Capital Markets & Securities:

2023 LEGAL YEAR IN REVIEW CANADA

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Capital Markets & Securities

2023 LEGAL YEAR IN REVIEW CANADA

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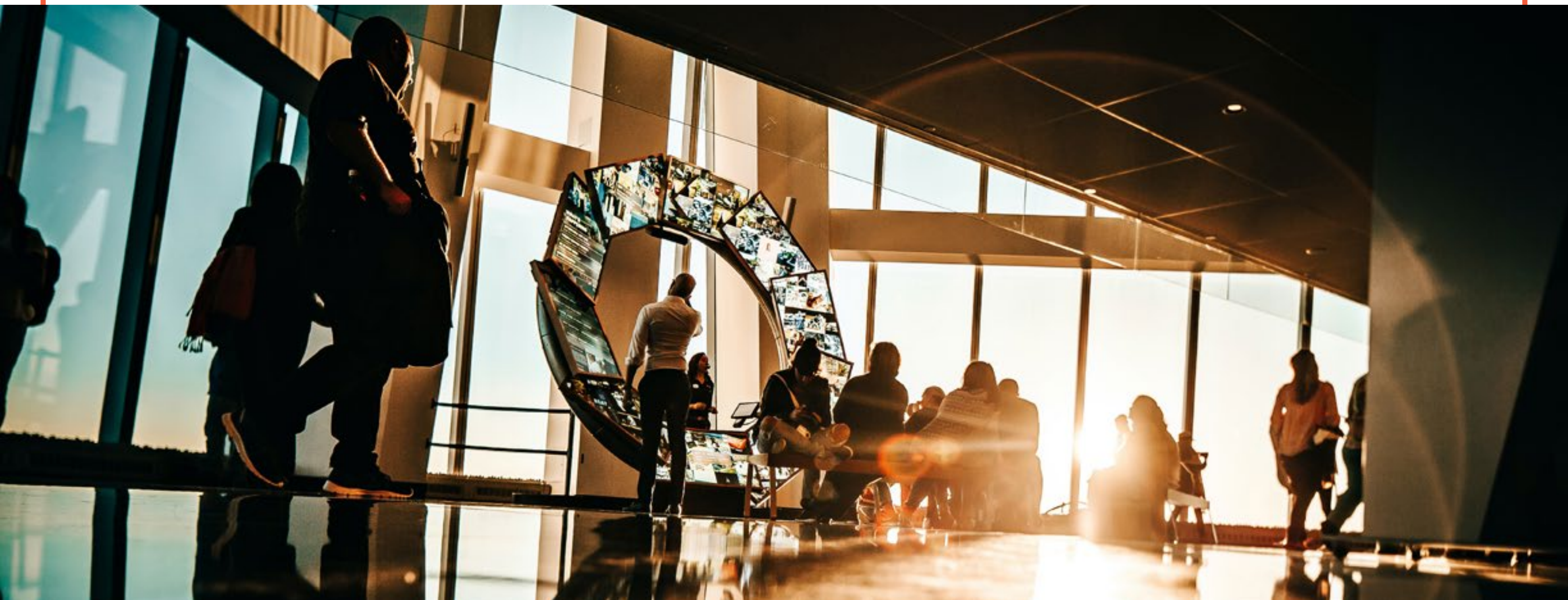
This Capital Markets & Securities: 2023 Legal Year-in-Review article includes our selection of 18 significant and interesting developments in the Canadian securities and capital markets landscape in 2023. The key legal developments that are summarized in this bulletin were important during 2023 and also have the potential to shape and influence the regulatory landscape in Canadian capital markets for years to come.

Edited by Geoff Clarke, Jonathan Tong, Mack Hosseinian and Andrew Gunpat



1. What constitutes a "material change" under the Securities Act? When should you disclose?

The recent decision in *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359, provided an analysis of what constitutes a "material change" under the *Securities Act* (Ontario). In a unanimous decision, the Ontario Court of Appeal ("**ONCA**") rejected the lower court's narrow interpretation and adopted a broader and more generous approach to the interpretation of a "material change" to the business operations or capital of a company. The decision provides direction and clarification regarding the meaning of a "material change" under the *Securities Act* (Ontario).[1]

The judgment arose from an alleged failure to comply with material change continuous disclosure requirements. In the lower court's decision, the plaintiff brought a class action against Lundin Mining Corporation ("**Lundin**") for its alleged failure to disclose a "material change" in its business, operations or capital as required under the *Securities Act* (Ontario). The alleged "material change" related to the instability of one of Lundin's open pit mines. Lundin did not disclose this information and, instead, waited weeks to report. As a result, Lundin's share price dropped following this disclosure. The lower court held the plaintiff had not demonstrated that the pit wall instability of the mine at issue constituted a "material change".

The ONCA overturned the decision and held that the lower court had erred in its interpretation of the terms "change", "business", "operations" and "capital" by adopting a narrow and definitive interpretation not previously adopted by any court, and had erred by applying that restrictive definition to the limited evidence available. The ONCA held that a more generous interpretation to the terms "change in the business, operation or capital" was warranted and endorsed a more expansive approach to the interpretation of "change". The ONCA found there was a reasonable possibility that the pit wall instability and rockslide were material changes that Lundin should have disclosed. In doing so, the ONCA endorsed a "two-step analysis" for issuers to follow in deciding whether a development impacting their business constitutes a "material change" requiring disclosure:

- assessing whether there is a change in the business, operations or capital; and
- determining economically if the change is material.

WHAT DOES THIS MEAN FOR PUBLIC ISSUERS?

This decision represents one of the most important decisions regarding the definition of "material change". The ONCA's more expansive decision of "material change" provides guidance to issuers on how broadly to interpret whether an event is a "change" that requires timely disclosure. Issuers must consider the "two-step analysis" in deciding whether a development impacting their business constitutes a "material change" and, thus, requiring disclosure. "Change" should be given an "expansive" and "generous" interpretation. An event *external* to the issuer can only qualify as a material change where it results in a change *in* the business, operations or capital of the issuer.

"Material change" is fact-specific and is not a "bright-line test". Distinguishing between a material fact and a material change can be difficult, as there is not always a clear line between events *external* to an issuer and events *internal* to an issuer. For example, it may be difficult to state with certainty when

a change has crystalized, as opposed to merely being threatened or anticipated. Issuers face tension between pressure to publicly disclose an unexpected or negative development or to refrain from disclosing until the situation and its potential consequences are fully understood. The importance of advice from experienced legal counsel ensures issuers make full and complete disclosure when a "material change" has been triggered.

2. WeedMD Case - Necessary Course of Business Exception for Selective Disclosure (Tipping)

On October 20, 2023, the Ontario Capital Markets Tribunal (the "**Tribunal**") released the first trial decision where it directly considered and applied the "necessary course of business" ("**NCOB**") exception to the prohibition against selective disclosure of material non-public information ("**MNPI**"), generally known as the tipping prohibition. *Kraft (Re)*, 2023 ONCMT 36 ("***Kraft***"), provides significant and substantive guidance on the meaning and applicability of the NCOB exception[2].

Section 76(2) of the *Securities Act* (Ontario) sets out the prohibition against tipping, where a person in a special relationship with an issuer is prohibited from informing, other than in the necessary course of business, another person of a material fact or material change about the issuer before the material fact or material change has been generally disclosed. The *Securities Act* (Ontario) does not provide the definition of NCOB or any guidance regarding relevant factors in establishing the NCOB exception. While National Policy 51-201 – *Disclosure Standards* ("**NP 51-201**") provides non-exhaustive categories of recipients of selective disclosure with whom communications could be viewed as having made in NCOB, the NCOB exception must be established on relevant facts and the recipient being listed in NP 51-201 is not a determinative factor to the inquiry.

BACKGROUND

WeedMD Inc., now Entourage Health Corp. ("**WeedMD**") is a reporting issuer on the TSX Venture Exchange in the business of producing and distributing medical cannabis. With the Canadian government's proposal to legalize recreational cannabis use, WeedMD sought to expand its business in 2017 and commenced negotiations to lease greenhouse space with Perfect Pick Farms Ltd. ("**Perfect Pick**").

During the course of negotiations, the Chairman and a director of WeedMD, Michael Paul Kraft, and his long-time friend and business associate Michael Brian Stein were in regular contact. On October 23, 2017, Kraft provided Stein with draft documents relating to the Perfect Pick transaction, including the draft lease and option to purchase agreement. While Stein was not in any contractual or employment relationship with WeedMD in 2017 and was not formally retained or compensated to review the documents, Stein provided comments on the draft documents. Kraft claimed that he had sought Stein's advice on the draft documents as Stein was Kraft's "go-to-advisor" for financial and real estate matters. The Perfect Pick transaction was announced on November 22, 2017. The day before the announcement, Stein acquired 45,000 WeedMD shares, which he sold over the following two days for a total profit of $29,345, representing an approximately 43% return.

The Staff of the Ontario Securities Commission ("**OSC**") alleged that Kraft breached the prohibition against tipping by providing Stein with MNPI. Applying the principles set out below, the Tribunal found that Kraft was in breach of the prohibition against tipping and Stein was in breach of the prohibition against insider trading.

KEY TAKEAWAYS FROM KRAFT

Meaning of "necessary": The phrase "necessary course of business" is distinct from "ordinary course of business", as the word "necessary" elevates the requirement of the purpose of the selective disclosure beyond a mere business purpose or business rationale, and imports a level of importance, including that something is "essential", "indispensable" or "requisite". The purpose of the selective disclosure must be sufficiently important or necessary to the business to warrant the exception to the blanket prohibition against selective disclosure.

Meaning of "business": The word "business" in the language of the NCOB exception is not qualified by the word "issuer". The Tribunal noted that the NCOB exception may not be limited to a consideration of what may be in the necessary course of the issuer's business in all factual situations. Accordingly, the selective disclosure exception may be available if the required communication is in the necessary course of the tipper's business.

Factors to consider: While it would not be appropriate for the Tribunal to identify a comprehensive list of relevant factors to establish the NCOB exception in all cases, the Tribunal acknowledged certain non-exhaustive factors relevant in establishing whether selective disclosure of MNPI is in the "necessary course of business". These factors include:

- the business of the issuer;
- the relationship between the tipper and the issuer;
- the relationship between the tipper and the tippee;
- the nature of the MNPI that was disclosed;
- the relevance of the MNPI to the relationship between the tippee and the issuer – i.e. whether the nature of the relationship between the tippee and the issuer necessitates the disclosure at issue;
- the tipper's reason for making selective disclosure to the tippee; and
- the credibility of the tipper seeking to establish the NCOB exception.

Objective standard: The NCOB exception is to be established on an objective standard and not on subjective belief of the tipper, even if held honestly and in good faith.

Burden of proof: The person seeking to rely on the NCOB exception bears the burden of establishing that the selective disclosure was made in the "necessary course of business".

Evidence of forethought: Evidence that the tipping prohibition and whether the purpose of making selective disclosure of MNPI falls under the NCOB exception were considered prior to the disclosure is not a precondition to avail oneself of the exception. However, such evidence will be helpful in establishing the purpose for which the disclosure was made after the fact. Such evidence may

include: discussions at the board or management level considering the advisability or need for the selective disclosure, documents specifying the purpose of making such disclosure, and confidentiality agreements with or confidentiality instructions to the intended recipient of the disclosure.

3. Launch of SEDAR+

As of July 25, 2023, SEDAR has transitioned to an all-new platform called SEDAR+. Similar to its predecessor, SEDAR+ collects and forwards a comprehensive collection of regulatory filings and financial statistics in Canada; however, now, with the goal of improved efficiency and transparency. SEDAR+ launched with three primary objectives to improve efficiency and transparency: enhanced operating hours; fee calculation; and to serve as a single source of information.[3]

SEDAR's original hours of operation were Monday to Friday, 7 a.m. to 11 p.m. (Eastern Time), and the system was not available on Canadian statutory holidays. SEDAR+ intended to operate on a 24-hour, 7 days a week cycle. Note, however, during the initial launch phase, SEDAR+ operated on reduced hours (7 a.m. to 9 p.m. Eastern Time) to allow for ongoing maintenance. Currently, SEDAR+ is available at the intended 24-hour, 7 days a week cycle.[4]

SEDAR+ introduced a new fee calculator that automatically previews company profiles provides instantaneous quotes for filing fees. Previously, on SEDAR, companies would submit their corporate information to get a fee estimate and filers then paid the fees. SEDAR+'s new filing fee process is designed to be more direct and transparent. Although users encountered some fee calculating errors during SEDAR+'s launch, the Canadian Securities Administrators ("**CSA**") implemented a pathway for users to contact the CSA service desk if they expect to make a filing where overcharging may occur.[5]

SEDAR+ launched with the intention of serving as a single source of information. Specifically, SEDAR+ consolidates the national Cease Trade Order database, the Disciplined List database, and certain filings previously made in paper or in the British Columbia Securities Commission's eServices system and the OSC's electronic filing portal. SEDAR+ also includes a consolidated reporting issuers list from all provincial and territorial regulators.[6]

While SEDAR+ experienced some technical issues during the initial launch, the new system has generally improved both the efficiency and transparency of the securities regulatory filings and disclosure system at large. However, user reviews of the new system are mixed. We expect to see additional improvements in the future.

4. New SRO Officially Named "Canadian Investment Regulatory Organization"

Effective January 1, 2023, the former Investment Industry Regulatory Organization of Canada and the former Mutual Fund Dealers Association of Canada ("**MFDA**") amalgamated and was temporarily given the name, the New Self-Regulatory Organization of Canada. On June 1, 2023, the amalgamated organization permanently changed its name to the Canadian Investment Regulatory Organization

(“**CIRO**”). Since then, CIRO has been the national self-regulatory organization that oversees all investment dealers, mutual fund dealers and trading activity on applicable marketplaces. In short, IIROC and the MFDA are now together called CIRO.

5. Mining Update: Critical Minerals Strategy in Canada

In December 2022, the Government of Canada released a highly anticipated report on called *The Canadian Critical Minerals Strategy - From Exploration to Recycling: Powering the Green and Digital Economy for Canada and the World* (the “**Strategy**”). The Strategy reflects the Government’s view that critical minerals are “a building block for the green and digital economy”, and that there is a “generational opportunity” for Canada to excel in the mining of critical minerals from exploration to recycling.[7] The Strategy is intended to be “an evergreen document” that will be built upon as the industry continues its growth and is here for the long-term.

Canada is not the only country that has focused on developing its mining strategy. Australia also launched their own strategy regarding critical minerals mining called: *Australia’s Critical Minerals Strategy 2023-2030*. The Australian approach follows a similar tune to Canada’s which states that critical minerals are essential to the manufacture of technologies focused on the creation of renewable and cleaner energy.[8] Critical minerals are key requirements for clean technologies, like batteries, electric vehicles and clean energy sources, such as wind turbines and solar panels.[9] As such, governments have not been the only stakeholders that have focused on the production and secure availability of these minerals, there has also been an emergence of direct investment by end users, such as those in the electrical vehicle space.[10] As the clean air and environmental shift in consumption increases, so too will these types investments also continue to increase.

Further to the release of the Strategy, on November 20, 2023 Canada announced the launch of the Call for Proposals of a Critical Minerals Infrastructure Fund (“**CMIF**”). The CMIF will provide up to $1.5 billion in federal funding over seven years for clean energy and transportation infrastructure projects which will hopefully help to enable the sustainable development and expansion of critical minerals in Canada.[11]

6. LIFE Exemption – Update and CSA Clarifications One Year Later

It has been about a year since the CSA introduced the listed issuer financing exemption ("**LIFE exemption**") through amendments to National Instrument 45-106 – *Prospectus Exemptions*, which came into effect on November 21, 2022. The LIFE exemption enables reporting issuers listed on a Canadian stock exchange to issue free trading securities without filing a prospectus in reliance on the issuer's continuous disclosure record and by filing a Form 45-106F19 – *Listed Issuer Financing Document*. In a 12-month period, qualified issuers may raise an amount up to the greater of $5,000,000 and 10% of the issuer's market capitalization, up to a maximum of $10,000,000.

Since its adoption, the market has seen various usages of the LIFE exemption, including brokered best efforts agency offerings, brokered bought deals and non-brokered private placements. The LIFE exemption has made it easier and more cost-effective for issuers to raise capital through smaller offerings, particularly for junior reporting issuers. With the LIFE exemption, issuers can also avoid the four-month hold period associated with a private placement and take advantage of less-discounted pricing. Likewise, retail investors have gained access to a broader range of investment opportunities which were previously restricted to institutions and accredited investors.

On June 1, 2023, the CSA published CSA Staff Notice 45-330 – *Frequently Asked Questions about the Listed Issuer Financing Exemption*, providing additional guidance on commonly asked questions regarding the LIFE exemption by market participants.

Notable clarifications are addressed below:

- ***Qualification Criteria:*** The CSA confirmed that issuers in default of securities legislation requirements cannot use the LIFE exemption. Issuers that do not have equity securities listed on a Canadian stock exchange at the time of distribution also cannot rely on the LIFE exemption, meaning that such listing must be completed prior to (and not concurrently or following) the closing of a LIFE offering.
- ***Available Funds Requirement:*** To rely on the LIFE exemption, issuers must reasonably expect to have sufficient funds to continue operations and meet business objectives for a period of 12 months following the distribution. If the available funds are insufficient, the CSA advised that issuers must increase their minimum offering amount. An issuer may close a LIFE offering in multiple tranches, provided that (i) the available funds requirement is met upon closing the first tranche and (ii) the last tranche closes within 45 days of the offering announcement.
- ***Types of Securities:*** The CSA has clarified that the issuance of flow-through shares are permissible under the LIFE exemption. The issuance of charitable flow-through shares are also permitted, provided that the end-purchaser is named in the report of the exempt distribution and has all statutory rights under the LIFE exemption. However, the LIFE exemption is not available for distributions of broker's warrants or securities for debt, which would require the use of a separate prospectus exemption.

- ***Bought Deals:*** In order to rely on the LIFE exemption for bought deal offerings, the CSA clarified that the following must be satisfied: (i) the actual subscribers have all the rights contemplated under the LIFE exemption and are named in the report of exempt distribution; (ii) the underwriter is not required to purchase any left-over securities; and (iii) no solicitations to purchase occur prior to the issuance and filing of the news release and the offering document.
- ***Dilution Limit:*** Under the LIFE exemption, the offering, combined with all other distributions made by the issuer under the LIFE exemption during the preceding 12 months, must not result in more than a 50% increase of the issuer's outstanding listed equity securities. The CSA clarified that any common shares that are issuable on the exercise of warrants must be included when calculating the dilution limit. However, such common shares issuable on exercise of warrants are not be included in the calculation of the maximum offering dollar amount.
- ***Concurrent Offerings:*** The CSA confirmed that the LIFE exemption can be used concurrently with other prospectus exemptions. However, the LIFE exemption cannot be used in Quebec concurrently with a prospectus offering in another province, as the CSA views this as a way for issuers to circumvent translation requirements.

7. Proposed Changes To Corporate Governance Disclosure

BACKGROUND

The CSA has issued a proposal to update the "comply or explain" disclosure regime related to diversity on boards of directors and in executive positions at public companies in Canada. The CSA sought feedback on two alternative approaches reflecting varying views across provincial and territorial regulatory jurisdictions. Interested parties were open to submit comments until September 29, 2023.[12] The proposed changes build upon existing diversity disclosure requirements, with the main objectives being increased transparency, providing decision-useful information for investors, and offering guidance to issuers on corporate governance practices. The proposal is in reference to Form 58-101F1 –*Corporate Governance Disclosure* of National Instrument 58-101 – *Disclosure of Corporate Governance Practices* and proposed changes to National Policy 58-201 – *Corporate Governance Guidelines* (the "**Notice**").[13]

The regulatory history outlines an evolution of disclosure requirements since December 31, 2014, focusing on the representation of women on boards and in senior management. Since January 2020, public companies subject to the *Canada Business Corporations Act* must provide additional diversity disclosure, aligning with the designated groups defined under the *Employment Equity Act*.[14] The Capital Markets Modernization Taskforce recommended setting diversity goals and implementation timelines, with specific targets for women, BIPOC, persons with disabilities, and LGBTQ+. Alternative proposals are introduced in the Notice, each emphasizing transparency, diversity, and governance practices. Each alternative is accompanied by suggested revisions to the CSA commentary in National Policy 58-201 – *Corporate Governance Guidelines*, aimed at addressing: (i) the duties of the nominating committee; (ii) the written policy regarding the director-nomination process; (iii) the utilization of a composition matrix; (iv) successful succession planning and board renewal mechanisms, including the implementation of term limits; (v) the written diversity policy; and (vi) objectives for attaining diversity in both board and executive officer positions.[15]

ALTERNATIVES

Alternative A: Alternative A proposes a flexible approach, allowing issuers autonomy in determining the dimensions of diversity aligning with their business strategies. While it mandates disclosure of chosen diversity objectives and progress, it avoids specifying particular categories beyond women. Issuers are required to describe their diversity objectives, methods for measuring progress, and mechanisms for achieving these objectives. The proposal acknowledges potential limitations on disclosure completeness arising from voluntary self-identification and grants issuers the discretion to identify relevant groups, such as Indigenous peoples, persons with disabilities, members of visible minorities, members of the LGBTQ2SI+ community, and linguistic minorities.

Alternative B: In contrast, Alternative B takes a more prescriptive stance, mandating reporting on five designated groups: women, Indigenous peoples, racialized persons, persons with disabilities, and LGBTQ2SI+. This alternative requires detailed, standardized tabular format disclosure for enhanced comparability and transparency. Issuers opting for Alternative B can voluntarily disclose information about other groups beyond the designated ones. Additionally, the proposal necessitates disclosure of measurable objectives tied to an issuer's written strategy for the representation of the designated groups, emphasizing accountability and integration of diversity goals into strategic planning. The distinct prescription in Alternative B aims to provide a standardized and comprehensive approach to diversity disclosure.

FUTURE OUTLOOK

The Notice solicited comments on the proposed alternatives, focusing on stakeholders' needs, and whether similar disclosure requirements should be extended to venture issuers in a second phase. The public comment period ended on September 29, 2023. The introduction of these alternatives signifies a potential transformation in the landscape of Canadian securities. These changes may usher in an era of heightened transparency, accountability, and diversity within corporate governance.

8. CSA Provides Update on Proposed Continuous Disclosure Reforms

In 2021, the CSA introduced proposed amendments to National Instrument 41-102 – *Continuous Disclosure Obligations* (the "**Proposed Amendments**"), seeking public comments. Among other things, the Proposed Amendments would consolidate interim and annual financial statements, management discussion and analysis, and the annual information form into a unified reporting document. This consolidation was expected to simplify disclosure requirements and reduce the regulatory burden for Canadian public companies, while still maintaining the core principles of investor protection. [16]

Initially, the CSA communicated an expected final version publication by the fall of 2023. However, in October, the CSA announced a delay in the release of the Proposed Amendments. The rationale behind this delay was the CSA's intention to synchronize the release of the Proposed Amendments

with the CSA's 2022 proposed electronic access model.[17] As of now, there is no specified target date for the Proposed Amendments to come into effect. Instead, the CSA assures investors that they will provide reporting issuers with ample time to transition to any new forms and requirements.[18]

9. TSX Amends Pricing Rules for Prospectus Offerings

On April 20, 2023, the Toronto Stock Exchange ("**TSX**") adopted amendments to Section 606 – *Prospectus Offerings* of the TSX Company Manual to replace the former framework with a clearer set of standards in assessing whether or not a prospectus offering is a *bona fide* public offering. With these amendments, the TSX will generally accept any offering price, regardless of the discount, if a prospectus is "Broadly Marketed" and there is no insider participation in the offering. An offering is "Broadly Marketed" if the agent or underwriter either (i) distributes the offered securities to at least 50 purchasers or (ii) makes the offer known to the selling group and/or equity capital markets desks at substantially all Canadian investment dealers. Furthermore, in calculating offering price discounts, the TSX will now use the closing price of the most recently completed trading session prior to the public announcement of the offering ("**Closing Price**") instead of the former five-day volume-weighted average trading price ("**VWAP**)". If the offering price is less than or equal to a 15% discount to such Closing Price, insider participation is permitted but only up to an insider's *pro rata* interest in the issuer and private placement rules will apply to any portion of insider participation beyond the *pro rata* interest. If the offering price exceeds a 15% discount to the Closing Price, the TSX will apply private placement rules to all insider participation in the offering.

The TSX also issued TSX Staff Notice 2023-0002, which provides guidance on pricing a prospectus offering or private placement where there has been recent disclosure of material information. In such a situation, the TSX will not include pre-dissemination trading in the calculation of market price. Instead, the TSX will generally assess the market price based on (i) in a prospectus offering, the most recent Closing Price and (ii) in a private placement, the one-day VWAP, in both cases reflecting one clear trading session post-dissemination of the material information. That said, the Staff Notice confirms that the TSX retains its discretion to use an alternate formula in cases where the Closing Price or VWAP does not appear appropriate.

10. CSA Proposes Permanent Exemptions for Well-Known Seasoned Issuers

On September 21, 2023, the CSA published a Notice and Request for Comment regarding proposed amendments to National Instrument 44-102 – *Shelf Distributions*, Companion Policy 44-102CP and National Policy 11-202 – *Process for Prospectus Reviews in Multiple Jurisdictions*. These proposed amendments will establish a permanent expedited shelf prospectus regime for well-known seasoned issuers ("**WKSI**") in Canada, which will reduce the regulatory burden for such issuers with strong market following, complete public disclosure record and sufficient public equity, and foster more efficient capital-raising.

In response to feedback from stakeholders regarding the unnecessary regulatory burden created by certain base shelf prospectus requirements for large, established reporting issuers and the implementation of the Canadian WKSI regime that is more closely aligned with the U.S. regime for better facilitation of cross-border offerings, the CSA issued temporary local blanket orders (the "**Blanket Orders**") that came into effect on January 4, 2022. The Blanket Orders allow issuers that meet the WKSI qualifications and certain conditions to file and obtain a receipt for a final base shelf prospectus on an accelerated basis without first filing a preliminary base shelf prospectus. The Blanket Orders continue to be in effect and will be replaced by the aforementioned proposed amendments if adopted.

An issuer qualifies as a WKSI under the proposed amendments if it: (a) either has qualifying public equity of at least $500 million or qualifying public debt of at least $1 billion on at least one day during the preceding 60 days; (b) is or has been a reporting issuer in a jurisdiction of Canada for the preceding three years; and (c) is qualified to file a short form prospectus under applicable securities law. An issuer with a mineral project is subject to additional criteria whereby the issuer's most recent audited annual financial statements must disclose: (a) gross revenue derived from mining operations of at least $55 million for the issuer's most recently completed financial year; and (b) gross revenue derived from mining operations of at least $165 million for the issuer's three most recently completed financial years. Further, an issuer must ensure that it has filed all periodic and timely disclosure required under applicable securities law to be eligible to file under the WKSI regime.

Under the proposed amendments, the qualifying WKSIs will be permitted to:

- File a final base shelf prospectus without first filing a preliminary base shelf prospectus;
- Omit certain disclosure from the base shelf prospectus, such as the aggregate dollar amount of securities that may be raised under the prospectus; and
- Be deemed to receive a receipt for a base shelf prospectus that would be effective for a period of 37 months, subject to compliance with the annual confirmation requirements upon filing a final base shelf prospectus.

The following are key differences between the Blanket Orders and the proposed amendments:

- ***Calculation of public equity.*** Under the proposed amendments, public equity is calculated using the average daily closing price of the issuer's equity securities for the 20 trading days preceding the date of calculation, and reporting insiders are excluded from this calculation. This is a deviation from the Blanket Orders, where public equity is calculated using the security sale price in the principal market for the 60 days preceding the date of filing the WKSI base shelf prospectus.
- ***Extended seasoning period.*** Under the proposed amendments, an issuer must have been a reporting issuer in at least one jurisdiction in Canada for the previous three years, as opposed to 12 months under the Blanket Orders.
- ***Exemptive relief.*** As opposed to the Blanket Orders under which exemptive relief applications were not accepted, such applications will be considered under the proposed amendments.
- ***Deemed receipt.*** Under the proposed amendments, no receipt is issued for a WKSI base shelf prospectus; instead, a receipt is deemed to be issued.
- ***Amendments.*** In contrast to the Blanket Orders which do not address amendments, the proposed amendments set out the requirements for an amendment to a WKSI base shelf prospectus and contemplate a deemed receipt for such amendment.
- ***Annual WKSI confirmation.*** The proposed amendments require an issuer that has filed a WKSI base shelf prospectus to confirm its eligibility annually within 60 days before filing the audited annual financial statements, by confirming that it continues to be a WKSI and remains eligible. The ongoing eligibility must be indicated in the issuer's annual information form or in an amendment to its WKSI base shelf prospectus, and in the event the issuer loses its eligibility, it must publicly announce that it will not distribute securities under the WKSI regime and withdraw its WKSI base shelf prospectus.
- ***Lengthened period of receipt effectiveness.*** Under the proposed amendments, the deemed receipt for a WKSI base shelf prospectus will be effective for up to 37 months from the date of deemed issuance, subject to annual confirmation requirements.

11. Navigating Regulatory Terrain: CSA Guidelines For Stablecoin In Canada

The CSA has recently issued additional guidance to crypto issuers and crypto asset trading platforms ("**CTPs**") regarding the regulation of "value-referenced crypto assets" ("**VRCAs**"), which includes widely recognized stablecoins. The shift was prompted by Staff Notice 21-332 – *Crypto Asset Trading Platforms: Pre-Registration Undertakings – Changes to Enhance Canadian Investor Protection*, dated February 22, 2023 ("**Notice 21-332**"), where the CSA reiterated that specific VRCAs could be classified as securities or derivatives. VRCAs, identified as crypto assets engineered to maintain a stable value over time by referencing the value of a fiat currency or other value or right (or a combination thereof), prompted concerns. VRCAs are predominantly employed to facilitate the trading, borrowing and lending of other crypto assets, potentially exposing investors to risks they may not fully comprehend.[19]

RESPONSE MEASURES – THE INTERIM FRAMEWORK

In response, the CSA sought to restrict CTPs from permitting clients to acquire or deposit VRCAs without prior written consent, curbing unauthorized securities trading while recognizing potential non-securities uses. Notice 21-332 detailed the possibility of consenting to VRCA transactions not involving securities. On October 5, 2023, the CSA issued Staff Notice 21-333 – *Crypto Asset Trading Platforms: Terms and Conditions for Trading Value-Referenced Crypto Assets with Clients* ("**Notice 21-333**"), presenting interim policies for issuers and CTPs to continue allowing fiat-backed crypto assets ("**FBCAs**"). Informed by participant comments in the Canadian crypto market and developing international standards, issuers of VRCAs must maintain asset reserves with a qualified custodian for the benefit of holders. Transparency requirements include making governance, financial statements and asset reserve information publicly available. Additionally, a crypto asset statement is required, stating to the effect that "no securities regulatory authority or regulator in Canada has evaluated or endorsed the crypto assets made available through the platform." The CSA has committed to providing specific guidance to CTPs and VRCA issuers independently. This draws a clear distinction in the specific procedures, responsibilities and compliance standards between CTPs handling VRCAs, and VRCA issuers, as described below.[20]

Guidelines for CTPs handling VRCAs: For a client to trade a VRCA, a CTP must satisfy the following conditions: (i) confirm the VRCA aligns one-to-one with the value of a Canadian or U.S. dollar; (ii) allow VRCA holders redemption rights against the issuer or reserve of assets under reasonable conditions; (iii) ensure the VRCA issuer maintains a daily-calculated reserve, held by a qualified custodian, equal to the aggregate nominal value of all VRCA units; (iv) mandate VRCA issuers to publicly disclose information, including VRCA details, redemption procedures, monthly assurance reports and annual financial statements; (v) direct the CTP to provide a crypto asset statement, emphasizing that no Canadian securities authority has endorsed the assets, and cautioning against stable value assumptions and the risk of VRCA issuer insolvency; and (vi) verify that the VRCA issuer has submitted an acceptable undertaking to the CSA.

Requirements of VRCA Issuers: VRCA issuers must comply with specified representations and undertakings, including ensuring the VRCA aligns one-for-one with the value of a Canadian or U.S. dollar. Additionally, they must have written policies for prudent reserve management, crisis recovery and conflict of interest disclosure. Undertakings involve publicly disclosing information such as VRCA details, compliant annual financial statements and associated fees. In addition, the VRCA issuer must explicitly acknowledge that completing an undertaking does not imply compliance with securities legislation. They must designate an agent to handle legal matters related to applicable Canadian securities legislation.

IMPLEMENTATION

Among other things, Notice 21-333 establishes a compliance schedule for CTPs and VRCA issuers. The CSA has prescribed three circumstantial timelines, as follows:

- For registered CTPs intending to discontinue VRCA trading, all related activities should cease by December 29, 2023. If opting to commence VRCA trading, they must contact their Principal Regulator, cease non-FBCA VRCA trades by December 29, 2023, and disallow clients from buying or depositing non-compliant FBCAs by April 30, 2024.
- CTPs with a "Pre-Registration Undertaking" under Notice 21-332 follow the same rights, obligations and timelines as registered CTPs.
- FBCA Issuers should provide an acceptable undertaking to the CSA by December 1, 2023. While the deadline allows for later submissions, it prevents trading in an issuer's VRCA by CTPs in situations (i) and (ii) above if the issuer does not conform after the applicable deadlines of December 29, 2023 or April 30, 2024.

FUTURE OUTLOOK

In order to protect investors and other participants, Canadian crypto market is poised for notable regulatory developments. With the implementation of the interim framework, featuring detailed provisions for both CTPs and VRCA issuers, the industry anticipates a more structured regulatory landscape focused on investor protection and market integrity. The CSA's appears committed to providing tailored guidance for CTPs and VRCA issuers, in order to address evolving challenges within the crypto space. As industry participants acclimate to the outlined conditions and transparency requirements, the market is expected to move towards enhanced security and transparency. Ongoing collaboration between regulators and industry stakeholders is likely to shape future regulations, with an eye towards fostering sustained growth and resilience in the Canadian crypto market while instilling confidence among investors.[21]

12. Environmental, Social and Governance ("ESG")

In 2023, a number of ESG trends and developments paved the way for added legal considerations that thoughtful public and private companies must consider in their management of business operations and ESG program. Such legal considerations range from climate-related disclosure obligations in the capital markets to ESG considerations in the private markets.

On June 26, 2023, the International Sustainability Standards Board ("**ISSB**") introduced IFRS S1 and IFRS S2.[22] Both standards will impose reporting obligations on issuers. IFRS S1 places emphasis on the disclosure of sustainability-related risks and opportunities that may impact an entity's financial viability.[23] Specifically, an entity will be required under IFRS S1 to disclose the governance processes, strategies and progress taken to identify, assess, monitor and manage sustainability-related risks and opportunities.[24] On the other hand, IFRS S2 requires an entity to build upon its disclosure obligations under IFRS S1 by disclosing the specific climate-related physical risks, climate-related transition risks and climate-related opportunities that the entity is exposed to.[25] Climate-related physical risks refer to risks that the entity is exposed to as a result of climate change (e.g., storms, floods, rising sea levels), whereas climate-related transition risks refer to the risks resulting from the transition to a lower-carbon operation (e.g., higher operating costs).[26]

Currently, the application of the IFRS S1 and IFRS S2 in Canada remains voluntary. However, it is noteworthy that the CSA has welcomed the introduction of both standards. Moreover, the CSA has stated that it will issue a market update in the coming months and continue to work with the Canadian Sustainability Standards Board in conducting "further consultations to adopt disclosure standards based on ISSB Standards" and considering any modifications to disclosure standards that are "necessary and appropriate in the Canadian context."[27]

In the private capital markets, investors continue to consider ESG criteria in identifying material risks, growth opportunities and future financial performance of companies. According to the McKinsey Global Private Markets Review 2023, ESG metrics are increasingly being incorporated into capital allocation processes, including by many limited partners.[28] In terms of numbers, the value of ESG-focused assets under management exceeded U.S. $100 billion for the first time in 2022.[29] To meet the growing consideration of ESG criteria by investors, business managers need to consider adopting ESG-focused policies and programs to meet stakeholder and investor expectations, thereby improving a company's access to capital and driving higher returns. Business managers should ensure that such policies and programs thoughtfully consider all aspects of the ESG spectrum. Policies targeting environmental factors may seek to reduce a company's carbon footprint, while social factors that may be targeted include diversity, equity and inclusion programs as well as workplace health and safety programs. Lastly, policies targeting governance factors include strengthening board diversity and ensuring compliance with ethical business practices.

13. Canadian Securities Exchange Makes Significant Changes to Listing Policies and Forms, Including a New "Non-Venture Issuer" Tier

The Canadian Securities Exchange (the "**CSE**") introduced important amendments to its listing regime to create a two-tier exchange having two categories of CSE-listed issuers: non-venture issuers ("**NV Issuers**") and all other listed issuers. The amendments effective April 3, 2023, introduced an eligibility review process for all listing applications. Requirements for the new senior tier include: increased

public float requirements; requirements for listing special purpose acquisition corporations and exchange traded funds; corporate governance requirements such as security holder approvals; and financial reporting obligations for all CSE listed issuers.[30]

"NV ISSUERS" - A NEW SENIOR LISTING TIER

The NV Issuers designation is designed to accommodate larger issuers and imposes more stringent reporting standards with shorter deadlines for compliance. This new senior listing tier also includes rigorous continuous disclosure and governance requirements on qualifying CSE-listed issuers. As a result, NV Issuers will have to abide to shorter deadlines for filing financial statements, required filing of an annual information form (an "**AIF**"), mandatory majority voting for the election of directors and a lower threshold for security holder approval of transactions. Some of the requirements include expanding the initial listing criteria. NV Issuers must now meet, in addition to the CSE's standard listing requirements, one of the following four standards:

- ***Equity Standard:*** (i) shareholders' equity of at least $5,000,000, and (ii) expected market value of public float of at least $10,000,000;
- ***Net Income Standard:*** (i) net income of at least $400,000 from continuing operations in the most recent fiscal year or in two of three of the most recent fiscal years, (ii) shareholders' equity of at least $2,500,000, and (iii) expected market value of public float of at least $5,000,000;
- ***Market Value Standard:*** (i) market value of all securities, including the class(es) to be listed, but excluding warrants and options, of at least $50,000,000; (ii) shareholders' equity of at least $2,500,000 including the value of any offering concurrent with listing; and (iii) expected market value of public float of at least $10,000,000;
- ***Assets and Revenue Standard:*** (i) total assets and total revenues of at least $50,000,000 each in the most recent fiscal year or in two of three of the most recent fiscal years; and (ii) expected market value of public float of at least $5,000,000.

NV Issuers continue to fall under the definition of "venture issuer" under National Instrument 51-102 – *Continuous Disclosure Requirements* ("**NI 51-102**"); however, pursuant to the CSE's amended policies, such issuers are subject to requirements that are comparable to requirements imposed on issuers on non-venture exchanges (e.g. TSX, Cboe Canada, NASDAQ and NYSE) under Canadian securities laws. The CSE has expressed its intention to seek amendments to the relevant instruments to exclude NV Issuers from the definition of "venture issuer" under NI 51-102.

CSE IMPLEMENTATION PROCESS FOR THE NV ISSUER REGIME:

- Listed Issuers that were listed on the CSE prior to April 3, 2023 will not automatically be designated as NV Issuers prior to review. The CSE initiated reviews of Listed Issuers with a financial year end of December 31, 2022, on or about April 30, 2023.
- All Listed Issuers will be reviewed annually following the filing of audited annual financial statements and, if identified as an NV Issuer, must comply with the shortened deadlines in their second quarter interim filings.
- An applicant listed on or after April 3, 2023 that the CSE identifies as an NV Issuer must comply with the amendments upon listing

New continuous disclosure requirements when the CSA pursue amendments to treat CSE-listed NV Issuers as senior issuers rather than a venture issuers:

- ***AIF:*** An NV Issuer will be required to prepare an AIF within 90 days of its year end.
- ***Shortened Financial Statement Filing Deadlines:*** The amendments introduce earlier filing deadlines for both annual and interim financial statements for NV Issuers. NV Issuers will now be required to file their financial statements within 90 days of the year end or 45 days of the end of each interim period (previously was 120 days following the financial year end and 60 days following the relevant quarter).
- ***Majority voting policy:*** The amendments will require majority voting for each director of an NV Issuer:
    - Each director be elected annually and individually.
    - A director must be elected by a majority of votes (50% plus one vote).
    - A majority voting policy be adopted that provides that:
        - directors not receiving a majority vote must tender their resignation immediately;
        - the board must decide whether to accept the resignation within 90 days and shall accept the resignation absent exceptional circumstances. Directors may not participate in any meeting where their resignation is being considered and the resignation will become effective when accepted by the board;
        - a press release must be issued setting out the board's decision.
    - Must be fully described in an NV Issuer's management information circular and posted on its website.
- ***Disclosure:***
    - More extensive executive compensation reporting requirements.
    - More extensive corporate governance disclosure, including of board processes, mandates, position descriptions, orientation and continuing education, codes of conduct, nomination processes, board compensation, board assessments, term limits, board committees and diversity.

14. Amendments to NI 45-106: Enhanced Disclosure Rules for Issuers Involved in Real Estate Activities or Acting as Collective Investment Vehicles

On March 8, 2023, the amendments to the offering memorandum exemption (the "**Amendments**") within National Instrument 45-106 – *Prospectus Exemptions* and its Companion Policy came into effect. The Amendments necessitate heightened disclosure for issuers involved in "real estate activities" and those classified as "collective investment vehicles" when preparing an offering memorandum.[31] The OSC underscores that these new requirements are designed to articulate a more transparent disclosure framework for issuers, providing clarity on their disclosure obligations. Simultaneously, the amendments aim to furnish investors with more precise, tailored information, enhancing their ability to make informed decisions.

15. 2% tax on Share Buybacks in Recent Budget

The 2023 federal budget, introduced on March 28, 2023, includes draft legislation for a new Buyback Tax, a 2% levy on share repurchases. Initially announced in the November 2022 Fall Economic Statement, this tax is set to impact publicly traded entities in Canada, covering both normal course issuer bids and substantial issuer bids. The legislation, applicable to repurchases occurring on or after January 1, 2024, outlines that the tax will generally apply to Canadian resident corporations and extend to various entities, excluding mutual fund corporations and those with repurchases totaling less than $1 million.[32]

Key features of the Buyback Tax involve its calculation, where the 2% tax is determined based on a covered entity's net repurchases of equity each taxation year.[33] This calculation considers the difference between the fair market value of equity repurchased and the fair market value of equity issued from treasury, with exceptions provided. The legislation defines covered entities as publicly traded Canadian resident corporations, real estate investment trusts, specified investment flow-through trusts, and SIFT partnerships, encompassing a range of entities within the taxation framework.[34]

16. TSX Formalizes Policy on Voting Agreements

On February 27, 2023, the TSX issued Staff Notice 2023-0001 providing guidance on voting agreements between or among a listed issuer and security holders. Specifically, the TSX clarified its position on reviewing voting agreements that have a material effect on an issuer's control. The TSX defines a voting agreement as an agreement requiring "a security holder to vote, or cause to be voted, any voting securities that it holds, or over which it exercises control or direction, directly or indirectly, as directed by management or in favour of one or more management proposals."[35] Whether there is a material effect on control is a factual determination made by the TSX and generally involves a security holder's (or a combination of security holders') ability to influence the outcome of a vote of security holders.[36] A voting agreement that has a material effect on the control of an issuer must receive disinterested security holder approval.[37]

The TSX will generally accept a voting agreement where (1) the listed issuer has obtained disinterested security holder approval or (2) the voting agreement allows a covenanting security holder to abstain or not participate in a security holder vote. Where a voting agreement does not satisfy (1) or (2), the TSX will assess whether a voting agreement has a material effect on an issuer's control by examining (a) the proposed voting term, (b) whether the voting agreement results in a block sufficient to influence the outcome of a vote, (c) the context in which the voting agreement is entered into and (d) the consequences facing a covenanting security holder if the voting agreement is breached.[38]

The TSX will also generally not review voting agreements (i) entered into by a listed issuer independent of a treasury issuance of listed or convertible securities to the covenanting security holder or its affiliates or (ii) not linked, directly or indirectly, to a transaction that is otherwise reviewable by TSX.

17. CSA Revisits Short Selling in Canada

After publishing the Joint CSA/IIROC Staff Notice 23-329 – *Short Selling in Canada* in December 2022, the CSA and, now CIRO, received 23 comment letters back from a range of stakeholders, all addressing the regulatory regime of short selling in Canada (the "**Comment Letters**").[39]

On November 16, 2023, the CSA and CIRO published the CSA/CIRO Staff Notice 23-332 – *Summary of Comments and Responses To CSA/IIROC Staff Notice 23-329 Short Selling in Canada* ("**Staff Notice 23-332**"). Staff Notice 23-332 summarizes the Comments Letters and tries to identify potential areas for further study.[40] However, the summary states that although there is important information in the Comments Letters for future development, there was "no real consensus on the appropriate regulatory regime for short selling".[41] Currently, there is no regulatory provisions being proposed, but the CSA and CIRO are expected to from a staff working group in 2024 to examine more broadly short selling issues in the Canadian Market using the Comments Letters as a foundation.[42] As such, there will be more to come on the topic of the regulatory regime of selling short in Canada in the coming year.

18. Canada's Modern Slavery Act: Implications on your Business

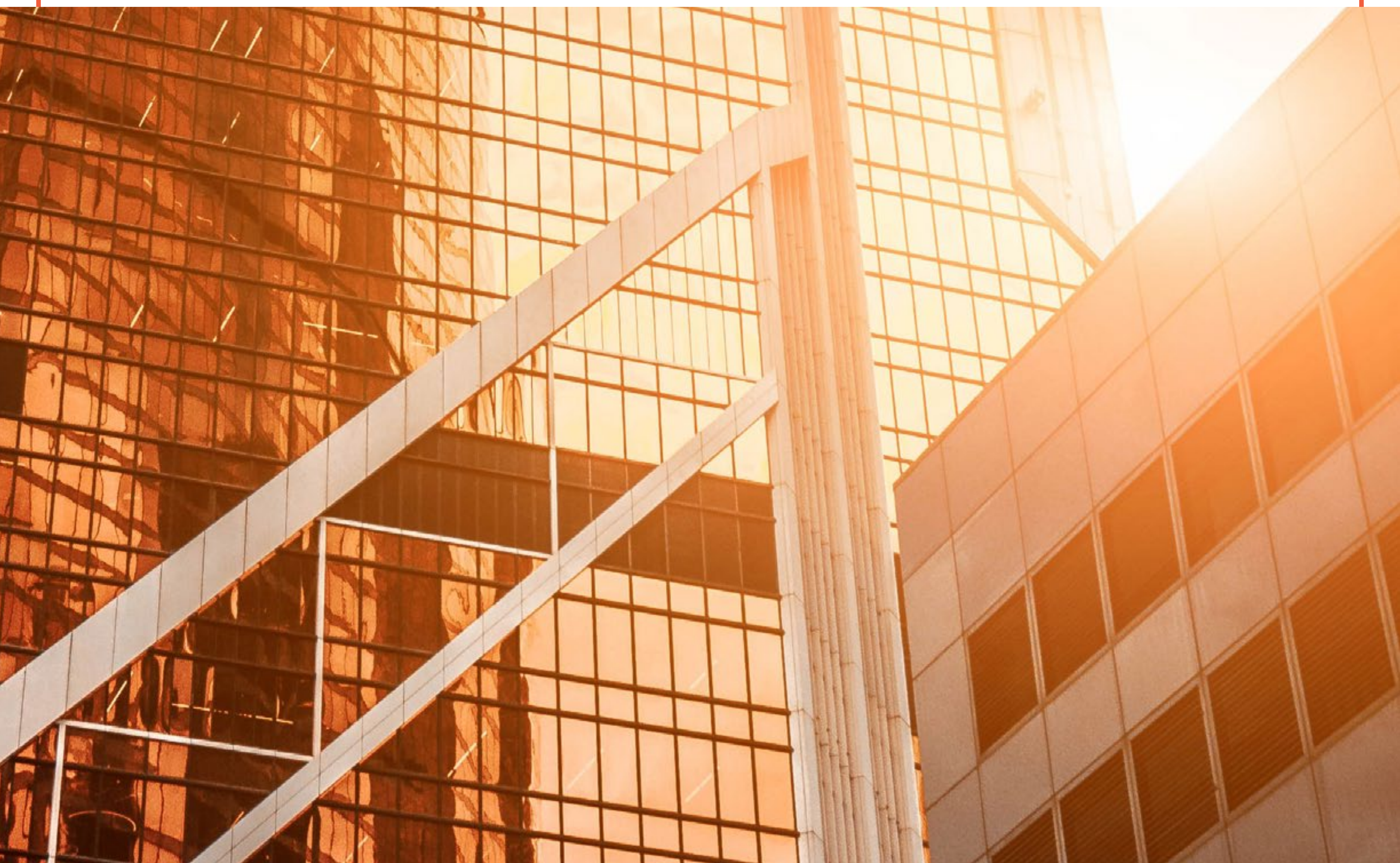
On January 1, 2024, *An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff* (the "**CMSA**") will come into force. Inspired by similar laws adopted in other jurisdictions, the CMSA seeks to prohibit the use of forced labour and child labour by increasing transparency in supply chains. Forced labour may be deemed to occur when labour or service is provided by a person "under circumstances that could reasonably be expected to cause the person to believe their safety or the safety of a person known to them would be threatened if they failed to provide or offer to provide the labour or service."[43] Child labour refers to labour performed by persons under the age of 18 in a manner that contravenes Canadian law, that is mentally, physically, socially or morally dangerous, or that interferes with their schooling.[44]

Notably, the CMSA will impose certain reporting obligations on qualifying entities. Specifically, a corporation, trust, partnership or unincorporated organization will be a reporting entity if it is either:

- listed on a stock exchange in Canada; or
- has a place of business in Canada, does business in Canada or has assets in Canada and, based on its consolidated financial statements, meets at least two of the following thresholds for at least one of its two most recent financial years: (a) have at least $20 million in assets, (b) have generated at least $40 million in revenue, or (c) employ an average of at least 250 employees.[45]

Moreover, in order to be subject to the annual reporting obligations, the reporting entity must also be engaged in the (i) production, sale, or distribution of goods in Canada or elsewhere, (ii) importation of goods produced outside Canada into Canada, or (iii) control an entity engaged in (i) or (ii).[46]

Entities covered by the CMSA must submit their first annual report to the Minister of Public Safety and Emergency Preparedness by May 31, 2024.[47] The report must also be put in a prominent place on the entity's website, and for entities incorporated under the *Canada Business Corporations Act*, included in the annual financial statement sent to each shareholder.[48] To satisfy its reporting obligations, the entity's report must disclose information including but not limited to the entity's supply chains, the due diligence processes employed by the entity with regards to forced labour or child labour and the steps taken by the entity in the previous financial year to "remediate" forced labour or child labour.[49] The reporting obligation under the CMSA is an annual one and any failure to comply may result in a summary conviction or a fine of up to $250,000. Given this, companies should consider implementing board policies, internal guidelines and due diligence processes into their business operations to facilitate compliance with the CMSA reporting obligations.



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CAPITAL MARKETS & SECURITIES EXPERTISE

Our Capital Markets and Securities Group provides issuers, underwriters, securities dealers, investors and other market participants with the full spectrum of capital markets transactional and advisory legal services.

We represent a full range of clients across all industry groups, including technology, real estate, mining, life sciences, financial services, oil and gas, biotech, manufacturing, consumer products, automotive, cannabis, cleantech, blockchain, cryptocurrency and artificial intelligence. We have represented issuers, selling security holders, purchasers and underwriters in both public and private financings as well as clients involved in mergers and acquisitions (M&A) and shareholder activism. We also act as counsel to investment dealers in structuring and marketing debt and equity products for their issuer clients.

We have acted as both issuers' and underwriters' counsel in offerings of equity, debt, preferred shares, innovative hybrid instruments as well as derivatives and structured products. We have frequently advised issuers and underwriters involved in public offerings carried out under the multi-jurisdictional disclosure system (MJDS) and cross-border private placements. Our expertise includes assisting our clients to develop new offering techniques and utilizing innovative financing instruments. We pride ourselves in developing novel and practical solutions to your needs.

Our lawyers have participated in large public and private offerings, as well as a number of midmarket and emerging market capital raising transactions. We have experience in capital raising activity at all stages in the capital raising cycle, including seed capital, angel investors, venture capital and public offerings. We often provide strategic advice to private companies in various industries when they are proceeding with a going-public transaction, including initial public offerings, reverse take-overs, capital pool transactions, and direct listings.

A CAUTIONARY NOTE

The *Securities & Capital Markets: 2023 Legal Year-in-Review* provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice based on specific facts and circumstances should be obtained.

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