CAPITAL MARKETS: 2022 LEGAL YEAR IN REVIEW

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At the start of 2022, the global economy was in fundamentally good form. The economic climate however saw a dramatic slowdown in the later part of the year, fueled by macro-environmental factors such as the conflict in Ukraine and the geopolitical uncertainties it created, supply chain disruptions, persistently high inflation, rising interest rates by the Bank of Canada and the enduring impacts of the pandemic. While this changing economic landscape led to a slowing of capital raising and M&A activity, there were several notable regulatory and deal-making developments in capital markets.

This *Capital Markets: 2022 Legal Year in Review* includes our pick of the ten most significant developments in Canadian capital markets in 2022. The top developments include, among others, the introduction of a new prospectus exemption available to smaller reporting issuers for capital raising and the implementation of a pilot program for well-known seasoned issuers in Canada based on a similar framework existing in the United States.

The key legal developments and proposed amendments outlined in our bulletin have the potential to shape and influence the regulatory landscape in Canadian capital markets for the years to come.

Introduction of the Listed Issuer Financing Exemption

On November 21, 2022, the Canadian Securities Administrators (the "**CSA**") amended National Instrument 45-106 – *Prospectus Exemptions* to adopt a new prospectus exemption available to reporting issuers (the "**Listed Issuer Financing Exemption**"). The Listed Issuer Financing Exemption seeks to provide a more efficient and cost-effective method of capital raising for small reporting issuers by allowing eligible issuers to raise limited amounts of capital from the public based on the issuers' existing continuous disclosure record, by filing a completed Form 45-106F19 *Listed Issuer Financing Document* in connection with the offering.

The Listed Issuer Financing Exemption is only available to reporting issuers who meet certain eligibility criteria including, among others, being a reporting issuer for at least 12 months prior to the date of the news release announcing the offering, having an active operating business and having filed all required disclosure documents. However, one advantage of issuing securities under the Listed Issuer Financing Exemption is that the securities issued will be immediately freely tradeable.

The Listed Issuer Financing Exemption is subject to various offering requirements and limitations. For instance, only listed equity securities or units consisting of listed equity securities and warrants convertible into listed equity securities are permitted to be distributed under the Listed Issuer Financing Exemption. Additionally, as of the date of the news release announcing the offering, the total dollar amount of such offering, when combined with all other distributions made under the Listed Issuer Financing Exemption during the preceding 12 months, must not exceed the greater of: (i) $5,000,000; and (ii) 10% of the issuer's market capitalization as of the date of the news release, to a maximum of $10,000,000. The distribution, when combined with all other distributions made under the Listed Issuer Financing Exemption during the last 12 months immediately prior to the date of the issuance of the news release, must not result in an increase of more than 50% in the issuer's outstanding listed equity securities (as of the date that is 12 months prior to the news release). Further, an offering made in reliance on the Listed Issuer Financing Exemption must close within 45 days of the issuance and filing of the news release announcing the offering.

Please see McMillan's bulletin on the Listed Issuer Financing Exemption for more details.

Well-known Seasoned Issuers Pilot Program Launched in Canada

On January 4, 2022, the CSA pilot program ("**Pilot Program**") for well known seasoned issuers ("**WKSIs**") came into force, permitting temporary exemptions from certain base shelf prospectus requirements for qualifying WKSIs. The program is modelled on the WKSI regime available in the United States; however, there are some notable differences. For instance, the CSA exemption does not eliminate the need to obtain a final receipt for the final base shelf prospectus before an offering can proceed. This requirement does not provide the same timing and execution certainty that WKSIs in the United States have, as registration statements filed under the United States WKSI regime become automatically effective.

Most significantly, the Pilot Program exempts WKSIs from the requirement to file and obtain a receipt for a preliminary base shelf prospectus. It also exempts WKSIs from certain base shelf prospectus disclosure requirements, including the requirement to disclose the aggregate dollar amount that may be raised and the number of securities qualified for distribution under the base shelf prospectus, the plan of distribution, the terms of the securities being distributed and a description of any selling security holders. Among other requirements, in order to qualify as a WSKI, an issuer must, within 60 days of filing a base shelf prospectus, either: (i) have outstanding listed equity securities with a public float of at least $500 million[1]; or (ii) have distributed at least $1 billion aggregate amount of non-convertible securities, other than equity securities under a prospectus in primary offerings for cash in the last three years.

Additionally, to be an eligible WKSI, the issuer's continuous disclosure filings must be current, the issuer must not be in default of any Canadian securities laws and the issuer must have been a reporting issuer in at least

one Canadian jurisdiction for 12 months before the filing date. There are further eligibility requirements for issuers with mining operations.

The Pilot Program is a welcome development as it provides quicker access to public markets for larger, more seasoned reporting issuers. Eligible WKSIs are able to take advantage of Canada's capital markets on an accelerated basis as they can proceed directly to filing a final base shelf prospectus. In contrast, under the current regime, issuers typically factor four to five working days for the completion of regulatory review and the settlement of comments on the preliminary base shelf prospectus. The Pilot Program is also a positive step toward aligning the Canadian shelf prospectus system with the existing model for WKSIs in the United States.

To date, 22 reporting issuers have filed 25 WKSI prospectuses, with Ontario acting as the principal regulator, and it is expected that reporting issuers will continue to take advantage of the Pilot Program until its completion on July 4, 2023, during which time the CSA may identify and evaluate operational concerns and further amendments appropriate to adopt a permanent regime.

Please see McMillan's bulletin on the Pilot Well-Known Seasoned Issuer Program for more details.

TSX Considering Adoption of Pricing Guidelines for Prospectus Offerings

On December 1, 2022, the Toronto Stock Exchange (the "**TSX**") published proposed amendments to Section 606 of the TSX Company Manual (the "**Proposed Amendments**"), which are expected to be effective in the first quarter of 2023.

If adopted, the Proposed Amendments will set standards to state clearly, what constitutes a bona fide prospectus offering which will rely on three key factors. First, to be considered "bona fide", a public offering must be broadly distributed (which is defined as an offering where the agent or underwriter either distributes the offered securities to at least 50 purchasers or makes the offer known to the selling group and/or equity capital markets desks at all Canadian investment dealers). Second, the TSX will generally accept the offering price of securities offered regardless of the discount price, assuming the prospectus is broadly marketed and there is no insider participation. It is worth noting that the TSX is proposing to use as a reference point the closing price of the most recently completed trading session of the issuer's listed securities rather than a five-day volume-weighted average price (VWAP) of such securities. Third, if insiders of an issuer intend to participate in a prospectus offering under the Proposed Amendments, the TSX will review certain factors (such as, among others, the discount price and insiders' *pro rata* interest) to determine whether the insider participation will be subject to the TSX's private placement rules.

The Proposed Amendments seek to provide clarity, predictability and greater transparency for issuers and their underwriters when raising capital using a prospectus.

Please see McMillan's bulletin on TSX Considering Adoption of Pricing Guidelines for Prospectus Offerings for more details.

CRA Guidance on Critical Mineral Exploration Tax Credit (Draft Legislation Providing Tax Credits for Certain Mining Issuers)

In August 2022, the Federal Government released draft legislation outlining the implementation of a new 30% critical mineral exploration tax credit ("**CMETC**"), first announced in the 2022 Federal Budget. On December 15, 2022, Bill C-32, the *Fall Economic Statement Implementation Act, 2022*, received Royal Assent, and provisions governing the CMETC have been incorporated into the *Income Tax Act* (Canada) (the "**Tax Act**").

The CMETC is expected to positively impact the ability of mining issuers operating in the resource exploration and development sector to raise capital by issuing "flow-through shares". The introduction of the CMETC was discussed in McMillan's bulletin: Budget 2022: Significant Changes to the Flow-Through Share Program Unveiled. The 30% CMETC is intended to serve as an enhanced alternative to the existing 15% mineral exploration tax credit ("**METC**"), and not as a supplementary tax credit.

While the Tax Act provisions governing availability of the CMETC are structurally comparable to the regime for the existing 15% METC, there are specific additional requirements that issuers distributing flow-through shares must satisfy in order for investors to be eligible for the CMETC. Unlike the METC, the CMETC would only benefit investments in mining companies exploring for certain "critical" minerals, which tend to be used in solar panels, batteries, permanent magnets and other electric vehicle components.[2] Additionally, the CMETC provisions require issuers to obtain a certification (a "**CMETC Certificate**") from a qualified engineer or geoscientist, in a prescribed form. The prescribed form (T100A *Certificate of Qualified Professional Engineer or Professional Geoscientist*) requires the engineer/geoscientist to identify the targeted minerals and explain why it is expected that the mineral deposit(s) being explored will contain primarily (i.e., more than 50%) critical minerals. The CMETC provides a significant financing opportunity for junior mining issuers at the exploration stage focused on "critical minerals" and an attractive investment opportunity for investors.

CSA Strengthen Regulatory Approach Toward Cryptocurrency

Cryptocurrency remained a hot topic throughout 2022, though perhaps with less positive sentiments than in previous years due to price deflation and notable collapses, including the widely publicized bankruptcy of FTX Trading Ltd. in November 2022. These trends underpin the efforts of the Canadian securities regulators to strengthen oversight of the cryptocurrency industry. The Ontario Securities Commission (the "**OSC**") has indicated a particularly firm stance towards regulating cryptocurrency through its enforcement actions against unregistered crypto-trading platforms, and the comments of its representatives including its Chief Executive Officer who in October 2022 referred to regulation of cryptocurrency as the "critical key to trust and adoption".

Following the 2021 announcement that crypto-trading platforms would require registration, the CSA created an additional obligation for platforms by announcing that pre-registration undertakings would be necessary. Absent an undertaking, or in response to actions in violation of an undertaking, the CSA stated that members may pursue disciplinary action against platforms.[3] Undertakings are made public through the principal regulator of the platform and require such platform to abide by many of the same terms and conditions required upon registration. These undertakings include collecting know-your-client information and assessing suitability, engaging an appropriate custodian for crypto assets and delivering a statement of risks to investors.

Division of the Ontario Securities Commission into Two Entities

In April 2022, the OSC underwent significant restructuring that resulted in a bifurcation of its adjudicative and regulatory functions. Under the new model, the Capital Markets Tribunal (the "**Tribunal**") was created to perform the adjudicative powers of the OSC, and existing proceedings were transferred to the Tribunal. This change reflects recommendations from the Final Report of the Capital Markets Modernization Taskforce, which noted that best practices in corporate governance are aligned with delineated regulatory and adjudicative functions.[4]

The bifurcation of the OSC's functions included the appointment of new adjudicators tasked with overseeing the administrative proceedings before the Tribunal. The role of the adjudicators replaces the previous role of the commissioner. The chief adjudicator and all other adjudicators do not serve any other position within the OSC. The line drawn between the OSC's function should positively impact fair and unbiased decision-making for parties appearing before the Tribunal.

Access Equals Delivery Model for Non-Investment Fund Reporting Issuers

The changing social climate has seen an increase in the widespread usage of communications technology across all sectors of corporate finance, and Canadian capital markets is no exception. In April 2022, the CSA published proposed amendments to implement an "access equals delivery" ("**AED**") model for most prospectuses, annual financial statements, interim financial reports and related management's discussion & analysis ("**MD&A**") for non-investment fund reporting issuers. The AED model would generally allow reporting issuers to satisfy delivery requirements under securities legislation by providing electronic access to an applicable document and announcing the availability of the documents via news release. The goal of the AED model is to reduce regulatory burdens on issuers while providing a method of accessible, cost-efficient, and timely communications for investors.

Corporate legislation will still apply if the proposed amendments are adopted, including those that mandate delivery requirements that may not be satisfied under the AED model. There have been concerns raised in respect of investor protection and a possible reduction in shareholder engagement as a result of adoption of

the AED model. Despite this, implementation of the AED model would reflect the evolution towards greater integration of technology and align Canada with other countries that have implemented similar models.

Corporate Governance: Regulatory Updates & Trends

*Amendments to the Canada Business Corporations Act ("**CBCA**") majority voting requirements*

Amendments to the CBCA and *Canada Business Corporations Regulations*, 2001 (the "**CBCA Regulations**") came into force on August 31, 2022. The amendments impact, among other things, how directors of CBCA corporations with publicly traded securities and other distributing corporations are elected. Rather than a "for" or "withhold" vote (as historically provided under the CBCA), reporting issuers incorporated under the CBCA must now allow shareholders to vote "for" or "against" the election of each nominee in an uncontested election for any shareholder meeting that is held after August 31, 2022 and each nominee must receive a majority of "for" votes to be elected. Unless the corporation is required to ensure that the board has the requisite number of resident director or independent directors, pursuant to the CBCA, a nominee that does not receive a majority of "for" votes may not be appointed as a director until the next annual general meeting.

These changes are significant, as under the previous system, in an uncontested election, even one "for" vote was sufficient for a nominee to be elected to the board. As a result of the amendments to the CBCA and the CBCA Regulations, TSX-listed CBCA corporations are no longer required to have a majority voting policy that provides that, in an uncontested director election, directors who receive more "withhold" votes than "for" votes must tender their resignation to the board, as such directors will no longer be elected.

On January 31, 2023, the CSA published an exemption for reporting issuers incorporated under the CBCA from the form of proxy requirement outlined in subsection 9.4(6) of National Instrument 51-102 – *Continuous Disclosure Obligations* ("NI 51-102") for uncontested elections. Subsection 9.4(6) of NI 51-102 form of proxy requires that shareholders of public companies be offered the option to "vote" or "withhold" from voting against a candidate nominated for director. The CSA noted that the blanket orders that exempt CBCA-incorporated issuers from subsection 9.4(6) of NI 51-102 will allow them to comply with the applicable requirements under the CBCA and associated regulations.

In addition to the above, the CBCA amendments changed the timeframe for which a shareholder must submit proposals to CBCA corporations. The new timeframe to submit proposals to a CBCA corporation is between 90 and 150 days before the anniversary of the last annual shareholder meeting (rather than the 90 days prior to the anniversary date of the notice of the last annual general meeting).

Changes to the Alberta Business Corporations Act

Amendments to the *Alberta Business Corporations Act* ("**ABCA**") became effective on May 31, 2022. The

amendments represent significant steps taken by the Government of Alberta to modernize the ABCA, improve corporate efficiency and reduce regulatory burdens.

Among other things, the amendments to the ABCA expand the court's discretion regarding plans of arrangement. A plan of arrangement is a court-supervised and approved procedure whereby corporations can complete mergers, acquisitions, reorganizations and corporate debt restructurings. Completing a plan of arrangement under the CBCA was generally viewed as more favourable and flexible than under the ABCA, especially for debt restructuring transactions. Prior to the changes, the ABCA required that plans of arrangement be approved by a majority of shareholders representing at least two-thirds of the votes cast by shareholders and, for arrangements involving debt, a majority of creditors representing at least two-thirds of the debt claims. However, the amended ABCA allows the courts to use their discretion in determining the required security holder approval threshold for plans of arrangement, instead of requiring shareholder meetings in all circumstances and a set approval threshold by creditors for debt restructurings. The ABCA now also allows the court to grant "any interim or final order it thinks fit", including a stay of proceedings.

Advancement of Gender Diversity on Boards: A Work in Progress

The CSA reported further progress on the advancement of women on boards. The CSA continues the review of "comply or explain" disclosure provided by non-venture issuers concerning the representation of women on boards and in executive positions. In its most recent annual report, the CSA reported that women occupied 24% of total board seats, up from 22% in 2021 and more than doubling the 11% in 2015. More information on the CSA's report can be found here.

Proxy advisory firms, Institution Shareholder Services Inc. ("**ISS**") and Glass Lewis & Co. ("**Glass Lewis**") released updates to their Canadian proxy voting guidelines for the 2023 proxy season.[5] Glass Lewis will generally recommend voting against the nominating committee chair of any TSX company board that is not at least 30% gender diverse or against the entire nominating committee of a board with no gender diverse directors. Similarly, ISS recommends voting against the chair of the nominating committee of S&P/TSX Composite companies where women represent less than 30% of the board. It is worth noting that ISS broadened its Canadian policy on diversity beyond gender to include racial and/or ethnic diversity requirements. Beginning in 2024, ISS will expect all S&P/TSX Composite companies to have at least one racially or ethnically diverse director.

Developments in the ESG Space

Proposed Requirements for Climate-Related Disclosure

On October 18, 2021, the CSA issued a notice and request for comments on the proposed National Instrument

51-107 – *Disclosure of Climate-related Matters* and its companion policy (collectively the "**Proposed Instruments**"). The Proposed Instruments sought to make disclosure of climate-related information mandatory in reporting issuers' information circulars and management's discussion and analysis. The Proposed Instruments would require climate-related governance disclosure and climate-related strategy, risk management and metrics and targets disclosure, respectively.

Since the closing of the comment period on February 16, 2022, significant developments occurred in the international ESG-related disclosure landscape. Specifically, in March 2022, the U.S. Securities and Exchange Commission introduced a set of rules in relation to climate-related disclosure, and the International Sustainability Standards Board, a standard-setting body established by the International Financial Reporting Standards, introduced two proposed international standards for ESG-related disclosure. In light of international developments, on October 12, 2022, the CSA provided an update on the status of the Proposed Instruments noting, "it will be actively considering" these developments and how they may "impact or further inform" the Proposed Instruments. The CSA emphasized the role "international consensus" plays in its decision-making process and suggested that the Proposed Instruments will be revised to better align with international standards.

Regulators Target Greenwashing

Interest in ESG issues has contributed to a significant growth in the market for ESG-labelled products and services, with a corresponding increase in risks of "greenwashing". In response to this growing risk, securities regulators are closely monitoring the marketing and disclosure compliance practices related to ESG.

Accordingly, on January 19, 2022, the CSA published Staff Notice 81-334 – *ESG-Related Investment Fund Disclosure* (the "**Notice**"). In preparing the Notice, the CSA reviewed the continuous disclosure documents of 32 ESG-related funds and found a number of discrepancies in the way that investment strategies were described in ESG-related funds. In light of these findings, the CSA provided guidance on how existing disclosure regulations apply to ESG-related funds. For example, the CSA encouraged funds with ESG-related investment objectives to disclose the ESG-related aspects of those operations, including the fund's progress or status on meeting its ESG-related investment objectives. For ESG-related funds using proxy voting as a strategy, the CSA recommended making all of the fund's annual proxy voting records available on its website.

More recently, the CSA published its biennial report reflecting the results of the Continuous Disclosure Review Program, which assesses reporting issuers' compliance with continuous disclosure obligations. In CSA Staff Notice 51-364 – *Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2022 and March 31, 2021* (the "**Report**"), among other things, the CSA encouraged issuers to avoid using overly promotional ESG language in continuous disclosure documents, and to ensure that information disclosed

voluntarily (e.g. on social media platforms) and in required disclosure documents (e.g. MD&A) is consistent. Please see McMillan's bulletin on the CSA's Notice and Report for more details.

Rio Tinto and Minority Shareholders

In December 2022, Rio Tinto International Holdings Limited ("**Rio Tinto**") completed its acquisition of the remaining 49% stake it did not own in Turquoise Hill Resources Ltd. ("**Turquoise Hill**"), nine months after its initial public proposal in March 2022. The transaction prompted scrutiny from the Autorité des marchés financiers ("**AMF**"), Québec's securities regulator, when Rio Tinto announced in November 2022 that it had reached specialized agreements with two dissident shareholders, Pentwater Capital Management LP and SailingStone Capital Partners LLC (together, the "**Named Shareholders**"), for them to exercise their dissent rights in exchange for withholding their votes on the acquisition. The transaction was subject to Multilateral Instrument 61-101: *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") and therefore required minority approval. The specialized agreements would have allowed the exclusion of the 32,617,578 shares (approximately 16%) beneficially owned by the Named Shareholders from the vote. As a result, the acquisition would have almost certainly received approval from the remaining minority shareholders.

Pursuant to their agreements with Rio Tinto, the Named Shareholders would have been paid 80% of the $43 per share offer on closing, with the remaining consideration to be paid out following final determination of the dissent proceedings via arbitration – in addition to whatever amount awarded as a result of the proceedings. In response to public interest concerns from the AMF, Rio Tinto terminated the agreements with the Named Shareholders and committed to providing the same offer to all minority shareholders of Turquoise Hill – with the caveat that dissent rights would need to be pursued through the courts rather than an arbitration process. Notably, however, shareholder dissent rights are rarely pursued through the Canadian court process due to the high costs and lengthy timelines associated with these proceedings. As such, the process would likely be of value only to large shareholders.

Canadian securities regulations have historically demonstrated a concern with protecting the rights of minority shareholders, including through the use of MI 61-101. MI 61-101's fundamental purpose is to prevent differential treatment, but recognizes that differential treatment may be justified if the benefit to shareholders outweighs the principle of equal treatment. In this regard, Canadian securities regulators have noted that providing a securityholder with preferential treatment in order to obtain their support for a transaction would not normally be justifiable and may therefore lead to intervention. The additional options and flexibility offered under the specialized agreements to only the Named Shareholders, combined with the potential of a higher payout, in order for the transaction to proceed, may have resulted in a perception by securities regulators of unequal treatment.

[1] In the U.S., a minimum US$750 million public float applies to WKSI issuers.
[2] The “critical” minerals include nickel, lithium, cobalt, graphite, copper, rare earth elements, vanadium, tellurium, gallium, scandium, titanium, magnesium, zinc, platinum group metals and uranium.
[3] Canadian securities regulators expect commitments from crypto trading platforms pursuing registration - Canadian Securities Administrators (securities-administrators.ca)
[4] Capital Markets Modernization Taskforce, Final Report, January 2021 (ontario.ca).
[5] Glass Lewis’ proxy voting guidelines apply to shareholder meetings of publically traded companies held on or after January 1, 2023, whereas ISS proxy voting guidelines applies to meeting held on or after February 1, 2023.

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A Cautionary Note