# 2024 YEAR IN REVIEW:

# Capital Markets & Securities Law

MILLERTHOMSON.COM

# Capital Markets & Securities Law:
# 2024 Year in Review

This Capital Markets & Securities: 2024 Legal Year-in-Review includes our selection of significant and interesting developments in the Canadian securities and capital markets landscape in 2024. These key legal developments, which are summarized below, 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 Wendy Wang

# Table of **contents**


| | | |
|---|---|---|
| 01 | Key regulatory changes for sustainability and diversity disclosures | PAGE 04 |
| 02 | Proposed amendments to cryptocurrency regulation | PAGE 07 |
| 03 | CSA releases updated guidance on virtual shareholder meetings | PAGE 09 |
| 04 | CSA to implement access model for non-investment fund prospectuses | PAGE 11 |
| 05 | Poison pill revisited: Ontario's Capital Markets Tribunal terminates a shareholder rights plan containing a 15% trigger | PAGE 13 |
| 06 | New rules, new relief: OSC proposes new rules to compensate harmed investors | PAGE 14 |
| 07 | OSC proposes permanent exemption for WKSIs, pending amendments to the shelf prospectus regime | PAGE 16 |
| 08 | CSA proposes amendments to align with CSE's senior tier and modernize securities regulations | PAGE 17 |
| 09 | CSA announces new exemption for exempt-market securities dealers | PAGE 18 |
| 10 | OSC announces new exemptions to support capital raising for early-stage Ontario businesses | PAGE 19 |
| 11 | A shorter T+1 standard settlement cycle is coming soon | PAGE 21 |
| 12 | CSA proposes binding dispute resolution framework for retail client complaints | PAGE 22 |
| 13 | Glass Lewis and ISS 2024 Canadian benchmark policy guidelines and updates | PAGE 24 |
| 14 | Joint actors in shareholder activism | PAGE 27 |
| 15 | OSC investor warnings | PAGE 28 |

# Key regulatory changes **for sustainability and diversity disclosures**

It is important for issuers to stay informed about ongoing changes to climate-related disclosure requirements in Canada, which may impact their regulatory expectations and reporting practices.

## CSSB adopted climate-related disclosure standards

On December 18, 2024, the Canadian Sustainability Standards Board **("CSSB")** released the final version of the sustainability disclosure standards, being NCDI 1 *General Requirements for Disclosure of Sustainability-related Financial Information* and NCDI 2 *Climate-related Disclosures* (collectively, the "**CSSB Standards**"), to enhance transparency for investors and support comparability across markets. Based on standards established by the International Sustainability Standards Board, the CSSB Standards introduce Canadian-specific modifications, such as transitional relief for Scope 3 greenhouse gas emissions. These standards are currently voluntary but may soon be mandated by the Canadian Securities Administrators ("**CSA**") for Canadian public issuers.[1]

## SEC climate disclosure rules signal a shift for Canadian issuers

On March 6, 2024, the U.S. Securities and Exchange Commission ("SEC") finalized its rules on climate-related disclosure. These rules apply to dual-listed Canadian issuers and Canadian companies classified as "foreign private issuers" or "domestic issuers" in the United States, unless they report through the multijurisdictional disclosure system. The SEC's rules require mandatory disclosure of Scope 1 and 2 emissions internal carbon pricing and emissions offsets, with compliance being enforced as early as 2026[2]. These rules are expected to influence and inform the CSA's proposed climate-related disclosure regulations on a go-forward basis.

As of February 11, 2025, the SEC's new rule is being challenged in litigation in the US Eighth Circuit Court and the SEC stayed effectiveness of the new rule pending completion of that litigation.

## CSA tightens ESG fund disclosure standards with new guidance

On March 7, 2024, the CSA issued a revised Staff Notice 81-334 – *ESG-Related Investment Fund Disclosure* (the "**Notice**"), updating its previous guidance on investment fund disclosure relating to environmental, social and governance ("**ESG**") matters. The Notice reflects findings from CSA reviews in 2022 and 2023, which uncovered examples of misleading communications and inconsistencies between prospectuses and sales materials.

The Notice offers detailed guidance on classifying funds based on ESG objectives and clarifies expectations for accurate disclosure, particularly regarding investment objectives, strategies and proxy voting policies. The CSA encourages investment fund managers to align their disclosures in accordance with the Notice.[3]

## AMF issues draft climate risk management guideline for financial institutions in Québec

In Québec, the Autorité des marchés financiers **("AMF")** released in July 2024 its Risk Management Guideline (the "**Guideline**"), targeting licensed insurers, financial cooperatives, authorized trust companies and other deposit institutions. The Guideline, informed by the Task Force on Climate-related Financial Disclosures and other

international bodies, outlines expectations across governance, integrated risk management, climate scenario analysis, capital adequacy, client fairness and financial disclosure in regards to managing climate-related risk.[4]

The AMF's approach is consistent with the Office of the Superintendent of Financial Institutions' Guideline B-15 on Climate Risk Management, underscoring a shared commitment to financial resilience and consumer protection in relation to climate-related risk in Canada.[5]

## EEA task force proposes new diversity categories, Potential Impact on CBCA reporting

The Employment Equity Act Review Task Force has recommended updates to the *Employment Equity Act* (Canada) (the "**EEA**") with respect to diversity reporting and efforts to modernize terminology used in the EEA framework, including the term "designated groups." Suggested changes include replacing the term "designated groups" with "employment equity groups," introducing terms like "racialized workers" and "Indigenous peoples," and creating new categories for Black workers and 2SLGBTQI+ workers.[6]

While no legislative changes have been proposed for the *Canada Business Corporations Act* (the "**CBCA**"), the Canadian government has expressed support for these recommendations and has planned consultations to modernize the EEA.[7] Any amendments to the EEA could influence CBCA diversity reporting.

# Proposed amendments to cryptocurrency regulation

On January 18, 2024, the CSA published proposed amendments to National Instrument 81-102 – *Investment Funds* ("**NI 81-102**") and the corresponding companion policy, which included changes to the rules on investment funds seeking to invest in crypto assets ("**Public Crypto Asset Funds**").[8]

These changes are part of an initiative to implement a regulatory framework for Public Crypto Asset Funds in order to protect investors and mitigate the unique risks associated with crypto assets.

These changes aim to provide greater clarity on the rules regarding the restrictions and requirements of such investment funds, including how they invest in crypto assets and the types of crypto assets that can be purchased, used or held.

**The proposed amendments to NI 81-102 include the following:**

| SECTION | DESCRIPTION OF CHANGE |
|---|---|
| 1.1 | The definition of "alternative mutual fund" will now include a mutual fund that invests in crypto assets. |
| 2.3 | Only alternative mutual funds and non-redeemable investment funds may buy, sell, hold or use crypto assets directly. |
| 2.12<br>2.13<br>2.14 | Crypto assets will be prohibited from being used in securities lending, repurchase transactions and reverse transactions as the loaned securities, transferred securities or collateral (as applicable) posted in connection with these transactions. |
| 2.18 | Money market funds will be prohibited from buying or holding crypto assets. |
| 6.5.1 | Custodians holding and safeguarding crypto assets on behalf of investment funds ("Crypto Custodians") will be required to keep crypto assets in offline storage, except as necessary to facilitate transactions. |
| 6.6 (3.1) | Crypto Custodians must maintain insurance for crypto assets it safeguards on behalf of an investment fund comparable to what a reasonably prudent person would maintain. |
| 6.7 | Crypto Custodians must obtain annual reports from a public accountant assessing its internal management and controls. |
| 9.4(2) | Public Crypto Asset Funds will be permitted to accept crypto assets as subscription proceeds if they are of equivalent value to the issue price of securities and they are acceptable to the fund's portfolio adviser and investment objectives. |

# CSA releases updated guidance on virtual shareholder meetings

On February 22, 2024, the CSA released updated guidance on conducting virtual shareholder meetings, expanding on the initial guidance released by the CSA in early 2022 following the COVID-19 pandemic.[9] Remaining up-to-date on CSA guidance on this topic is important for engaging in CSA best practices during the 2025 proxy season and beyond.

The initial guidance released in 2022 aimed to support reporting issuers as they adjusted to the changes brought on by the pandemic. It was intended to assist reporting issuers in fulfilling their obligations under securities legislation, as well as recommend practices to facilitate shareholder participation. The updated guidance builds upon this objective following the CSA's consultations with market participants.

## Clear and comprehensive disclosure to shareholders

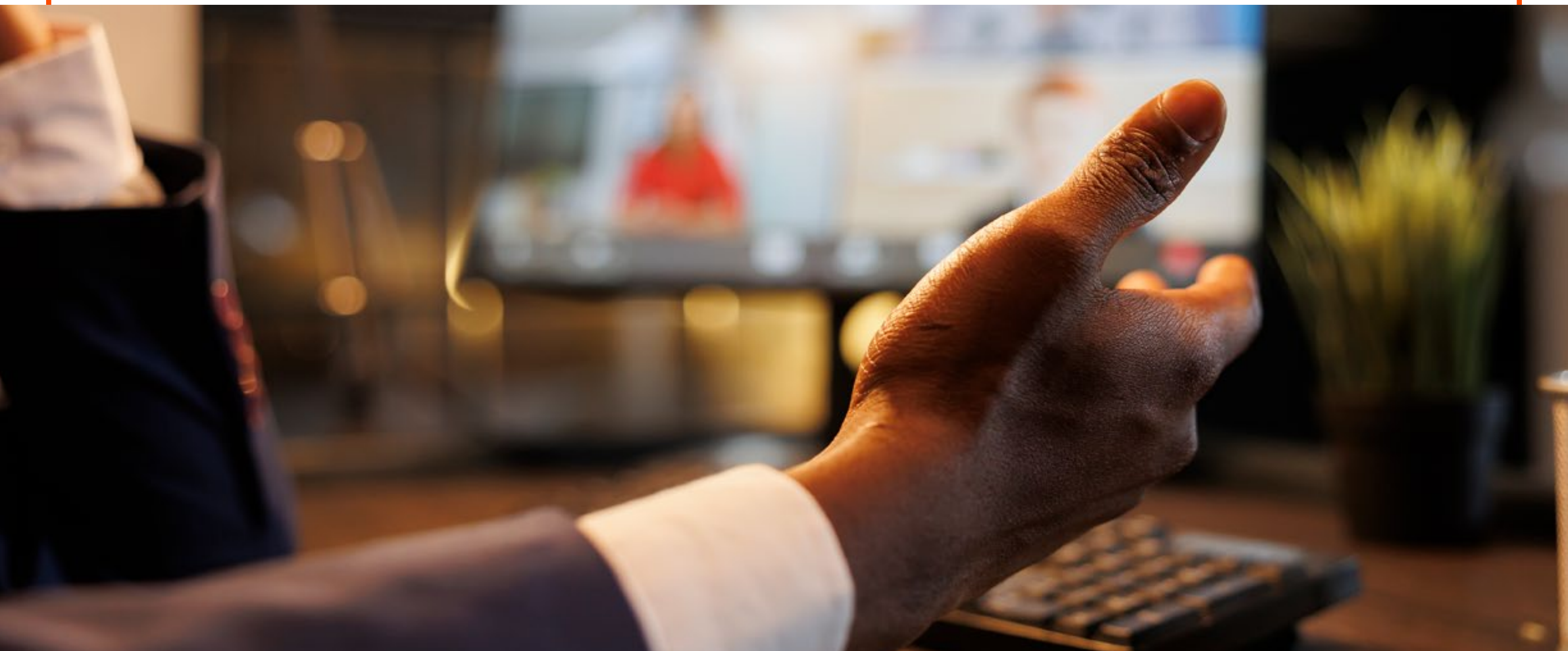
Reporting issuers must continue to provide clear and comprehensive disclosure within its management information circulars and associated proxy-related materials to foster participation and voting at virtual meetings. Clear and comprehensive disclosure is essential to equip shareholders with the necessary information to understand the business of a reporting issuer and to exercise their shareholder rights at meetings: the CSA cautions issuers to remain alert in carrying out this objective in connection with their virtual shareholder meetings.[10]

One way that reporting issuers can provide a sufficient level of clarity to their proxy-related materials is by including plain language explanations of how shareholders can participate in meetings, including the logistics of registration, authentication and voting processes.[11]

## Facilitating shareholder participation at virtual meetings

Given that an annual meeting may be the only opportunity for shareholders to meaningfully engage with management, the CSA advises that attending and participating in virtual shareholder meetings should not be overly complex, nor should they require more than a basic level of technological proficiency. Other ways that the CSA encourages reporting issuers to facilitate shareholder participation include:

- providing shareholders with opportunities to make motions or raise points of order;
- ensuring shareholders are able to raise questions and provide direct feedback to management; and
- ensuring that any virtual platform used has functionality permitting shareholder participation as fully as possible.[12]



# CSA **to implement access model for non-investment fund prospectuses**

## Background

On January 11, 2024, the CSA released its final amendments to various national instruments and corresponding policies, implementing a new access model for delivering preliminary and final prospectuses of non-investment fund reporting issuers to investors (the "**Access Model**").[13]

Aiming to reduce regulatory burdens, the Access Model is intended to modernize Canada's capital markets with a cost-effective, timely and environmentally-friendly approach to communicating with investors. However, the CSA recognizes the need to balance accessibility and efficiency with investor protection and market integrity. Reflecting this concern, the Access Model is available for most prospectus offerings but does not extend to rights offerings, medium-term note offerings and other continuous distributions under a shelf prospectus.

# Summary of the amendments

### APPLICATION

In all jurisdictions, except British Columbia, Québec and New Brunswick, prospectus delivery is satisfied when: (a) the prospectus is filed on SEDAR+ and a receipt is posted for the prospectus; and (b) a news release is issued and filed on SEDAR+, alerting investors that the document is accessible on SEDAR+ and that an electronic or paper copy can be obtained upon request. In British Columbia, Québec and New Brunswick, delivery under the Access Model operates as an exemption from the relevant securities legislation requirement to deliver a prospectus.

### VOLUNTARY

The Access Model is voluntary, meaning investors maintain their right to paper or electronic copies of final prospectuses. If requested, the issuer must send an electronic or paper copy of the preliminary or final prospectus, or any amendment (as applicable), within two business days of receiving the request and without monetary charge to the investor.

### PROSPECTUS DELIVERY EXEMPTION

Under the Access Model, a dealer is exempt from prospectus delivery requirements if: (a) the document is filed on SEDAR+ and a receipt is issued and posted on SEDAR+ for the document; and (b) after the receipt is posted for the document, a news release is issued and filed on SEDAR+.[14]

### WITHDRAWAL RIGHTS

The Access Model also preserves the ability for eligible purchasers to exercise their withdrawal rights within two business days after the later of: (a) meeting the Access Model's delivery conditions; and (b) the date of the securities purchase agreement or, in Québec, the date of the subscription.

### SHELF AND POST-RECEIPT PRICING ("PREP")

The Access Model provides distinct requirements for shelf and PREP prospectuses. For these types of prospectuses, the issuer is permitted to file a single news release on a forward-looking basis, disclosing material information and announcing that the prospectus will be available on SEDAR+ within two business days. In comparison, for final prospectuses, the required news release would be issued and filed on the same day as the receipt.

# Poison pill revisited:

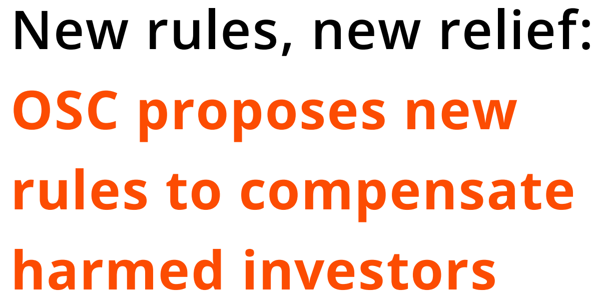
## Ontario's Capital Markets Tribunal terminates a shareholder rights plan containing a 15% trigger

On July 24, 2024, Ontario's Capital Markets Tribunal (the "**Tribunal**") ordered the termination of a shareholder rights plan (or "poison pill") implemented by Bitfarms Ltd. ("**Bitfarms**").[15] Bitfarms' shareholder rights plan (the "**Rights Plan**") set an acquisition cap of 15% on its shares, lower than the typical 20% threshold. This marked the first time the Tribunal had reviewed such a plan since the 2016 amendments to Canada's takeover bid rules. The Rights Plan was opposed by Riot Platforms Inc. ("**Riot**"), who owned 14.9% of Bitfarms, as it was seen by Riot as an unfair attempt to limit shareholder rights and obstruct its corporate governance reform efforts.

Riot alleged that the 15% trigger undermined the Canadian bid regime's predictability, deviating from established norms that allow shareholders to acquire up to 19.9% before triggering a formal bid requirement.

On the other hand, Bitfarms argued the 15% threshold was necessary to protect its ability to review strategic alternatives, asserting that Riot's potential "blocking position" could discourage other bidders and reduce shareholder value. Riot contended the Rights Plan contravened shareholder democracy, hindered market liquidity, and threatened to set a dangerous precedent. Riot also urged the Tribunal to consider National Policy 62-202 – *Take-Over Bids* – Defensive Tactics, which affirms the "protection of the bona fide interests of shareholders" and urges the preservation of "an open and even-handed environment" in which shareholders may make fully-informed decisions.

The Tribunal sided with Riot, underscoring the Tribunal's potential reluctance to approve rights plans below the 20% trigger, barring extraordinary circumstances. The Tribunal's detailed reasons remain pending, and Riot and Bitfarms have since settled.



# New rules, new relief: OSC proposes new rules to compensate harmed investors

The Ontario Securities Commission (“**OSC**”) has released proposed rules aiming to establish a new process for distributing funds collected through disgorgement orders directly to harmed investors.[16] This initiative, as part of the legislative changes introduced under Bill 146 – *Building a Strong Ontario Together Act (Budget Measures)*[17], is designed to align Ontario’s practices with those already in place in British Columbia and Québec. If implemented, the rules would create a structured, claims-based system allowing investors to receive compensations without pursuing separate civil litigation.

## Eligibility criteria

To be eligible under the new rules, investors must show clear, direct financial losses stemming from the misconduct that is subject to the disgorgement order, along with documentary evidence to support such losses. Losses related to missed investment opportunities will not be considered as a direct financial loss under the proposed rules. Investors must also not have been involved in the misconduct that led to the disgorgement order.

The proposed rules would not apply to distributions of disgorged funds in cases of insider trading or tipping. This is due to challenges in quantifying specific investor losses in such cases. Another exception is where the funds disgorged are insufficient to justify the costs of distribution.

## Claims process

First, the OSC is to post a notice on its website specifying, among other things, instructions on how eligible applicants can file a claim and the final deadline for submission (the "**Claims Notice**"). Investors must then submit their claims, along with supporting evidence, within a minimum 90-day period after the posting of the Claims Notice. Following the claim submission, the OSC may either manage the distribution process directly or, in more complex cases, appoint a court administrator. Payments will only be made after *all* claims have been reviewed, with possible partial payments retained for disputed claims.

## Policy rationale

The proposed rules aim to enhance investor protection in Ontario by ensuring that wrongdoers are held accountable and that affected investors can seek restitution through the regulatory framework. This policy rationale underpinning the treatment of disgorged funds is evident in the recent Supreme Court of Canada case of *Poonian v. British Columbia (Securities Commission)*.[18] Here, the court clarified that disgorgement orders tied to securities fraud cannot be discharged in bankruptcy, as they directly relate to the fraudster's ill-gotten gains. As such, and in line with the policy of investor protection, investors' claims to disgorged funds will remain protected against bankruptcy while bankrupt offenders will continue to be held accountable for their misconduct.

## Conclusion

Public comments for the proposed rules were being accepted until October 9, 2024. Final amendments are now expected to follow, with the implementation of the rules anticipated to enhance investor protection and strengthen regulatory accountability in Ontario's capital markets.

# OSC

## proposes permanent exemption for WKSIs, pending amendments to the shelf prospectus regime

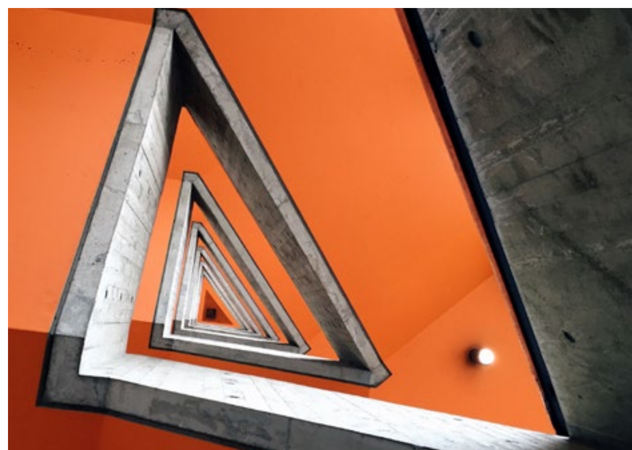
On July 30, 2024, the OSC proposed Rule 44-503 – *Exemption from Certain Prospectus Requirements for Well-Known Seasoned Issuers* (“**Rule 44-503**”)[19] as a rule under the *Securities Act* (Ontario) (the “**Act**”),[20] which exempts qualifying well-known seasoned issuers (“**WKSIs**”) from certain base shelf prospectus requirements.

Rule 44-503 is the result of a series of initiatives by the CSA to implement a Canadian WKSI regime aimed at reducing unnecessary regulatory burdens in base shelf prospectus requirements for large, established reporting issuers that have a strong market following and up-to-date disclosure records. As part of local blanket orders facilitated by the CSA in 2022, the OSC issued Ontario Instrument 44-501 – *Exemption from Certain Prospectus Requirements for WKSI (Interim Class Order)* (the “**Blanket Order**”).[21] The Blanket Order allows WKSIs to file and obtain a receipt for their final base shelf prospectus on an accelerated basis without needing to first file a preliminary version.

To qualify as a WKSI, an issuer must: (a) either have qualifying public equity of at least $500 million or qualifying public debt of at least $1 billion; (b) be, or have been, a reporting issuer in Canada for the past three years; and (c) be qualified to file a short form prospectus under the Act. Issuers with mineral projects must meet additional requirements of disclosing a gross revenue derived from its mining operations of at least: (i) $55 million for the issuer’s most recently completed financial year; and (ii) $165 million in aggregate over the past three most recently completed financial years.

On September 21, 2023, the CSA published for comments its proposed amendments to NI 44-102 – *Shelf Distributions* (the “**Proposed Amendments**”)[22] and other related rules and policies to establish a permanent expedited shelf prospectus regime for WKSIs. For details on the Proposed Amendments, please see **Miller Thomson’s Capital Markets & Securities: 2023 Legal Year In Review**. Stakeholders and the Capital Markets Modernization Taskforce have shown support for the Proposed Amendments.

As the Blanket Order expired on January 4, 2025, Rule 44-503 bridges the gap by making the Blanket Order exemptions permanent until the CSA adopts the Proposed Amendments. On November 19, 2024, the Minister of Finance approved Rule 44-503, and it came into force on January 4, 2025.



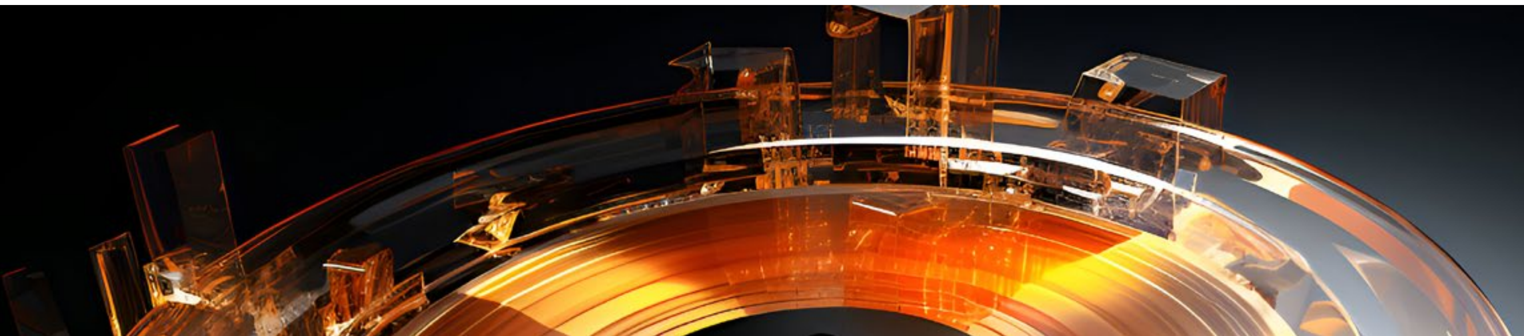
# proposes amendments to align with CSE’s senior tier and modernize securities regulations

On August 1, 2024, the CSA published for comment proposed amendments to select national instruments and policies. These changes aim to address the establishment of a senior tier by the Canadian Securities Exchange (“**CSE**”), codify blanket orders in line with the CBCA “majority voting” amendments, modernize escrow agreements by eliminating the need for them to be signed, sealed and delivered by securityholders in the presence of a witness, and include other housekeeping updates. The comment period for these proposed amendments ended on October 30, 2024.[23]

Following the CSE’s introduction of a senior tier in April 2023, the CSA proposed redefining “venture issuer” and “IPO venture issuer” under securities laws to align them with non-venture exchanges. Additional revisions update National Instrument 45-106 – *Prospectus Exemptions* to include the CSE as a “listed issuer,” allow specific short form prospectus filings for CSE-listed issuers under National Instrument 44-101 – *Short Form Prospectus Distributions* and reclassify the definition of “exempt issuers” within National Policy 46-201 – *Escrow for Initial Public Offerings* (“**NP 46-201**”). Amendments were also made to Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* that would limit exemptions for CSE senior tier issuers related to formal valuations and minority approval. Further, the proposed amendments seek to codify CBCA “majority voting” blanket orders, modernize escrow agreements under NP 46-201, and reflect the recent renaming of PLUS markets to “AQSE Growth Market” and Aequitas Neo Exchange Inc. to “Cboe Canada Inc”.[24]

# CSA

## announces new exemption for exempt-market securities dealers



On June 20, 2024, the CSA issued Coordinated Blanket Order 31-930 (“**Order 31-930**”), which allows exempt market dealers (“**EMDs**”) to participate in prospectus-qualified distributions as selling group members. This initiative aims to increase access to capital for start-ups, as well as small- and medium-sized businesses. In Ontario, this change follows a recommendation from the Ontario Capital Markets Modernization Taskforce, which suggested that allowing EMDs to act as selling group members would increase available capital for issuers, provide more investment opportunities to investors and enable EMDs to support businesses throughout their growth stages.

Traditionally, EMDs have been restricted to assisting start-ups and smaller businesses with raising capital by acting as dealers for exempt securities, particularly in the pre-initial public offering stage. As the businesses would grow and seek access to capital through additional and broader channels, such as prospectus offerings, EMDs would no longer be able to participate. However, Order 31-930 allows EMDs to remain involved in the capital-raising process of issuers as they grow and become more established.

To participate in prospectus offerings under Order 31-930, EMDs must: (a) follow the terms of a selling group agreement with the issuer or lead underwriter; (b) only act as dealers for investors who qualify for prospectus exemptions; (c) not act as underwriters; and (d) not receive compensation exceeding 50% of the lowest compensation paid to any investment dealer in the selling group. Furthermore, EMDs must report a change in business activity and file a Form 33-109F declaring their intent to participate in prospectus offerings.[25]

Order 31-930 has been implemented by securities regulatory authorities in Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, Québec and Saskatchewan. Order 31-930 operates as a temporary exemption from the restrictions of subsection 71(2)(d) of National Instrument 31-103 – Registration Requirements, Exemptions and Ongoing Registrant Obligations (“NI 31-103”). It will remain in effect until December 20, 2025, allowing the CSA to evaluate its impact on the market.

# CSA

## announces new exemptions to support capital raising for early-stage Ontario businesses

As the nature and size of businesses in Ontario's markets continue to evolve, the OSC has responded to some of these changes by announcing a series of initiatives to support capital raising for early-stage Ontario businesses.[26] These initiatives include the following, as more particularly described below:

a. an extended prospectus exemption for "Self-Certified Investors" (as defined below);
b. an early-stage business registration exemption; and
c. an angel investor group registration exemption.

### a. Extended prospectus exemption for "Self-Certified Investors"

In October 2022, the OSC issued Ontario Instrument 45-507 – *Self-Certified Investor Prospectus Exemption (Interim Class Order)*, which allowed for a temporary prospectus requirement exemption for non-investment fund issuers if they have a head office in Ontario and if they distribute securities to Self-Certified Investors, provided that other conditions are also met. For investors to qualify as a "**Self-Certified Investor**," a purchaser must provide the issuer with a completed "Confirmation of Qualifying Criteria," as well as an "Acknowledgement of Risks." Along with completing the aforementioned documents, to qualify as a Self-Certified Investor, investors must also meet at least one of the prescribed qualifications, such as:

i. holding certain designations (e.g., CFA, CPA or CBV **ntd: consider not using the acronyms**) or business degrees;
ii. passing certain courses or exams; or
iii. having relevant operational experience at a business that operates in the same industry or sector as the issuer and being able, as a result of this experience, to adequately assess and understand the risk of investment in the issuer.

These exemptions will remain in effect until October 25, 2025, subject to any exemptions or extensions.

## b. The early-stage business registration exemption

When an entity is "in the business" of trading in securities, certain dealer registration requirements will apply. These requirements may be onerous and expensive for early-stage businesses, who seek to raise capital regularly, but do not want to run the risk of being subject to registration requirements. This exemption allows eligible businesses to engage in certain permitted marketing activities while remaining exempt from dealer registration requirements. To be considered an eligible business, businesses must:

i. have its head office and operations in Ontario;
ii. be seeking capital to start, grow or scale;
iii. have less than 100 employees;
iv. have a primary business purpose that is not investing in real estate, mortgages, other businesses or other assets;
v. have a business purpose other than to identify and evaluate assets or a business with a view to completing a significant transaction; and
vi. not be engaged in the business of holding, investing in or trading crypto assets, or the operation of a gaming or betting business.

The OSC recognizes the importance of early-stage businesses as contributors to the economy, job creation, and innovation and competition, and this exemption reflects the OSC's interest in continuing to foster the growth of early-stage businesses in Ontario.[27]

## c. The angel investor group registration exemption

Angel investor groups are groups that bring together angel investors interested in supporting early-stage businesses. Similar to the foregoing, the activities these groups partake in run the risk of triggering registration and dealer requirements. To qualify for the exemption, the angel investor group must:

i. be a not-for-profit;
ii. operate in Ontario with its head office located in Ontario;
iii. have no more than 500 members, each being an accredited investor or eligible to be a Self-Certified Investor (as discussed above);
iv. engage in one or more prescribed activities, such as identifying early-stage businesses in Ontario seeking capital to introduce to its members; and
v. limit any transaction-based compensation it receives to a maximum of 5% of the value of the securities invested by its members.

# A shorter

## T+1 standard settlement cycle is coming soon

In May 2024, the standard settlement cycle for securities in Canada and the United States shifted from T+2 (trade date plus two business days) to T+1 (trade date plus one business day).[28] This transition is expected to, among other things, decrease credit and counterparty risk, reduce collateral costs, enhance market liquidity and offer quicker access to funds.

The changeover occurred during the weekend of May 25th to May 27th 2024, with Canada beginning T+1 trading on May 27th, while the U.S. started on May 28th due to Memorial Day. Both markets aligned on T+1 trading by May 30, 2024.

In preparation for these amendments, regulatory adjustments were made to support the transition to the shorter settlement cycle. This included amendments by the CSA to update trade matching and settlement rules, as well as changes by the Toronto Stock Exchange ("TSX") and Canadian Investment Regulatory Organization (CIRO).

Moving forward, industry participants must update their internal systems and processes to comply with the new cycle. Resources and guidance have been provided by the Canadian Capital Markets Association (CCMA) and the Depository Trust and Clearing Corporation (DTCC) to facilitate a smooth transition and application of the amendments moving forward.

# CSA
# proposes binding dispute resolution framework for retail client complaints

## Background

On November 30, 2023, the CSA issued a publication with a 90-day comment period that expired on February 28, 2024, regarding proposed amendments to various complaint-handling provisions in NI 31-103 and its companion policy.[29]

Currently, Part 13, Division 5 of NI 31-103 provides for complaints issued by registered firms, other than investment firms, to be handled and responded to by the Ombudsman for Banking Services and Investments ("**OBSI**"). The OBSI is an independent service that resolves disputes and recommends monetary compensation up to $350,000; however, it has no formal authority or procedures for requiring firms to pay complainants.[30]

# Proposed new **Framework**

The CSA's proposed amendments would create a new and independent dispute resolution service ("**IDRS**") that is a not-for-profit entity recognized by CSA jurisdictions and would have the authority to issue binding decisions.[31] This proposed framework is meant to promote fairness, efficiency and accessibility for all parties while improving access to dispute remedies.

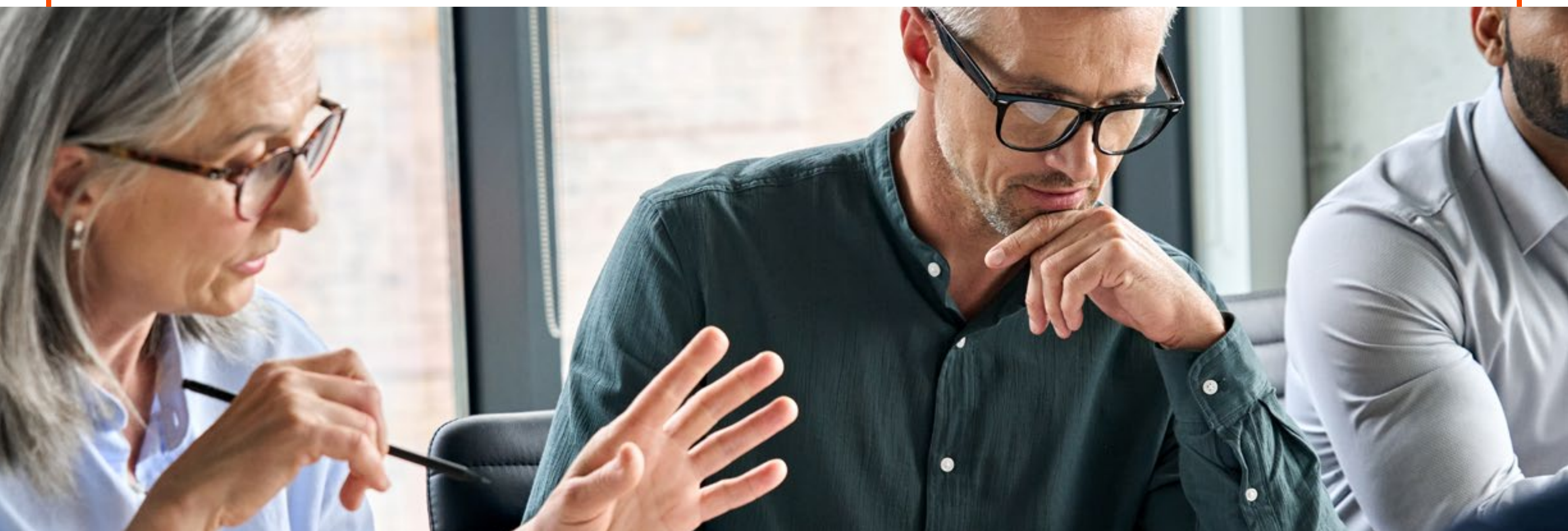
Under this new framework, the intent is for the OBSI to be the IDRS. The framework consists of two stages: (a) the "investigation and recommendation" stage; and (b) the "review and decision" stage.

The first stage would integrate the OBSI's existing investigation and recommendation processes, which is triggered when a retail client notifies the IDRS of an unresolved complaint through the firm's internal complaint handling process and requests that the IDRS consider resolving it.

The second stage is a new stage whereby the IDRS would issue a binding decision. This stage is triggered by submitting a written objection to the IDRS regarding its recommendation. A senior decision-maker of the IDRS who was not involved in the first stage would consider the objection and conduct their own review in accordance with the "essential process test", which enables the senior ombudsman of the IDRS to use inquisitorial and adversarial processes.

While there is no proposed statutory right of appeal for a decision rendered in the "review and decision" stage, the proposed framework contemplates the availability of judicial review in applicable circumstances.

On November 7, 2024, the CSA declared that they have reviewed all comments since the closure of the comment period on February 28, 2024, and have plans to issue a further publication for comment in the second half of 2025, which includes the CSA's proposed approach to oversight.



# Glass Lewis and ISS 2024

## Canadian benchmark policy guidelines and updates

### Glass Lewis updates for 2024

For 2024, proxy advisory firm Glass Lewis & Co. (“**Glass Lewis**”) has introduced several important updates to its benchmark policy guidelines, impacting board accountability, human capital management, cyber risk oversight, interlocking directorships, audit expertise, clawback provisions, executive ownership and shareholder equity awards.[32]

#### BOARD ACCOUNTABILITY ON CLIMATE- RELATED MATTERS

In 2023, Glass Lewis implemented a policy stating that Glass Lewis may recommend voting against responsible directors in specific circumstances for companies with material exposure to climate risk due to their own operations. This policy previously applied to the largest and most significant emitters; however, the 2024 policy guidelines extends this policy to TSX 60 companies in industries identified by the Sustainability Accounting Standards Board (SASB) as having greenhouse gas emissions that pose a financially material risk.

#### HUMAN CAPITAL MANAGEMENT

Where a company’s board has not addressed serious concerns about human capital management, Glass Lewis may recommend voting against key board members, such as the chair of the relevant oversight committee, the governance committee chair and/or the board chair.

#### CYBER RISK OVERSIGHT

Following cyber-incidents which cause a material impact, Glass Lewis will evaluate the board’s cybersecurity oversight, response and transparency. If these elements are found to be insufficient, Glass Lewis may recommend against re-electing certain or all directors.

#### INTERLOCKING DIRECTORSHIPS

Glass Lewis discourages board interlocks that could indicate conflicts of interest and will generally recommend withholding votes for directors with interlocking relationships. Glass Lewis has expanded this policy to consider both public and private companies. Other interlocking relationships will be evaluated on a case-by-case basis, and multiple board interlocks among non-insider directors will be investigated for patterns of poor oversight.

#### AUDIT FINANCIAL EXPERT DESIGNATION.

Glass Lewis may recommend withholding votes from the audit committee chair if there is no “audit financial expert” on the committee. This audit financial expert designation is now considered separately from “financial skills” in the skills matrix, which includes more general financial expertise beyond accounting or audit experience. Glass Lewis expects companies to disclose that such a director has experience as one or more of the following: (a) a chartered accountant; (b) a certified public accountant;

(c) a former or current Chief Financial Officer of a public company or corporate controller of similar experience; (d) a current or former partner of an audit company; or (e) an individual having similar demonstrably meaningful audit experience.

### CLAWBACK PROVISIONS

Glass Lewis emphasizes that clawback policies should address excessive risk-taking by enabling recovery of incentive compensation from executives when there is evidence of problematic actions or decision-making. These may include material misconduct, a material reputational failure, material risk management failure or a material operational failure, where the consequences have not yet been reflected in the incentive payments and where recovery is warranted. Recoupment should be provided regardless of whether an executive officer's employment has been terminated with or without cause. Companies should provide explanations when opting not to pursue clawbacks, including explanations of alternative measures pursued, which Glass Lewis will assess when determining their overall recommendation for the advisory vote on executive compensation.

### EXECUTIVE OWNERSHIP GUIDELINES

A new policy formalizes the expectation for minimum share ownership rules for named executive officers (i.e. "NEOs"), with transparent disclosure in the "Compensation Discussion and Analysis" section of the management information circular. This disclosure should outline the rules and explain how outstanding equity awards impact ownership levels. Glass Lewis considers the inclusion of unearned or unvested awards in ownership calculations, without adequate disclosure, to be potentially problematic.

### EQUITY AWARDS FOR SHAREHOLDERS

For equity awards where the recipient is a large shareholder whose vote can affect the approval of the proposal, Glass Lewis recommends companies consider the level of approval from disinterested shareholders to prevent conflicts of interest. Glass Lewis will view non-votes and votes of abstention from the large shareholder favourably, during their evaluation.

## Key ISS Voting Guideline Updates for 2024

Proxy advisory firm Institutional Shareholder Services ("**ISS**") has also announced several updates to its voting guidelines for the 2024 proxy season.[33]

### BOARD DIVERSITY POLICY.

ISS has removed the one-year grace period for companies listed on the S&P/TSX Composite Index to comply with the board diversity policy of ISS. Starting February 1, 2024, companies should either have at least one racially or ethnically diverse director or publicly commit to adding one before their next annual general meeting ("**AGM**").

### NON-EXECUTIVE DIRECTOR ("NED") COMPENSATION.

For TSX-listed companies, ISS has updated its guidelines on NED equity compensation. The percentage limits on option grants have been removed and now individual grants should not exceed $150,000 annually across all equity compensation plans, with no more than $100,000 in stock options. ISS will vote against any grants exceeding this limit. Additionally, ISS will oppose equity-based compensation plans that do not specify annual individual NED grant limits of $100,000 worth of stock options or $150,000 worth of shares.

### VENTURE COMPANY EQUITY PLANS.

For companies listed on the CSE, shareholder approval is required within three years of the implementation of a "rolling" equity plan and every three years thereafter. ISS has revised its policy regarding venture companies' equity compensation plans and will now recommend a vote against continuing compensation committee members – or the full board, if no compensation committee exists – if a company fails to seek approval of an equity-based compensation plan at the AGM after adopting the plan.

# Joint actors

## in shareholder activism

A decision by the British Columbia Securities Commission ("**BCSC**") has provided guidance on proxy contests and the criteria for determining whether shareholders are acting jointly or in concert. In *NorthWest Copper Corp. (Re)*, the BCSC reviewed an application by NorthWest Copper Corp. ("**NorthWest**") involving the alleged non-compliance of three shareholders with early warning disclosure requirements found in National Instrument 62-104 – *Take-Over Bids and Issuer Bids* ("**NI 62-104**").[34]

Under NI 62-104, joint actors must publicly disclose their joint action in advance where they collectively hold more than 10% of a company's outstanding securities.[35] The three shareholders of the case at hand, hereinafter referred to as X, Y and Z, held 0.4%, 3.9% and 7.9% of the outstanding securities, respectively. Accordingly, the case turned on Z's involvement as a potential joint actor since otherwise, the 10% threshold would not be met.

The issues arose when X delivered notice that he planned to nominate an alternate slate of directors and specifically stated he was not acting in concert with other shareholders. NorthWest then claimed that X had been jointly acting with Y and Z, without making prior disclosure, contrary to NI 62-104.

The evidence supporting NorthWest's claim included the following: (a) Z loaned $500,000 to Y to participate in NorthWest's prior private placement; (b) Z funded the costs of X's proxy solicitation campaign; and (c) Z's nominee was included in X's slate of directors. However, Z did not sign any formal agreement with the dissidents and had also been negotiating with management to support them in the vote in exchange for a nominee on management's slate of directors. Z expressed that his intention was to mitigate his risks by ensuring he had a nominee, no matter which side prevailed in this matter.

The BCSC ultimately found that despite Z's financial support of the dissidents, Z was acting solely in his own best interest at all times during the contest and was only interested in ensuring he had a representative on the board moving forward. Accordingly, the BCSC declined to draw the inference that Z was working jointly with X and Y from circumstantial evidence where there were reasonable alternative explanations. That is, Z was not "engaged in a common enterprise" with the dissidents in a manner that would find them to be joint actors.

The BCSC concluded by stating that the "bar for a finding that parties are acting jointly or in concert is appropriately set relatively high." The decision sends a strong signal that Canadian regulators will safeguard the ability for public shareholders to engage in strategic communications and ensure that the free flow of information remains unhindered.

# OSC investor warnings

The OSC has been reviewing the use of digital platforms to engage investors and has expressed concern that these platforms may be detrimental for investors. The OSC has begun to examine the techniques utilized within digital engagement practices to ensure that investors' best interests are adequately protected, and published a report in February 2024 on this topic.[36]

Many of these digital platforms are available to self-directed retail investors, and the OSC is one of many regulators globally who are concerned that these platforms engage in potentially deceptive and misleading practices to draw investors in. These techniques are called "dark patterns," which are strategies employed by businesses to mislead the investor into making choices that ultimately benefit the business and not the investor, sometimes also at the expense of the investor. Some examples of strategies that may harm investors are to disguise the cost of investing to investors by failing to disclose hidden fees, by obtaining personal investor information without informed consent, and/or by complicating the process to withdraw funds or close accounts. [37]Accordingly, investors are encouraged to be cautious when using these platforms.

In its publication, the OSC reviewed some of the strategies that regulators are introducing throughout not only Canada, but in the United States and Europe as well, as these issues are arising globally. In Canada, the regulatory framework for these issues includes *the Personal Information Protection and Electronics Document Act*, Canada's *Anti-Spam Legislation (CASL)* and *the Competition Act*. There is growing interest for provincial securities regulators, including the OSC, to become more involved in the regulation of these digital platforms.[38]

# Our Experience

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: 2024 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.

# Endnotes

1 See manual CPA- Canada Sustainability

2 SEC Final Rule Release No. 33-11275, The Enhancement and Standardization of Climate-Related Disclosures for Investors.

3 CSA Staff Notice 81-334 (Revised) *ESG-Related Investment Fund Disclosure*.

4 Autorité des marchés financiers. Climate Risk Guideline. Available at **https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-toutes-institutions/LD-gestion-risques-lies-aux-changements-climatiques_an.pdf**.

5 Office of the Superintendent of Financial Institutions. Climate Risk Management. Available at **https://www.osfi-bsif.gc.ca/en/guidance/guidance-library/climate-risk-management**.

6 Government of Canada. A Transformative Framework to Achieve and Sustain Employment Equity - Report of the Employment Equity Act Review Task Force. Available at **https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/reports/act-review-task-force.html**.

7 Government of Canada. Minister O'Regan receives Task Force report on Employment Equity Act modernization. Available at **https://www.canada.ca/en/employment-social-development/news/2023/12/minister-oregan-receives-task-force-report-on-employment-equity-act-modernization.html**.

8 CSA, Notice and Request for Comment – Proposed Amendments to National Instrument 81-102 Investment Funds Pertaining to Crypto Assets (Jan 18, 2024)

9 CSA, "Canadian securities regulators provide updated guidance on virtual shareholder meetings" (February 2022), online: **https://www.securities-administrators.ca/news/canadian-securities-regulators-provide-updated-guidance-on-virtual-shareholder-meetings/**.

10 CSA, "Canadian securities regulators provide updated guidance on virtual shareholder meetings" (February 2024), online: **https://www.securities-administrators.ca/news/canadian-securities-regulators-provide-updated-guidance-on-virtual-shareholder-meetings-2/**.

11 Ibid.

12 Ibid.

13 OSC, "CSA Notice of Publication of Amendments and Changes to Implement an Access Model for Prospectus of Non-Investment Fund Reporting Issuers" (January 2024), online: **https://www.osc.ca/en/securities-law/instruments-rules-policies/4/41-101/csa-notice-publication-amendments-and-changes-implement-access-model-prospectuses-non-investment**

14 Ibid.

15 Riot Platforms, Inc. v Bitfarms LTD and Ontario Securities Exchange, Capital Markets Tribunal File No. 2024-11, July 24, 2024. **https://www.capitalmarketstribunal.ca/en/proceedings/riot-platforms-inc-v-bitfarms-ltd/order-riot-platforms-inc-v-bitfarms-ltd-0**

16 OSC, "OSC seeks feedback on proposed process for distributing disgorged funds to harmed investors" (July 2024), online: **https://www.osc.ca/en/news-events/news/osc-seeks-feedback-proposed-process-distributing-disgorged-funds-harmed-investors**.

17 Bill 146, *Building a Strong Ontario Together Act (Budget Measures), 2023*, 1st Sess, 43rd Leg, Ontario, 2023 (assented to 4 December 2023) SO 2023, c 21.

18 *Poonian v British Columbia (Securities Commission)*, 2024 SCC 28.

19 OSC, Rule 44-503 *Exemption from Certain Prospectus Requirements for Well-Known Seasoned Issuers* (September 19, 2024).

20 *Securities Act*, RSO 1990, c S.5.

21 OSC, Ontario Instrument 44-501 – *Exemption from Certain Prospectus Requirements for Well-Known Seasoned Issuers (Interim Class Order)* (December 6, 2021).

22 CSA, Notice and Request for Comment – *Proposed Amendments to National Instrument 44-102 Shelf Distributions Relating to Well-Known Seasoned Issuers* (September 21, 2023).

23 Canadian Securities Administrators. CSA Notice and Request for Comment – Proposed Amendments and Changes to Certain National Instruments and Policies Related to the Senior Tier of the Canadian Securities Exchange, the Cboe Canada Inc. and AQSE Growth Market Name Changes, and Majority Voting Form of Proxy Requirements. 47 OSCB 6251, August 1, 2024. Available at https://www.osc.ca/en/securities-law/instruments-rules-policies/4/41-101/csa-notice-and-request-comment-proposed-amendments-and-changes-certain-national-instruments-and.

24 Ibid.

25 CSA, NI 33-109 *Registration Information* (June 6, 2022).

26 OSC, "OSC announces initiatives to enhance access to capital for early-stage businesses in Ontario" (May 2024), online: **https://www.osc.ca/en/news-events/news/osc-announces-initiatives-enhance-access-capital-early-stage-businesses-ontario**.

27 Ibid.

28 OSC, "Canadian securities regulators announce move to T+1 settlement cycle" (May 2024), online: **https://www.osc.ca/en/news-events/news/canadian-securities-regulators-announce-move-t1-settlement-cycle**.

29 OSC, "CSA Notice and Request for Comment – Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service – Proposed Amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations and Proposed Changes to Companion Policy 31-103CP Registration Requirements, Exemptions and Ongoing Registrant Obligations" (November 2023), online: **https://www.osc.ca/en/securities-law/instruments-rules-policies/3/31-103/csa-notice-and-request-comment-registered-firm-requirements-pertaining-independent-dispute**

30 Ibid.

31 Ibid.

32 Glass Lewis & Co. 2024 *Benchmark Policy Guidelines – Canada*, Jan. 2024.

33 Institutional Shareholder Services (ISS). *Proxy Voting Guidelines for TSX-Listed Companies: Benchmark Policy Recommendations.* ISS, Jan. 2024.

34 *NorthWest Copper Corp.* (Re), 2023 BCSECCOM 602

35 CSA, NI 62-104 *Take-Over Bids and Issuer Bids* (June 9, 2023)

36 OSC, "Digital Engagement Practices : Dark Patterns in Retail Investing" (February 2024), online: **https://www.osc.ca/en/investors/investor-research-and-reports**.

37 Ibid.

38 Ibid.

Miller Thomson's

# Capital Markets Team

## PARTNERS

(Listed by Year of Call)

Lawrence Wilder
Partner | Toronto
+1 416.597.6062
LWILDER@MILLERTHOMSON.COM

Bernard Blouin
Partner | Montreal
+1 514.871.5351
BBLOUIN@MILLERTHOMSON.COM

Bruno Caron
Partner | Montreal
+1 514.879.4076
BCARON@MILLERTHOMSON.COM

Dwight D. Dee
Partner | Vancouver
+1 604.643.1239
DDEE@MILLERTHOMSON.COM

Geoff Clarke
Partner | Toronto
+1 416.597.6056
GCLARKE@MILLERTHOMSON.COM

Adam Kline
Partner | Toronto
+1 416.597.4333
AKLINE@MILLERTHOMSON.COM

Rohit Kumar
Partner | Waterloo Region, Toronto
+1 416.595.2665
RKUMAR@MILLERTHOMSON.COM

Alexander Lalka
Partner | Toronto
+1 416.597.4391
ALALKA@MILLERTHOMSON.COM

Rhea Solis
Partner | Calgary
+1 403.298.2421
RSOLIS@MILLERTHOMSON.COM

Jonathan Tong
Partner | Toronto
+1 416.597.6052
JTONG@MILLERTHOMSON.COM

Mack Hosseinian
Partner | Toronto
+1 416.597.6033
MHOSSEINIAN@MILLERTHOMSON.COM

# Miller Thomson's
# Capital Markets Team

## ASSOCIATES
(Listed by Year of Call)

**Brandon Meyer**
Associate | Toronto
+1 416.595.8529
BMEYER@MILLERTHOMSON.COM

**Ian Polisuk**
Associate | Toronto
+1 416.595.2991
IPOLISUK@MILLERTHOMSON.COM

**Andrew Gunpat**
Associate | Toronto
+1 416.595.258
AGUNPAT@MILLERTHOMSON.COM

**Thomas Ghag**
Associate | Vancouver
+1 604.628.2931
TGHAG@MILLERTHOMSON.COM

**Christopher Fallis**
Associate | Toronto
+1 416.597.6089
CFALLIS@MILLERTHOMSON.COM

**Madison Derraugh**
Associate | Toronto
+1 416.597.6075
MDERRAUGH@MILLERTHOMSON.COM

**Simon Igelman**
Associate | Toronto
+1 416.597.6018
SIGELMAN@MILLERTHOMSON.COM

**Andrea Chiu**
Associate | Toronto
+1 416.597.6088
ACHIU@MILLERTHOMSON.COM

**Conner Broude**
Associate | Toronto
+1 416.596.2104
CBROUDE@MILLERTHOMSON.COM

**Wendy Wang**
Associate | Toronto
+1 416.597.6079
WWANG@MILLERTHOMSON.COM

**Sandra Wright**
Associate | Toronto
+1 416.597.6096
SWRIGHT@MILLERTHOMSON.COM

**Raquel Moses**
Associate | Toronto
+1 416.597.4329
RMOSES@MILLERTHOMSON.COM

**Eugene Yeung**
Associate | Toronto
+1 416.597.6032
EYEUNG@MILLERTHOMSON.COM

MILLER THOMSON

**MILLERTHOMSON.COM**

## Disclaimer

This publication is provided as an information service and may include items reported from other sources. We do not warrant its accuracy. This information is not meant as legal opinion or advice.

© Miller Thomson LLP. This publication may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested by contacting **newsletters@millerthomson.com.**

VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON WATERLOO REGION TORONTO VAUGHAN MONTRÉAL

MILLERTHOMSON.COM