

# CAPITAL MARKETS: 2023 LEGAL YEAR IN REVIEW

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Amidst the backdrop of a recovering global economy, the landscape of capital markets in 2023 was marked by evolving geopolitical tensions and the aftermath of pandemic-induced disruptions. Policymakers faced the intricate challenge of addressing persistently high inflation and managing interest rates to foster economic growth. While the market experienced volatility and uncertainty, there were several notable regulatory and legal developments in capital markets.

This *Capital Markets: 2023 Legal Year in Review* includes our pick of the ten most significant developments in Canadian capital markets in 2023. These key developments have the potential to mold and impact the regulatory landscape within Canadian capital markets throughout 2024 and the years ahead.

## **CSA Adoption of Amendments to the Offering Memorandum Exemption with a Focus on Real Estate Issuers and Collective Investment Vehicles**

On March 8, 2023, the Canadian Securities Administrators (“**CSA**”) adopted amendments to the offering memorandum exemption (the “**OM Exemption**”) in National Instrument 45-106 – *Prospectus Exemptions* (“**NI 45-106**”) and the Companion Policy to NI 45-106 (the “**Amendments**”). In addition to the clarification of general disclosure requirements under NI 45-106, the Amendments introduced new disclosure requirements for issuers engaged in “real estate activities” and issuers considered “collective investment vehicles”, both new definitions under the Amendments.

### *Issuers Engaged in “Real Estate Activities”*

Under the Amendments, an issuer will generally be considered to be engaging in “real estate activities” where its business purpose is primarily to generate income or gain for security holders from the lease, sale or other disposition of real property, subject to certain exceptions. Issuers engaged in “real estate activities” are required to provide the additional disclosure described in Schedule 1 – *Additional Disclosure Requirements for an Issuer Engaged in Real Estate Activities* to Form 45-106F2 – *Offering Memorandum for Non-Qualifying Issuers* (“**Form 45-106F2**”). This includes, among others, providing an independent appraisal of an interest in real property to investors if the issuer proposes to acquire an interest in real property from a related party and the likelihood of the acquisition is high, or if a value for an interest in real property is disclosed in the offering memorandum

outside of the issuer's financial statements.

#### *Issuers Considered "Collective Investment Vehicles"*

Under the Amendments, an issuer will be considered to be a "collective investment vehicle" where its primary purpose is to invest money provided by its securityholders in a portfolio of securities, other than the securities of subsidiaries of the issuer. This includes investment funds to the limited extent they are currently permitted to use the OM Exemption in certain jurisdictions of Canada. Issuers considered "collective investment vehicles" are required to provide the additional disclosure described in Schedule 2 – *Additional Disclosure Requirements for an Issuer that is a Collective Investment Vehicle* to Form 45-106F2.

#### *General Amendments*

The Amendments also introduced general amendments to existing disclosure requirements under NI 45-106, ranging from heightened disclosure where a material amount of proceeds will be transferred to a third party, to disclosure of criminal or quasi-criminal convictions. These additional disclosure requirements under the Amendments may impose increased costs for certain issuers, particularly junior issuers and those now classified as engaged in "real estate activities" or considered to be "collective investment vehicles". As such, the additional time and cost associated with compliance may result in increased reliance on other prospectus exemptions, such as the "accredited investor" exemption.

For more information, please see McMillan's bulletin on [the Amendments to the OM Exemption in NI 45-106](#).

#### **Launch of New Centralized Platform SEDAR+**

On July 25, 2023, the CSA launched the new centralized platform, System for Electronic Document Analysis and Retrieval + ("**SEDAR+**"), which replaced the former System for Electronic Document Analysis and Retrieval ("**SEDAR**"). The new SEDAR+ platform aims to streamline the regulatory compliance process by replacing several existing national records filing systems, thereby increasing accessibility and convenience for both filers and the general public. The CSA has stated that the new SEDAR+ system will save time, simplify payments and reduce costs for issuers.

SEDAR+ provides market participants with a user-centric, single-window access design to file documents and pay fees. In contrast to the previous standalone systems, SEDAR+ integrates several systems and databases into one web-based platform to standardize inputs and simplify the filing process, as well as expand public search functionality. The new SEDAR+ platform now incorporates the National Cease Trade Order Database, Disciplined List and reporting issuer lists, making it easier for users to determine, among others, if a reporting issuer is in default with any securities regulatory authority.

In addition to consolidating several legacy systems, all exemptive relief applications and Form 45-106F1 – *Report of Exempt Distribution* filings are now filed directly through SEDAR+ instead of through each individual provincial and territorial securities commission filing portals. SEDAR+ also aims to save filers time by automatically calculating filing, system and late fees, as well as processing payments when filings are submitted.

Finally, the new SEDAR+ system offers issuers expanded filing hours. Whereas the former SEDAR platform's filing hours were limited to the hours of 7:00 a.m. to 11:00 p.m. (eastern time), filers can now access SEDAR+ 24 hours a day, seven days a week to permit filings at any time and to provide immediate access to an issuer's public filings. The CSA's expectation is that this will ultimately facilitate and enhance communication among filers, securities regulatory authorities and the general public.

Please see McMillan's bulletin on the [transition to SEDAR+](#) for more details.

### **Amendments to CSE Policies and Forms Including Creation of “Non-Venture Issuer” Listing Category**

On April 3, 2023, the Canadian Securities Exchange (the “**CSE**”) implemented comprehensive amendments to its policies. These amendments made significant changes, both in terms of the introduction of new requirements and the clarification of previously existing CSE policies, providing useful guidance to issuers and bringing the CSE in closer alignment with other Canadian stock exchanges.

Among other notable changes, CSE Policy 2 – *Qualification for Listing* (“**CSE Policy 2**”) has been updated to implement an “eligibility review” process for issuers applying to list on the CSE immediately before or concurrently with filing a prospectus. Applicants are now required to first submit a document with sufficient detail to determine that the eligibility requirements have been met, after which the CSE will conduct a review and provide confirmation of eligibility or conditions the applicant must meet before listing. In addition, CSE Policy 2 implemented a new tier tailored towards senior issuers, designated by the CSE as “NV Issuers” (Non-Venture Issuers), which encompasses elevated listing standards that NV Issuers must satisfy in addition to the basic listing qualifications.

CSE Policy 4 – *Corporate Governance, Securityholder Approvals, and Miscellaneous Provisions* has been expanded to require that a CSE-listed issuer (a “**Listed Issuer**”) obtain securityholder approval for certain transactions. For instance, for a Listed Issuer that is not a NV Issuer, securityholder approval is now required for both sales of securities and acquisitions where: (i) the number of securities to be issued is greater than 50% of the outstanding securities and a new control person is created; (ii) the total number of securities to be issued is greater than 100% of the outstanding securities; or (iii) the Listed Issuer or the CSE has determined that the issuance would materially affect control of the Listed Issuer. For a NV Issuer, both sales of securities and acquisitions will require securityholder approval if the number of securities to be issued is more than 25% of the

NV Issuer's currently outstanding securities. Other transactions requiring securityholder approval include the adoption of, or amendments to, any shareholder rights plans or security-based compensation plans, rights offerings where the securities are offered at a price greater than the maximum permitted discount and certain consolidations.

Additionally, CSE Policy 6 – *Distributions & Corporate Finance* ("**CSE Policy 6**") has been updated to require advance public notice for acquisitions and private placements and to include prescribed details for price reservation requests. In particular, CSE Policy 6 has introduced limited exceptions to the \$0.05 minimum private placement security price requirement, whereby a Listed Issuer may now complete a private placement at a price less than \$0.05 if certain requirements are met. The amended CSE Policy 6 also introduces new filing and reporting requirements for security-based compensation arrangements.

Further, on May 18, 2023, the CSE announced the approval and implementation of amendments to the CSE Form 2A Listing Statement ("**Form 2A**"), which is required for all initial listing applications. The amendments replace the prior form requirements with references to disclosure requirements in a narrative form, though the standard of 'prospectus level disclosure' remains the same as prior to the amendments.

Please see McMillan's bulletins on the [CSE amendments](#), including the [new NV Issuer tier](#), and the [amendments to Form 2A](#) for more details.

### **Extension of Blanket Relief for Well-Known Seasoned Issuers**

In 2023, several provinces extended the duration of existing blanket relief granted to well-known seasoned issuers ("**WKSIs**"), exempting them from certain base shelf prospectus requirements.

As background, the initial relief was granted in each Canadian province and territory pursuant to local blanket orders that were substantively harmonized across the country (the "**Blanket Orders**"). The Blanket Orders – which streamline the offering process for WKSIs and facilitate more efficient capital raising – are part of a broader initiative by the CSA to reduce the regulatory burden on Canadian reporting issuers. As described in [CSA Staff Notice 44-306](#) dated December 6, 2021, the Blanket Orders exempt eligible WKSIs from the requirement to file and obtain a receipt for a preliminary prospectus in connection with the filing of a base shelf prospectus. Additionally, the Blanket Orders exempt WKSIs from certain disclosure requirements relating to the final base shelf prospectus including, among others, the requirement to disclose: (i) the aggregate dollar amount and number of securities qualified under the base shelf prospectus; (ii) a plan of distribution; (iii) details of the securities being distributed; and (iv) any selling securityholders.

In contrast to other Canadian provinces and territories that did not specify an explicit expiry date, the Blanket Orders in Alberta, Newfoundland and Labrador, Ontario and Manitoba included an expiry date of July 4, 2023,



which was subsequently extended in each of those provinces.

In Alberta and Newfoundland and Labrador, the Blanket Orders were amended on May 31, 2023, and June 30, 2023, respectively, to eliminate the 2023 expiry date. As such, these Blanket Orders will only expire on the effective date of an amendment to National Instrument 44-102 – *Shelf Distributions* (“**NI 41-102**”) that addresses substantially the same subject matter as the Blanket Orders.

The Ontario and Manitoba Blanket Orders were amended on June 4, 2023, to expire on the earlier of: (i) January 4, 2025; and (ii) the date that substantially the same subject matter is addressed by an amendment to NI 41-102.

For more details, please refer to McMillan’s bulletins on the [pilot WKSI program](#) and the [Ontario Securities Commission \(the “OSC”\)’s extension of the blanket relief for WKSIs](#).

### **CSA Solicitation of Comments on Two Proposed Approaches to Diversity Disclosure**

On April 4, 2023, the CSA published proposed amendments to corporate governance requirements for non-venture issuers currently set out in 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 “**Proposed Amendments**”).

The Proposed Amendments relate to the diversity of directors and executive officers of public companies in Canada. The Proposed Amendments introduce two approaches to build upon existing disclosure requirements regarding the representation of women on boards and in executive officer positions, as well as board renewal. Both approaches are intended to provide enhanced, decision-useful information to investors to assist with their investment and voting decisions. The alternative proposals are described as “Form A” and “Form B”.

Form A, endorsed by the securities regulatory authorities in Alberta, British Columbia, the Northwest Territories and Saskatchewan, mandates disclosure with respect to women and any group identified by the issuer as being part of its diversity strategy. Form A requires an issuer to disclose its approach to achieving or maintaining diversity on its board, including its objectives as they relate to women and individuals from “identified groups”. An “identified group” can include, without limitation, Indigenous peoples, persons with disabilities, members of visible minorities, members of the LGBTQ2SI+ community and members of linguistic minorities but does not include women.

Additionally, Form A directs issuers to disclose how they would measure progress in achieving their diversity objectives as well as any targets and data on the representation of women, and individuals from identified groups to the extent they collect data on such groups. If the issuer has not set targets, it will have to provide an explanation.

In contrast, Form B, endorsed solely by the OSC, mandates disclosure of data and existing targets set by the issuer for all “designated groups” regardless of whether the group is part of the issuer’s diversity strategy. A “designated group” includes women, Indigenous peoples, racialized persons, persons with disabilities and LGBTQ2SI+ persons. Form B further requires disclosure of targets and data to be recorded in a standardized tabular format to promote consistency and comparability. Similar to Form A, if the issuer has not set targets, it will have to provide an explanation.

The disclosure mandated by Form B is similar to the disclosure requirements already applicable to reporting issuers governed by the *Canada Business Corporations Act*. Form B also requires disclosure regarding any written strategy, written policies and measurable objectives relating to diversity on an issuer’s board. Form A and Form B require the same disclosure requirements for board nominations and renewal, however, both will require disclosure that goes beyond the representation of women.

The public comment period for the Proposed Amendments closed on September 29, 2023. The CSA is in the process of reviewing comment letters submitted by stakeholders.

Please see McMillan’s bulletin on the [two approaches to diversity disclosure](#) for further details on the Proposed Amendments.

### **BCSC Held that the Bar for a Finding of Parties “Acting Jointly or in Concert” is Set Relatively High in *NorthWest Copper Corp.***

In December 2023, the British Columbia Securities Commission (the “**BCSC**”) released its reasons for its ruling dismissing the application brought by Northwest Copper Corp. against three respondents alleging the respondents were “acting jointly or in concert” in their efforts to reshape the company’s board of directors and as a result, failed to comply with the early warning requirements under National Instrument 62-104 – *Take-Over Bids and Issuer Bids* and National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*.

The BCSC’s decision provides important guidance on an issue that is often raised by issuers facing dissident actions by multiple shareholders and is most noteworthy for its ruling that, while a complainant must prove on a balance of probabilities that the parties are acting jointly or in concert, the bar for such a finding is set relatively high. The policy reason for such a conclusion appears to be that the “free flow of information and opinion among shareholders of a public company” is more important than the requirement for disclosure, unless there is “*sufficiently clear, convincing and cogent evidence that parties are acting jointly or in concert*” (emphasis added). The BCSC’s finding may make it far more difficult to prove that a shareholder is acting jointly or in concert, particularly before a securities regulatory authority where less evidence may be available to a complainant.

The decision also reaffirms key legal principles and offers other guidance and insight. It clarifies that the concept of “acting jointly or in concert” is not solely limited to take-over or issuer bids and is also applicable to proxy solicitations aimed at voting for an alternate slate of directors.

With respect to the early warning requirements, the BCSC held they are only triggered by an acquisition of securities, not merely by the aggregation of shares held by persons who begin acting jointly or in concert, where the group’s holdings are at 10% or more of the outstanding securities of that class.

Another important aspect of the decision is the emphasis on the requirement that, to be found “acting jointly or in concert”, parties must be working together to achieve a joint specific purpose. As a result, it is not sufficient for the parties to simply be aligned in interest, there must also be a concerted effort to bring about a specified objective. In the context of soliciting proxies to nominate a new slate of directors, acting jointly or in concert necessitates that all involved parties are actively engaged and coordinated in their efforts to secure the election of the proposed dissident slate.

Finally, the decision also suggests that securities regulatory authorities are unlikely to issue an order that disenfranchises shareholders, such as banning shareholders from voting at a general meeting or restricting their share trading, when any potential harm can be remedied through a disclosure order.

For additional details, please see McMillan’s bulletin on [NorthWest Copper Corp.](#)

### **CSA and CIRO Provided Update on Short Selling Regulatory Regime Review**

On November 16, 2023, the CSA and the Canadian Investment Regulatory Organization (“**CIRO**”) published CSA/CIRO Staff Notice 23-332 – *Summary of Comments and Responses to CSA/IIROC Staff Notice 23-329 Short Selling in Canada* (the “**Staff Notice**”), summarizing comments received in response to CSA/IIROC Staff Notice 23-329 – Short Selling in Canada which sought input from market participants on the short selling regulatory regime in Canada. While no specific changes to regulatory provisions were proposed at the time, the Staff Notice stated that CIRO was actively considering ways “to clarify and support its existing requirement to have a reasonable expectation to settle a short sale trade on the settlement date”.

On January 11, 2024, CIRO published for comment, in Notice 24-0003 – *Proposed Amendments Respecting the Reasonable Expectation to Settle a Short Sale*, proposed amendments to the short selling framework under the Universal Market Integrity Rules (“**UMIR**”). CIRO is proposing to support and clarify the short selling framework under UMIR by:

1. adding a new positive requirement under UMIR 3.3 to have, prior to order entry, a reasonable expectation to settle on settlement date any order that upon execution would be a short sale;
2. adding in supervisory and gatekeeping requirements relating to the proposed UMIR 3.3; and

- generally consolidating current UMIR provisions relating to short selling into one location within UMIR with corresponding housekeeping changes to UMIR generally (the “**Proposed Short Selling Amendments**”).

Simultaneously, CIRO also published proposed guidance (the “**Proposed Guidance**”) aimed at clarifying the various current and proposed requirements related to short sales and failed trades. CIRO also noted that, together with staff of the CSA, it will continue to explore other areas of short sale regulations where additional regulatory measures may be appropriate. The Proposed Short Selling Amendments and the Proposed Guidance are open for comment until April 12, 2024.

For more details, please refer to McMillan’s bulletins on the [CSA and CIRO update](#) and the [Proposed Short Selling Amendments and the Proposed Guidance](#).

### **Ontario Superior Court Clarified “Unreasonable or Unjustifiable” Delay for Requisitioned Meetings in *Sandpiper v. First Capital***

On February 1, 2023, the Ontario Superior Court of Justice (the “**Court**”) issued a decision, *Sandpiper Real Estate Fund 4 Limited Partnership v. First Capital Real Estate Investment Trust*, 2023 ONSC 794, ordering First Capital Real Estate Investment Trust (“**First Capital**”) to call and hold a special meeting of its unitholders two months earlier than First Capital’s scheduled annual and special meeting of May 16, 2023. The decision is a result of an application by Sandpiper Real Estate Fund 4 Limited Partnership (“**Sandpiper**”) and associated entities who were unitholders of First Capital, to compel First Capital to hold a unitholder meeting on March 1, 2023, or as soon as practical thereafter. Sandpiper had previously requisitioned a special meeting of unitholders (the “**Requisition**”) in December 2022 to replace four independent members of the board of trustees of First Capital (the “**Board**”) with four of Sandpiper’s own nominees. The Board opted to hold a combined annual general and special meeting on May 16, 2023, more than five months after the Requisition.

Ultimately, the Court concluded that the Board’s decision resulted in an “unreasonable or unjustifiable” delay, ordering the special meeting to be held on March 1, 2023, or as soon as possible thereafter. In reaching this conclusion, the Court assessed if the Board’s decision to delay the meeting warranted deference. The Court determined that the Board’s decision-making process merited a low level of deference, citing factors such as, among others, limited discussion of the Requisition at the Board meeting and the involvement of trustees targeted for replacement in passing the resolution with respect to the date of the special meeting.

The decision provides additional guidance on the analysis in which a court will use in assessing whether the delay between a requisition and a meeting is unreasonable, such as the importance of an appropriate and diligent decision-making process by directors, and the potential prejudicial effect that such delay may have on unitholders.



Please see McMillan's bulletin on [Sandpiper v. First Capital](#) for a detailed analysis of the decision and the Court's reasoning.

### **First Trial Application by Ontario Capital Markets Tribunal of the 'Necessary Course of Business' Exception in Kraft (Re)**

On October 20, 2023, the Capital Markets Tribunal of the OSC (the "**Tribunal**") released its decision in *Kraft (Re)*, addressing for the first time the application of the "necessary course of business" (the "**NCOB**") exception to the prohibition against "tipping". Under Section 76(2) of the *Securities Act (Ontario)* (the "**Act**"), a person in a "special relationship" with an issuer is prohibited from informing another person of a material fact or material change with respect to an issuer that has not been generally disclosed, *other than in the necessary course of business*. The Tribunal in *Kraft (Re)* referred to the prohibition as the selective disclosure of material non-public information ("**MNPI**").

*Kraft (Re)* concerned the sharing of material information that was not generally disclosed between Michael Kraft, the Chairman and director of WeedMD Inc. (the "**Company**"), and Michael Stein, his long-time friend and business associate. Prior to any public announcement, Kraft sent Stein draft documents received by the Company regarding a lease and option to purchase property that marked a significant expansion of the Company's production capacity. Kraft asked Stein to provide comments on the draft documents, as the two often discussed potential deals and business opportunities. While Stein had been a consultant to the Company in previous years, he was not retained to formally review the draft lease, nor was he compensated for conducting such review. In the following weeks, Stein purchased 45,000 shares of the Company, later selling those shares after the expansion was announced by the Company for a profit of \$29,345 (approximately a 43% return on investment).

In finding that Kraft had breached Section 76(2) of the Act, the Tribunal determined that Kraft's communication with Stein was not in the "necessary course of business", despite Kraft's argument that the communication was to seek advice on the draft documents. The Tribunal emphasized that the inclusion of the word "necessary" in the exception imports a level of importance, or something that is "essential", "indispensable" or "requisite". Determining whether the selective disclosure of MNPI meets this threshold depends on a number of factors relevant to the circumstances, such as the nature of the relationship between the tipper, the issuer and the tippee, the relevance of the information to this relationship, and the tipper's reasons for making the disclosure to the tippee.

While Stein may have provided Kraft with advice about the expansion, the Tribunal determined that there was no evidence of a necessary business purpose justifying the selective disclosure of MNPI. To successfully rely on the NCOB exception, evidence that the disclosure was necessary may contribute to substantiating a valid

purpose for such disclosure. The evidence can take various forms such as discussions at the board or management level considering the need for selective disclosure of MNPI, confidentiality agreements regarding the use of MNPI and documents (e.g., retainer agreements, minutes and memos) specifying the purpose for making such disclosure.

Findings of improper sharing and use of MNPI can result in long-lasting ramifications for the parties involved, and *Kraft (Re)* serves as an example of the importance of developing formalized decision-making processes and procedures regarding the handling of MNPI.

For more information, please see McMillan's bulletin on [Kraft \(Re\)](#).

### **Enhanced Pre-registration Undertakings for Unregistered Crypto Trading Platforms**

With the publication of CSA Staff Notice 21-332 – *Crypto Asset Trading Platforms: Pre-Registration Undertakings – Changes to Enhance Canadian Investor Protection* (the “**CSA Staff Notice**”) on February 22, 2023, the CSA introduced an “enhanced” form of pre-registration undertaking (“**PRU**”), thereby expanding the existing requirements for unregistered crypto asset trading platforms (“**CTPs**”) to continue to operate in Canada while they seek registration and related exemptive relief. The CSA had previously announced in August 2022 that unregistered CTPs are expected to file a PRU whereby the filer agrees to certain terms and conditions to continue operating in Canada. The changes to the PRU followed in response to the insolvencies of several notable CTPs and significant investor losses with respect thereto.

Key changes in the enhanced form of PRU include:

1. the introduction of the “Acceptable Third-Party Custodian” concept and further imposing conditions regarding custody and the segregation of crypto assets held on behalf of Canadian clients;
2. further requirements to prevent unregistered CTPs from pledging or otherwise using crypto assets held on behalf of Canadian clients;
3. an outright prohibition on offering margin, credit, or other forms of leverage in connection with trading crypto contracts or crypto assets;
4. a commitment from the controlling mind(s) and global affiliates of the CTP to not undermine the independence of the CTP;
5. enhanced financial reporting consistent with the requirement for registered securities dealers;
6. the requirement to appoint a Chief Compliance Officer to maintain compliance procedures and to monitor and assess compliance of the unregistered CTP with applicable Canadian securities laws; and
7. a prohibition on the trading of crypto contracts based on proprietary tokens without consent of the CSA.

Through the CSA Staff Notice, the CSA also reiterated its view that “Value-Referenced Crypto Assets” (“**VRCA**”),

a term which includes those crypto assets commonly referred to as stablecoins, may be classified as securities or derivatives under Canadian securities legislation. The enhanced PRU accordingly prohibits unregistered CTPs from facilitating the trade of a VRCA without prior written consent of the CSA.

For more details, please see McMillan's bulletin on the [enhanced pre-registration undertakings for CTPs](#).

by [Ouvedi Rama Naiken](#), [Sam Kelley](#), [Zach Lechner-Sung](#), [Cody Foggin](#), [Kiira Kaarid](#), [Troy Hilson](#), [Navaneeth Ravichandran](#), [Kyle Smith](#), [Anju Xing](#), [Daniel Civichino](#) (Articling Student), [Micah Zierer-Clyke](#) (Articling Student)

### **A Cautionary Note**

The foregoing 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 should be obtained.

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