seen as a disruptor to the current regulatory landscape and an influencer in the modernization of securities regulation. Ultimately, the Task Force’s report did not recommend incorporating RegTech based solutions into the OSC’s regulatory enforcement processes.

Where regulatory processes were considered burdensome, the OSC opted to consider technology-based solutions to simplify the regulatory requirements. For example, the OSC was willing to consider technological alternatives to the delivery of notices under sections 11.9 and 11.10 of NI 31-103⁷ where it could reduce the burden without compromising the underlying objective of that national instrument.⁸

INTO THE SANDBOX

The Task Force also discussed the expansion of FinTech firms and the concerns raised with their novel business models. The Task Force reinforced the use of initiatives such as the OSC Launchpad (discussed below) to assist in navigating compliance with terms and conditions imposed with registration.

In Canada, regulators have created a number of initiatives including the OSC Launchpad and the CSA Regulatory Sandbox, allowing registrants to operate innovative business models that don’t fit the traditional mould.

The two initiatives are distinct. The OSC Launchpad is an arm of the OSC; the CSA Regulatory Sandbox is a pilot environment where firms can operate in a limited commercial setting – often on a time-limited basis. Some recent firms to use the OSC Launchpad and the CSA Regulatory Sandbox are TokenGX Inc. (“TokenGX”) and Wealthsimple Digital Assets Inc. (“Wealthsimple”).

In late 2019, TokenGX was granted time-limited exemptive relief from the OSC to pilot test a secondary trading marketplace for crypto-assets (tokens). The trading marketplace is powered by blockchain technology and allows investors to buy and sell private market securities between themselves.⁹ The OSC restricted the annual investment limit (\$10,000 to \$30,000) and has significant oversight of the firm while the pilot test is ongoing.

Wealthsimple obtained OSC registration in August 2020 (subject to numerous conditions) to operate a platform where clients could buy, hold, and sell crypto-assets. Wealthsimple filed an application for time-limited relief from certain registrant obligations, including prospectus and trade reporting requirements.¹⁰ Similar to TokenGX, the OSC has capped the amount investors can fund at \$30,000.00 per annum.

The approvals of TokenGX and Wealthsimple signal the beginning of a new framework whereby Canadian regulators are able to simultaneously promote innovation and market confidence while keeping Canada competitive in global financial markets.

Endnotes

A New Crop of Securities Class Actions and Amendments to the Class Proceedings Act

- 1 *Trends in Canadian Securities Class Actions: 2019 Update*, NERA Economic Consulting, March 19, 2020, at p. 2, online: <https://www.nera.com/content/dam/nera/publications/2020/PUB_2019_Recent_Trends_Canada_0320.pdf> [NERA].
- 2 The amendments to Ontario's *Class Proceedings Act* contain a transition provision wherein class proceedings commenced before October 1, 2020 (the date the amendments come into force) are governed by the previous CPA and any new class proceeding commenced after October 1, 2020 is subject to the amended CPA. As such, the increase in new class proceedings up to October 2020 may be an attempt by class counsel to ensure that their claims are governed by the former statutory regime.
- 3 NERA at p. 3.
- 4 CSA Staff Notice 51-357, "Staff Review of Reporting Issuers in the Cannabis Industry".
- 5 CSA Multilateral Staff Notice 51-359, "Corporate Governance Related Disclosure Expectations for Reporting Issuers in the Cannabis Industry".
- 6 *Miller v FSD Pharma, Inc.*, 2020 ONSC 2253 [Miller].
- 7 *Earle v CannTrust Holdings Inc.*, 2020 ONSC 579.
- 8 *Miller v HEXO Corp.*, Court File No. 500-06-001029-194.
- 9 *Dillon v Wayland Group Corp.*, Court File No. 500-06-001020-193.
- 10 *Harpreeet v Cronos Group Inc. et al*, Court File No. CV-20-00641990-00CP.
- 11 *Organigram Holdings Inc. v Downton*, 2020 NSCA 38.
- 12 *Langevin v Aurora Cannabis Inc. et al*, Court of Queen's Bench of Alberta, Court File No. 2001-07541.
- 13 NERA at p. 4.

The Shifting Activism and Governance Landscape: Evolving Investor Demands in the New Normal

- 1 RBC Global Asset Management, "2019 Corporate Governance and Responsible Investment Annual Report", online: <<https://www.rbcgam.com/documents/en/other/2019-cgr-i-annual-report.pdf>>.
- 2 "Corporate America faces heat on racial diversity; Investors want data already reported to government made public", *National Post*, July 3, 2020.
- 3 "Bombardier under fire over ex-CEO's pay; \$17.5M package", *National Post*, June 6, 2020.
- 4 "Some Big Names Out in New BMO ESG ETFs; Eight Funds", *National Post*, January 21, 2020.
- 5 "Blackrock Toughens Climate Change Stance; Fundamental Reshaping of the Future", *National Post*, January 15, 2020.
- 6 "Now is the right time to rethink executive compensation", *The Globe and Mail*, April 9, 2020.
- 7 "Can Teck Resources fend off attacks from activist funds?", *The Globe and Mail*, May 10, 2020.
- 8 "Bombardier under fire over ex-CEO's pay; \$17.5M package", *National Post*, June 6, 2020.
- 9 "To attract more investors, shareholders urge gold miners to change compensation packages", *The Globe and Mail*, September 21, 2020.

Ontario and British Columbia Regulatory and Legislative Updates, Jurisdictional Considerations, and COVID-19 Updates

- 1 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.
- 2 *Ibid* at p. 3.
- 3 NI 31-103, *Registration Requirements, Exemptions, and Ongoing Registrant Obligations*.
- 4 Notice 11-789 at p. 9.
- 5 *Ibid* at p. 14-15.
- 6 *Ibid* at p. 16-17.
- 7 BCSC, "Act, Regulations & Rules", online: <<https://www.bcsc.bc.ca/securities-law/law-and-policy/act-regulations-rules>>.
- 8 BC Reg 45/2020.
- 9 2019 SKCA 89 [Berger].
- 10 *Ibid* at para. 64.

- 11 *Ibid* at para. 63.
- 12 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>>.
- 13 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>>.
- 14 *Ibid*.
- 15 *Ibid*.
- 16 MI 61-101, "Protection of Minority Securityholders in Special Transactions".
- 17 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>>.

Guidance for Special Committees and Disclosure Obligations: A Catalyst Case Study

- 1 2020 ONSEC 6.
- 2 *Ibid* at para. 47.

Developments in Cryptocurrency Regulation and Enforcement

- 1 CSA Staff Notice 21-327, *Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto-assets*.
- 2 2020 OSCB 6548.
- 3 2019 SECPOLY 631032676005.
- 4 2020 SECPOLY 636747441005.

Recent Developments in Insider Trading Cases and a COVID-19 Caution from the SEC

- 1 *Finkelstein v Ontario Securities Commission*, 2018 ONCA 61 [Finkelstein]. This long-running, high profile insider trading case involved a Toronto M&A lawyer and various other capital market participants.
- 2 2019 ONSEC 36.
- 3 *Finkelstein* at para. 58.
- 4 2019 ONSEC 8.
- 5 SEC, Public Statement, "Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC's Division of Enforcement, Regarding Market Integrity" (March 23, 2020), online: <<https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>>.
- 6 OSC, News Release, "Update on OSC operations in response to COVID-19" (March 24, 2020), online: <https://www.osc.gov.on.ca/en/NewsEvents_nr_20200324_update-osc-operations-response-to-covid-19.htm>.

Artificial Intelligence Activity on the Enforcement Front

- 1 The members are the securities regulatory authorities in Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec, and Saskatchewan ("CSA Members").
- 2 CSA, "Canadian Securities Regulators Announce Agreement with Kx to Deliver Advanced Post-Trade Analysis", September 13, 2018, online: <<https://www.securities-administrators.ca/aboutcsa.aspx?id=1735>>.
- 3 *Collaborating to Protect Investors and Enforce Securities Law*, FY2019/2020, at p. 5, online: <<http://www.csanctions.ca/assets/pdf/CSA-Enforcement-Report-English.pdf>>.
- 4 Kx Platform, online: <<https://code.kx.com/platform/>>.
- 5 *Evolving Securities Enforcement for a Digital World*, CSA, FY2018/2019, at p. 11, online: <https://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSA-Enforcement-Report_FINAL201819.pdf>.
- 6 *Reducing Regulatory Burden in Ontario's Capital Markets*, OSC, 2019, online: <https://www.osc.gov.on.ca/documents/en/20191119_reducing-regulatory-burden-in-ontario-capital-markets.pdf> [Reducing Regulatory Burden].
- 7 NI 31-103, *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, ss. 11.9-11.10.
- 8 *Reducing Regulatory Burden* at p. 68.
- 9 *TokenGX Inc., Re*, 41 OSCB 8511, online: <https://www.osc.gov.on.ca/documents/en/ord_20191023_tokengx.pdf>.
- 10 *Wealthsimple Digital Assets Inc., Re*, 43 OSCB 6548, online: <https://www.osc.gov.on.ca/documents/en/ord_20200807_wealthsimple-digital-assets.pdf>.

About Cassels

Cassels Brock & Blackwell LLP is a Canadian law firm focused on serving the transaction, advocacy, and advisory needs of the country's most dynamic business sectors.

Cassels offers one of the largest business law practices in Canada, advising clients from start-ups to multi-national organizations – across the street and around the world – and we are consistently cited as market leaders by such authorities as *Chambers*, *Lexpert*, and *Best Lawyers*.

We are dedicated to staying on the leading edge of trends in law and business to offer practical and flexible solutions to your legal challenges, and our lawyers are proud to serve leadership roles in business, civic, charitable, and cultural organizations in community, national, and international organizations.

At Cassels, your success is our priority.

OUR EXPERTISE

- Aboriginal
- Banking & Specialty Finance
- Business
- Cannabis
- Class Actions
- Competition & Foreign Investment
- Construction
- e-Discovery & Information Governance
- Employment & Labour
- Energy
- Entertainment & Sports
- Franchise
- High Growth & Venture Capital
- Hospitality
- Information Technology & Data Privacy
- Infrastructure
- Insurance & Reinsurance
- Intellectual Property
- International Trade
- Litigation
- Mergers & Acquisitions
- Mining
- Municipal, Planning & Environmental
- Private Equity
- Product Liability
- Real Estate & Development
- Regulatory
- Restructuring & Insolvency
- Securities
- Securities Litigation
- Taxation
- Universities & Colleges

SECURITIES LITIGATION GROUP

Our Securities Litigation Group has extensive experience advocating on behalf of market participants including issuers, advisors, directors, officers and shareholders in high stakes civil and regulatory disputes. Our versatile team of litigators have been recognized by *Lexpert*, *Chambers*, and *Best Lawyers in Canada*, and are complemented by leading practitioners from our corporate securities group.

Our lawyers have acted in numerous leading Canadian securities cases and represent clients in many different areas including:

- Proxy battles, takeover bids and other change of control litigation
- Securities class actions
- Enforcement proceedings before various Canadian regulators, the SEC, IIROC, MFDA and other regulatory tribunals
- Cross-border investigations and prosecutions
- Oppression remedy claims and shareholder disputes
- Court-ordered plans of arrangement for public companies and income trusts
- Investment advisor and dealer negligence claims

We also provide strategic advice on managing risk and avoiding litigation and regulatory proceedings, recognizing that the best resolution for our clients is often a negotiated resolution.

OUR TEAM

KATE BYERS, Associate
416 860 6759 | kbyers@cassels.com

CARLY COHEN, Partner
416 869 5368 | ccohen@cassels.com

ROBERT B. COHEN, Partner
416 869 5425 | rcohen@cassels.com

DANIELLE DIPARDO, Associate
778 372 7333 | ddipardo@cassels.com

JOSEPH HAMALIUK, Associate
416 642 7455 | jhamaliuk@cassels.com

CHRISTOPHER HORKINS, Partner
416 815 4351 | chorkins@cassels.com

LARA JACKSON, Partner
416 860 2907 | ljackson@cassels.com

DAVID KELMAN, Associate
416 869 5343 | dkelman@cassels.com

STEPHANIE KERZNER, Associate
416 860 6571 | skerzner@cassels.com

JESSICA LEWIS, Associate
778 372 6791 | jlewis@cassels.com

ALEXANDRA MURPHY, Associate
416 869 5388 | amurphy@cassels.com

JOHN M. PICONE, Partner
416 640 6041 | jpicone@cassels.com

BRIGEETA RICHDALÉ, Partner
778 372 7655 | brichdale@cassels.com

DEREK RONDE, Partner
416 640 3063 | dronde@cassels.com

CHRISTOPHER SELBY, Associate
416 860 6737 | cselby@cassels.com

JONATHAN SHEPHERD, Associate
416 642 7462 | jshepherd@cassels.com

REBECCA SIM, Associate
778 372 6784 | rsim@cassels.com

LORNE SILVER, Partner
416 869 5490 | lsilver@cassels.com

ANNA TOMBS, Associate
416 860 6563 | atombs@cassels.com

STEPHANIE VOUDOURIS, Associate
416 860 6617 | svoudouris@cassels.com

Cassels

cassels.com

Suite 2100, Scotia Plaza
40 King Street West
TORONTO, ON
M5H 3C2 Canada

t: 416 869 5300
f: 416 350 8877

Suite 2200, HSBC Building
885 West Georgia Street
VANCOUVER, BC
V6C 3E8 Canada

t: 604 691 6100
f: 604 691 6120

Suite 3810, Bankers Hall West
888 3rd Street South West
CALGARY, AB
T2P 5C5 Canada

t: 403 351 2920
f: 403 648 1151