Canadian Securities Litigation: Trends to Watch 2023

Capital market participants in Canada face a minefield of emerging securities regulatory and litigation risks, from the rising wave of climate disclosure-related litigation and shareholder activism to the enhanced scrutiny of cybersecurity controls and the rippling financial impacts from rapid changes in crypto asset ecosystem, to name a few. Our **Securities Litigation Group**, in collaboration with members of our **Capital Markets**, **Critical Situations and Shareholder Activism** and **ESG and Sustainability** groups, provides an overview of these significant developments and highlights trends to watch for in 2023.

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Is Cyber-Related Securities Litigation Coming to Canada?

By Wendy Berman, Dan Glover, Katherine Booth, Brittany Cerqua and Jessica Mank

The prevalence and sophistication of cyber attacks is an emergent risk for public companies and other capital market participants. Cybersecurity incidents can have significant financial, operational, legal and reputational impacts. As a result, there is heightened scrutiny by stakeholders and regulators of cybersecurity-related disclosures, including disclosure of risk mitigation controls, strategy and governance and timely disclosure of cybersecurity incidents.

Even in the absence of more prescriptive regulatory requirements, stakeholders are increasingly challenging the adequacy of cybersecurity-related disclosures following a cybersecurity incident, both through class action litigation and complaints to regulators.

This growing trend in cybersecurity disclosure-related litigation has not yet reached Canada, but Canadian companies should be watching. Cybersecurity class action litigation in Canada has generally advanced liability theories based only on harm to individuals whose information was impacted, not harm to shareholders as a result of misleading or inaccurate cybersecurity-related disclosure. The landscape is different in the United States, where cybersecurity-related disclosure securities class actions are a developing area for plaintiff's counsel.

> **There is heightened scrutiny by stakeholders and regulators of cybersecurity-related disclosures, including disclosure of risk mitigation controls, strategy and governance and timely disclosure of cybersecurity incidents.**

Enhanced cybersecurity disclosure requirements will increase the risk of litigation, including class actions and securities enforcement action. Although Canadian securities regulators have not proposed nor implemented any enhanced mandatory cybersecurity-related disclosure requirements for public companies or registrants, we anticipate that the cybersecurity disclosure requirements implemented or proposed in other jurisdictions may prompt Canadian developments.

IN CANADA, REGULATORY GUIDANCE BUT NO RULES

Canadian public issuers are required required to disclose material risks affecting their business (including the financial impacts of such risks, where practicable) as well as any material change in their business, operations or capital that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the company.[1] Canadian registered advisors, dealers and investment fund managers are also required to establish a system of controls to ensure compliance with securities legislation and manage the risks associated with the business in accordance with prudent business practices.[2]

Any material cybersecurity risks or cybersecurity incidents must be disclosed under general disclosure requirements. However, Canadian securities regulators have not imposed enhanced mandatory disclosure about cybersecurity risk management, a company's cybersecurity posture or cyber attacks. To date, Canadian securities regulators have only published guidance which sets outs regulatory expectations for issuers' cybersecurity-related disclosures (published in 2017)[3], including:

- risk governance and risk mitigation strategy (including to what extent the issuer maintains insurance for cybersecurity incidents and its reliance of third party experts for cybersecurity strategy or remediation of cyber incidents);
- specific, detailed disclosure of material cybersecurity risks with determination of materiality requiring assessment of both the probability of cybersecurity incident(s) and the anticipated magnitude of the incident;
- maintenance of internal controls and procedures designed to ensure that detected cybersecurity incidents are communicated to management for timely disclosure decisions; and
- material cybersecurity incidents, including if appropriate disclosure of the anticipated impact and costs of the incident, with materiality determination based on a contextual analysis of the incident and related circumstances, including impact on operations and reputation, customers, employees and investors, throughout the different phases of detection, assessment and remediation of the issuer's incident response process.

Canadian securities regulators expectations for registered dealers, advisors and investment fund managers, include that such registrants have an obligation to:

1. maintain cybersecurity policies and procedures;
2. conduct frequent, adequate training for all employees;
3. perform annual cybersecurity risk assessments;
4. prepare and implement a cybersecurity incident response plan;
5. ensure oversight and evaluation of the adequacy of third party service providers' cybersecurity practices;
6. implement data protection measures; and
7. review the adequacy of insurance coverage for cybersecurity incidents.

While such guidance is not a mandatory disclosure rule, Canadian securities regulators apply the guidance "when assessing how firms comply with their obligations to manage the risks associated with their business".[4]

The TSX also does not have prescriptive cybersecurity disclosure requirements, but provides guidance in the context of ESG disclosure that encapsulates cybersecurity. The TSX lists cybersecurity and data privacy as a 'social' factor that may be material for issuers and thereby trigger disclosure requirements.[5] The TSX notes, "The fundamental principle is that issuers should provide all information that would be material to an investor's investment decision, including material information about E&S issuess".[6]

NEW PROPOSED CYBERSECURITY REPORTING OBLIGATIONS IN THE US

In the United States, the US Securities and Exchange Commission (SEC) currently has only published guidance on cybersecurity obligations.[7] However, in March 2022, the SEC proposed new cybersecurity-specific rules that, if implemented, will impose significant new disclosure obligations, including requirements to provide disclosure about material cybersecurity incidents, risk management, strategy and governance.[8] The comment period on the SEC's proposed new rule has closed. The SEC has not yet confirmed what changes will be made to the proposed rules or when any new rules will take effect.

> **Enhanced cybersecurity disclosure requirements will increase the risk of litigation, including class actions and securities enforcement action.**

"Material" Incidents

Under the proposed new rules, issuers would be required to report "material" cybersecurity incidents within four business days of determining the incident is material. An incident would be material if "there is a substantial likelihood that a reasonable shareholder would consider [the incident] important" in making an investment decision, or where the incident would have "significantly altered the 'total mix' of information made available" to the investor. Doubts as to the materiality of information should "be resolved in favour of…investors". The company's determination of materiality would need to occur as soon as reasonably practicable, and the fact of an ongoing investigation would not be grounds to delay reporting.

If the cybersecurity incident is reportable, companies would be required to disclose specific information including: (i) when the incident was discovered and whether it is ongoing; (ii) a brief description of the nature and scope of the incident; (iii) whether any data was stolen, altered, accessed or used for an unauthorized purpose; (iv) the effect of the incident on the company's operations; and (v) whether the company has remediated or is remediating the incident. Companies would also be required to disclose in their periodic reports any material changes, additions or updates to information previously reported about a material cybersecurity incident.

Incidents That Are Material in the Aggregate

The proposed new rules would impose new obligations on issuers to analyze cybersecurity incidents in the aggregate, and disclose incidents that while individually immaterial and thus not reportable on their own, have become "material" in the aggregate.

Cybersecurity Risk Management and Strategy

The proposed new rules would further require issuers to make periodic disclosures about their cybersecurity risk management and strategy, including: the issuer's policies and procedures to identify and manage cybersecurity risks; management's role in assessing and managing cybersecurity risks and implementing the issuer's cybersecurity policies, procedures and strategies; management's relevant expertise in cybersecurity; and the board of directors' oversight of the company's cybersecurity risk.[9]

TRENDS IN CYBER-RELATED SECURITIES CLASS ACTIONS

Cyber-related securities litigation is a developing area of class actions in the United States. The core allegation in these claims is that a company or its directors and officers allegedly made false or misleading representations about the company's cybersecurity posture (*e.g.*, compliance with privacy laws and regulations or not disclosing regulatory investigations) or a cybersecurity incident (*e.g.*, downplaying or not disclosing an incident), and are therefore liable to shareholders for any decline in the company's share price that occurs after a cybersecurity issue becomes public.

> **Notwithstanding the challenges plaintiffs face, cyber-related securities fraud claims continue to be filed and remain an emerging risk for issuers.**

So far, plaintiffs have had a mixed bag of success and face significant challenges in such claims, although several recent decisions may indicate a trend that such claims will survive beyond preliminary motions to strike. For example, *In re Equifax Inc. Securities Litigation* survived a motion to dismiss, in part, and was later settled for $149 million.[10] *Alphabet Inc. v. Rhode Island* also survived a motion to dismiss (with the US Supreme court declining leave to appeal in March 2022) and involved a claim for misleading and inadequate risk disclosure regarding cybersecurity threats, some of which were realized risks.[11] *In re: K12 Inc. Securities Litigation* was dismissed because most of the alleged misrepresentations about the company's ability to provide virtual learning services were statements that would not be relied on by investors.[12] All but one claim for misleading cybersecurity disclosure was dismissed in *In re Zoom Securities Litigation* because of a failure to demonstrate fraudulent intent (which is not a requirement in Canadian securities class actions). The surviving alleged misstatement that the company maintained robust data security

capabilities survived as a result of the CEO's statement that the company had "fallen short…of privacy and security expectations"[13]. *In re 360 DigiTech, Inc. Securities Litigation* was dismissed, including because the company's statements about its regulatory compliance adequately disclosed the evolving Chinese regulatory landscape and attendant risks.[14]

Notwithstanding the challenges plaintiffs face, cyber-related securities fraud claims continue to be filed and remain an emerging risk for issuers. If the SEC's new rules are implemented, companies' increased disclosure obligations may provide more fodder for class action plaintiffs and counsel.

In Canada, proposed class actions relating to cyber attacks have so far primarily been focused on individuals whose information may have been affected by a cybersecurity incident, not securities class actions. However, a developing body of Canadian law is making it increasingly difficult for plaintiffs to prosecute these claims, especially where the defendant is the victim of a third party hack and there is no evidence any proposed class member has actually suffered any harm.[15] Given these developments, we anticipate that Canadian plaintiff's counsel will follow the trend in the United States and commence securities-related class actions on behalf of investors on the basis of inadequate cybersecurity disclosures and seek damages based on share price drops.

LOOKING AHEAD

Trends in the United States are often a harbinger of what may be coming to Canada. Given the heightened risk of, and enterprise impacts from, a cyber attack, issuers should anticipate that Canadian securities regulators are either already, or will soon be, considering increasing their regulatory reach over issuers' cybersecurity and disclosure obligations, and Canada may begin to see cyber-related securities class actions. Both of these developments will bring more scrutiny to issuers' cybersecurity risk management practices and disclosures.

Looking ahead to 2023 and beyond, Canadian public companies should continue to make cybersecurity risk management a priority when assessing compliance with securities laws. Boards of directors should also continue to anticipate increasing responsibility for and oversight of cybersecurity matters, and ensure they are up to date on their legal obligations and the company's cybersecurity posture and procedures.

The Race to Green: A Perfect Storm for Heightened Scrutiny and Litigation

By **Wendy Berman**, **Sonia Struthers**, **Isabelle Vendette**, **Sam Rogers**, **William Main**, and **Jonathan Nehmetallah**

The increasing prevalence of physical, financial and social impacts arising from the climate crisis has shifted stakeholder sentiment and created a unique opportunity for value creation in the transition to a net zero economy. Global inflows into sustainable assets reached over US$4 trillion and Canadian investments in sustainable funds more than doubled in 2021 with the growth tapering in 2022.[1] This paradigm shift in the global allocation of capital demonstrates the importance of factoring climate-related risks and opportunities into the price of investments to ensure efficient capital allocation as well as the importance of managing the concomitant increased risk for potential "greenwashing" or "climate washing".

This "race to green" is happening against the backdrop of a rapidly evolving landscape for sustainability-related disclosures and a growing wave of greenwashing litigation against companies and their directors and officers. Greenwashing allegations span claims of inaccurate or misleading statements about climate-related financial and operational impacts and risks, climate-related commitments or strategies and sustainability-related attributes of products or corporate activities. Activists are increasingly using innovative climate-related litigation strategies to not only obtain monetary damages, but also to garner publicity and to drive corporate change.

EVOLVING DISCLOSURE LANDSCAPE

An evolving disclosure landscape and the lack of any global baseline for consistent comparable mandatory sustainability-related disclosures creates unique challenges for issuers and asset managers, including increased risk of scrutiny by stakeholders for greenwashing. In Canada, mandatory climate-related disclosure requirements are relatively limited:

1. private companies are only required to meet federal disclosure requirements for greenhouse gas emissions on a facility basis, subject to certain thresholds;[2]

2. publicly-listed issuers are subject to mandatory climate-related risk disclosures with enhanced mandatory climate-related disclosure rules proposed by Canadian securities regulators (expected to be final in the near term)[3], and are also subject to mandatory federal disclosure requirements for greenhouse gas emission on a facility basis, subject to certain thresholds; and,

3. investment funds are not subject to any mandatory sustainability-related specific disclosures or taxonomies. Canadian securities regulators have only provided guidance aimed at reducing the potential for greenwashing within the context of the existing disclosure requirements relating to investment strategies and marketing materials.[4]

> **Activists are increasingly using innovative climate-related litigation strategies to not only obtain monetary damages, but also to garner publicity and to drive corporate change.**

The Canadian federal government has proposed mandatory climate-related financial disclosures for federally regulated banks and other financial institutions, expected to be final in early 2023 and implemented through a phased approach beginning in 2024.[5] These proposed disclosures, as well as those proposed by Canadian securities regulators are largely consistent with the voluntary framework established by the Task Force on Climate-related Financial Disclosures framework ("**TCFD**").[6] A Canadian taxonomy for the use of green or transition terms or labelling has not yet been developed nor has any global taxonomy been endorsed, although the federal government has published a framework for the development of a taxonomy.[7]

Mandatory enhanced climate-related disclosure requirements for issuers and investment funds are at various stages of implementation in other jurisdictions, including the US, UK, Europe and Australia.[8] We anticipate that Canada will adopt some of the requirements that have been implemented or proposed in these jurisdictions in the coming years.

REGULATORY ENFORCEMENT

Even prior to the implementation of enhanced mandatory sustainability-related disclosure requirements, globally regulators have indicated that they will hold companies (and their directors and officers) and asset managers, responsible for their sustainability-related statements, whether in regulatory filings, voluntary sustainability reports or marketing materials, using a range of tools from disclosure deficiency warning letters to enforcement proceedings.

Although no securities enforcement proceedings have yet been commenced in Canada, securities regulators have issued warnings and reports about sustainability-related disclosure deficiencies for both public companies and investment funds and recently made strong statements that enforcement will be used to address greenwashing by capital market participants.[9] The Canadian Competition Bureau has also signaled that greenwashing is a high enforcement priority.[10]

> **We also expect increasing whistleblower complaints by investors and other stakeholders to regulators relating to sustainability-related disclosures, including net zero commitments and other climate-related statements and strategies.**

Recent disclosure reviews demonstrate that there are significant deficiencies in climate-related disclosures, even under the current, less prescriptive regime. The Canadian securities regulators 2021 review of public company disclosures showed that:

- more than 40% of climate-risk disclosures were boilerplate, vague or incomplete;
- 25% did not address the related financial impact at all; and
- none of the companies quantified the financial impact of the identified climate-related risks.[11]

The 2022 review highlighted an increase in overly promotional and unsubstantiated sustainability-related disclosures and identified greenwashing in core regulatory filings and voluntary filings (such as sustainability or ESG reports), including unsubstantiated net zero or carbon neutral commitments.[12] The 2022 review of investment funds' disclosure highlighted that more than 50% of funds with sustainability-related investment strategies failed to identify or explain any of the sustainability-related factors underlying their investment strategies, more than a third of the funds held investments in industries that should have been excluded based on their stated investment strategy and 20% had holdings that appeared inconsistent with the fund's name or investment strategies.[13] Given such deficiencies in sustainability-related disclosures and increased investor reliance on such disclosures, there is a significant risk of enforcement action in Canada.

US[14], UK[15] and Australian financial regulators have also signalled that "greenwashing" or "green fraud" is a top priority.[16] The SEC recently established a separate ESG enforcement unit[17] and commenced a number of greenwashing and other climate-related enforcement investigations and proceedings.[18] The Australian securities regulator also commenced enforcement proceedings for greenwashing in 2022 against an energy company and an asset manager.[19]

We also expect increasing whistleblower complaints by investors and other stakeholders to regulators relating to sustainability-related disclosures, including net zero commitments and other climate-related statements and strategies. Securities and competition regulators in Canada have implemented formal whistleblower programs (some of which provide monetary rewards) or private inquiry complaint programs through which interested stakeholders can submit complaints or inquiries alleging inaccurate or misleading climate-related disclosures. We have seen a sharp increase in sustainability-related complaints under these programs.

There have been several high profile greenwashing complaints to the SEC in 2022 and 2023 relating to net zero commitments and other climate-related statements and strategies. In January 2023, an environmental activist filed a whistleblower complaint with the SEC alleging misleading disclosure by a global company relating to a $3.2 billion sustainability-linked green bond issuance by a global meat company which were marketed based on a net zero which failed to include certain greenhouse gas emissions that comprise 97% of the company's climate impact.[20] Likewise, in February 2023 an activist group filed a complaint with the SEC alleging a global energy company overstated its financial investment in renewable energy by including fossil fuel-related investments.[21]

The Canadian Competition Bureau recently commenced a number of greenwashing investigations and enforcement proceedings following complaints filed by environmental groups and other stakeholders, including: an investigation of a Canadian bank for alleged greenwashing statements regarding its climate and sustainable finance commitments; an investigation of an industry association greenwashing statements that natural gas is "clean", affordable and a part of a sustainable energy future;[22] an investigation of 23 manufacturers and distributors that marketed their wet wipe products as "flushable",[23] and a recent settlement involving allegations of misleading statements regarding the recyclability of its products against a consumer coffee products company, which resulted in a $3 million fine, $800,000 charitable donation, enhanced compliance program and product packaging modifications.[24]

In the US, whistleblower complaints have similarly lead to regulatory investigations, including complaints filed by environmental groups with the Federal Trade Commission alleging misleading statements regarding investment in renewable energy investments and carbon emission reductions[25] and by former employees against the asset management arm of a global bank with the SEC alleging that misleading statements regarding use of sustainable investing criteria for the US$1 trillion of assets under management.[26] Recently, several activist groups filed a complaint with the Australian competition and securities regulators (and formally requested that the UK financial regulator coordinate with the Australian regulators on the regulatory response) against a global mining company alleging misleading statements about its climate impact, net zero commitment and accounting of carbon emissions.[27]

GREENWASHING CIVIL ACTIONS

There has been a steady upswing globally in civil litigation, including class actions, against companies alleging inaccurate or misleading sustainability-related practices, commitments or product features. Activist stakeholders are increasingly leading such litigation with the primary objective of modifying corporate conduct – a marked shift in the litigation dynamic. For example, a class action by an Australian pension fund member alleging inadequate disclosure and investment strategy regarding climate-related risks resulted in a settlement whereby the fund committed to a net zero target.[28]

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Securities and consumers class actions against companies for misleading climate-related disclosures and misstating sustainability-related aspects of their products are also increasing.[29] In one of the first proposed greenwashing class actions in Canada, six major retailers have been accused of falsely labelling or advertising their plastic bags as "recyclable".[30] The plaintiffs rely heavily on a report prepared for the government of Quebec,[31] which concluded that many bags described as recyclable are discarded by the sorting centres in Quebec and seek damages a well as a declaratory order requiring the retailers to cease marketing their bags as "recyclable".

The same consumer coffee products company that settled with the Competition Bureau is also facing class action suits in multiple jurisdictions in Canada and the US alleging it has engaged in unlawful and unfair practices by making misleading statements regarding the recyclability of its products.[32]

In Europe, Australia, and the US, a number of greenwashing claims have been commenced by activist shareholders against major oil companies relating to net zero or carbon neutrality commitments, climate-related financial impacts and the financial value and attributes of oil reserves or alternative energy sources.[33] In addition, activist organizations have also commenced class actions against financial institutions alleging false or misleading net zero or other climate related commitments.[34] In February 2023, an activist organization, with the apparent support of several institutional shareholders, commenced a "first of its kind" claim in the UK against the directors of a major oil company alleging breach of their duties by failing to manage material climate-change related risks and failing to implement a energy strategy that moves away from fossil fuels fast enough.[35]

OUTLOOK

Given the global focus on sustainability-related disclosures and the ongoing implementation of more prescriptive mandatory sustainability-related disclosures regimes, we expect continued growth in sustainability-related litigation, complaints, and regulatory enforcement action.

There are a number of steps Canadian issuers and their directors and officers can take to mitigate such risks, including:

- **Goals, aspirations and actions:** Mind the gap between the company's sustainability-related goals and its actions. A credible action plan for achieving climate-related commitments, such as net-zero pledges and a robust governance structure for proper monitoring and oversight of the activities under such plan are critical to effectively mitigate litigation risk. Be mindful of any need to revise the action plan and any stated goals as a result of internal and external developments.
- **Implement deliberate and process-driven disclosure and marketing practices:** Treat sustainability-related statements and the use of sustainability-related labels with the same level of care and scrutiny that is applied to other material financial and strategic disclosures or representations to ensure alignment between market representations and the action being taken. Ensure a clear documented record of the process.
- **Put in place the governance structure** to ensure sustainability-related issues are being appropriately embedded and prioritized throughout your firm. Consider the use of a cross-functional steering committee.

Crypto Crackdown: OSC Enforcement in 2022, and Predictions for 2023

By Lori Stein, Wendy Berman and Jacob Robinson

Financial regulators across the globe continue to grapple with the evolving and broadening crypto asset ecosystem and its impact on financial markets. In Canada, securities regulators have used a combination of a "cooperative" regulatory compliance regime and enforcement actions to manage systemic risk relating to digital assets. In the wake of recent high-profile failures in the crypto sector, we anticipate that Canadian securities regulators will continue to tighten compliance requirements and increase their enforcement activities.

Throughout 2022, the Ontario Securities Commission (**OSC**) was active in enforcement against crypto asset market participants. These enforcement efforts focused primarily on market intermediaries, specifically the operators of online platforms (**Crypto Trading Platforms** or **CTPs**), which allow clients to buy, sell and hold crypto assets and use margin and derivatives to gain leveraged exposure to crypto assets. The OSC also utilizes cooperation arrangements with securities regulators globally as part of these enforcement initiatives. Recently, the OSC cooperated with the US Securities and Exchange Commission (the **SEC**) to commence an action against an Ontario resident and his affiliated companies for "a fraudulent offering of crypto security tokens" to investors around the world. We expect the OSC to bring similar enforcement actions in 2023.

This article provides an overview of enforcement actions taken by the OSC in 2022.

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CRYPTO TRADING PLATFORMS

On March 29, 2021, the Canadian Securities Administrators (**CSA**) published Staff Notice 21-329 Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements (**SN 21-329**), clarifying that securities laws apply to CTPs that "facilitate or propose to facilitate the trading of…instruments or contracts involving crypto assets… (**Crypto Contracts**)" in cases where the CTP provides custody, services for the crypto assets traded on the platform. SN 21-329 also reminded platforms that offer "traditional" derivative products that provide exposure to crypto assets that they are subject to existing regulatory requirements and they should contact their local CSA member to discuss approaches to compliance with securities law.

The same day, the OSC issued a press release notifying all CTPs that currently offer trading in derivatives or securities to clients in Ontario that they must bring their operations into compliance with Ontario securities laws or face potential regulatory action. The OSC instructed all CTPs to contact OSC staff to start compliance discussions by April 19, 2021.

The OSC stayed true to its threat and from May to August 2021, the OSC announced proceedings against four foreign-domiciled CTPs that offered leveraged crypto asset investment products to retail investors in Ontario and had not engaged in any efforts to bring their operations into compliance with Ontario securities laws. In 2022, orders were issued against all four platforms: **KuCoin** and **ByBit** in June, and **Poloniex** and **OKX** in October. All four orders imposed significant monetary penalties on the CTPs relating to their past conduct, but the severity of market restrictions varied based on the extent to which the platform cooperated with the OSC in its investigation.

KuCoin and Poloniex did not participate in the proceedings, resulting in adverse inferences and factual findings by the Tribunal. These platforms were subject to administrative penalties and disgorgement orders in the range of US$2 to $3.5 million, costs of investigation and hearing, and permanent bans from the Ontario capital markets. The Panel also concluded that all spot, margin and derivative products offered on the platforms were "investment contracts" and therefore securities, based on the test established by the Supreme Court of Canada in *Pacific Coast Coin Exchange*.

In contrast, ByBit and OKX cooperated with the OSC's investigation and negotiated settlements with the OSC. Each platform agreed to disgorge revenues generated from Ontario accounts and pay costs of the proceeding. Each platform also gave an undertaking to wind down most of its existing Ontario business and bring its operations into compliance by pursuing registration under

Ontario securities laws. If at any time during registration discussions, the OSC communicates to the CTP that it will not be feasible for it to operate in a manner that is compliant with Ontario securities laws, the CTP agrees that it will completely wind down its Ontario operations.

Other global CTPs exited Ontario in 2022 without having formal proceedings commenced against them. On March 17, Binance Holdings Limited and Binance Capital Markets Inc. (together, **Binance**) gave an **undertaking to the OSC** that effectively prohibits Binance from offering any services in Ontario (the **Binance Undertaking**). The Binance Undertaking holds Binance accountable for taking steps to address concerns arising from events beginning in December 2021, when Binance falsely notified investors that it was allowed to continue operations in Ontario after previously announcing its withdrawal from Ontario in May 2021. Then, in January 2022, Binance confirmed to OSC Staff that trading restrictions were in place for Ontario accounts on the Binance platform, when in fact Ontario accounts were able to trade. The Binance Undertaking required Binance to adopt procedures for preventing Ontarians from opening new accounts, restricting existing Ontario accounts to "liquidation only", reimbursing withdrawal fees charged to Ontario clients, retaining a third party compliance consultant and reporting to the OSC. The Binance Undertaking also acknowledged the OSC's reservation of its rights to bring enforcement proceedings against Binance for other misconduct.

Throughout late 2021 and 2022, many other global CTPs have recognized that offering services in Ontario comes with a degree of enforcement risk similar to the US, and have restricted Ontarians from accessing their platforms, such as Bitmex, Bittrex, Bitfinex, Huobi and others. Generally, these CTPs operate from offshore jurisdictions and offer margin, derivatives and other leveraged products that provide exposure to crypto assets. It is noteworthy that FTX stopped opening new accounts in Ontario in late 2021 and restricted access to margin and derivatives by existing retail investors in Ontario in early 2022. These restrictions may have reduced the losses experienced by Ontario residents from the collapse of FTX relative to their neighbours in other Canadian jurisdictions.

The OSC's willingness to enforce against unregistered foreign CTPs is similar to that of the SEC and the US

Commodity Futures and Trading Commission (**CFTC**). However, the OSC distinguished itself from US regulators by offering a clear path to compliance, albeit one that is narrow and restrictive. The OSC has also spearheaded the CSA's emerging regulatory regime for CTPs as securities dealers and marketplaces, under which **ten registered CTPs** have agreed to terms and conditions (**T&C**) of registration intended to reduce investor protection risks associated with CTP operations by imposing detailed obligations relating to crypto asset custody, insurance, risk disclosure, product due diligence and **investment limits on the Canadian dollar value that retail investors may invest** in crypto assets other than bitcoin, Ether, Litecoin and Bitcoin Cash.

The OSC (and other CSA members) are in discussions with numerous other CTPs that have expressed a willingness to register under securities laws in order to continue to service Canadian clients. In 2022, the CSA announced a new requirement for CTPs that are working toward registration under securities laws to provide a publicly available undertaking (a **Pre-Registration Undertaking** or **PRU**) in order to continue to provide services in Canada while pursuing registration and subsequently announced that it is strengthening its oversight of CTPs by imposing a deadline for all CTPs offering services in Canada to provide a Pre-Registration Undertaking, cease operating in Canada or face enforcement action. In the wake of recent insolvencies of a number of CTPs, the CSA implemented started a 30 day countdown for unregistered CTPs and an enhanced PRU with stricter requirements regarding custody and segregation of assets, blanket prohibitions on offering margin or leverage and prohibitions on offering value referenced crypto assets (commonly known as stablecoins).[1]

> **The OSC will proceed directly against a token issuer when it determines it is in the public interest, to protect investors and send a deterrent message to others considering similar activities.**

CRYPTO SECURITY TOKEN ISSUERS

The OSC recently commenced the first enforcement proceedings against issuers of security tokens.

On September 30, 2022, the OSC commenced proceedings against an issuer of security tokens, issuing a **Statement of Allegations** against Ontario resident Troy Richard James Hogg and his affiliated companies in relation to a US$51 million fundraise for Dignity token (DIG, formerly United Ingot/UNY) from investors around the world (**Hogg**). The OSC described the case as "a fraudulent offering of crypto security tokens that serves as a cautionary tale to investors interested in the crypto asset sector."

The OSC alleges that beginning in 2017, Hogg and his companies promoted and sold crypto asset tokens to investors without filing a prospectus or obtaining the necessary registration with the OSC. While raising funds, Hogg and his companies also allegedly defrauded investors by using false or misleading statements in promotional materials, including claims that the value of the UNY/DIG token was backed by $10 billion in gold bullion, a claim that was not supported by documents reviewed by OSC Staff. The promotional materials also reportedly claimed each UNY/DIG would be backed by a floor price of US$1 worth of gold, presenting the tokens as investments "with limited risks and maximum potential."

OSC Staff also allege that Hogg and his companies diverted investor funds to purchase luxury boats, real estate in Ontario and the Caribbean, and transferred funds to other companies controlled by Hogg. In addition, crypto asset mining equipment intended for the benefit of holders of the UNY/DIG token was transferred to Hogg for his personal use.

OSC Staff seek sanctions against Hogg and his companies, including permanent bans from trading in securities or derivatives or acquiring securities in Ontario, acting as a director or officer of any issuer or any registrant, or from acting as a registrant or promoter. Staff are also seeking a disgorgement of all amounts obtained as a result of non-compliance with Ontario securities laws, an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law and payment of all costs of the investigation. In the meantime, the proceeds of sales of certain properties were placed in the custody of the Accountant of the Ontario Superior Court of Justice.

On January 17, 2023, the OSC commenced a second proceeding against a security token issuer, issuing a **Statement of Allegations** against former Ontario residents Shorupan Pirakaspathy and Warren Carson and their affiliated companies (collectively, **GX**) in relation to the sale of GXTokens to Ontarians. In what the OSC describes as a "multi-level marketing scheme", they allege that GX enticed members of the public to become "brokers" and earn commissions by selling tokens using GX's online operating system. GXTokens were promoted as investments, with the promise of access to products and features that were "in development".

OSC Staff also allege that GX raised $280,000 from Ontario investors through the sale of GXTokens and equity in GX legal entities, which is a relatively small amount of funds compared to typical OSC enforcement proceedings. However, it is likely that the OSC proceeded with this matter to send a warning, as the alleged misconduct of GX exemplifies the fraud and scams, which plague the crypto asset sector. The sanctions sought by Staff in the allegations against GX are similar to those sought in Hogg.

These two recent enforcement proceedings represent a departure from the OSC's primary focus on market intermediaries such as CTPs, illustrating that the OSC will proceed directly against a token issuer when it determines it is in the public interest, to protect investors and send a deterrent message to others considering similar activities.

On December 12, 2022, the CSA publicly announced for the first time its view that "**stablecoins, or stablecoin arrangements, may constitute securities or derivatives.**" Many registered CTPs currently offer Canadian clients the ability to trade in stablecoins. Registered CTPs, as well as CTPs that provide PRUs, are prohibited from offering Canadian clients the ability to trade in or obtain exposure to crypto assets that are themselves securities or derivatives and are required to have policies and procedures in place to make this determination. To date, the OSC has not brought an enforcement action against any stablecoin issuer or promoter.

CROSS-BORDER COLLABORATION WITH THE SEC

In Hogg, the OSC thanked the SEC for its assistance with the investigation, explaining that the SEC had conducted a parallel investigation and filed charges in the US District Court for the Southern District of Florida against Hogg and several US residents.

The OSC and SEC have a long history of collaboration, including in the SEC's 2019 **complaint against the Ontario-based crypto asset issuer Kik Interactive Inc.** (**Kik**), which included details regarding Kik's discussions

with OSC Staff prior to commencing its offering of Kin tokens in the US. The SEC obtained a final judgment against Kik in October 2020, including a permanent injunction and US$5 million penalty.

As Canadian market participants are likely aware, 2022 saw a large expansion of the SEC's Crypto Assets and Cyber Unit, as well as numerous enforcement actions against crypto asset issuers and promoters. The SEC achieved notable success in the decision made by US District Court for the District of New Hampshire (the **Court**) on November 7, 2022, ***SEC v. LBRY, Inc.*** (**LBRY**). The Court held in a summary judgment that the digital tokens offered and sold by LBRY were unregistered securities based on its application of the "Howey Test"[2] for an investment contract. In LBRY, there were no allegations of fraud or misappropriation of investor funds. However, the promotional statements made by LBRY's senior management team and their significant holdings of pre-mined LTC tokens persuaded the court that purchasers of LTC were in a common enterprise with LBRY and expected profits to come significantly from LBRY's efforts in continuing to develop its platform.

Notwithstanding LBRY, the SEC's 2022 crypto efforts have been criticized. For example, critics point out that even the SEC's most successful cases, such as its US$100 million settlement with **BlockFi Lending LLC** (**BlockFi**), fail to protect retail consumers from CTP counterparty risk. In November 2022, nine months after the SEC settlement, BlockFi filed for Chapter 11 protection. The SEC also did not appear to take steps against **Celsius** or **FTX.US**, the collapses of which exposed US customers to millions in losses.

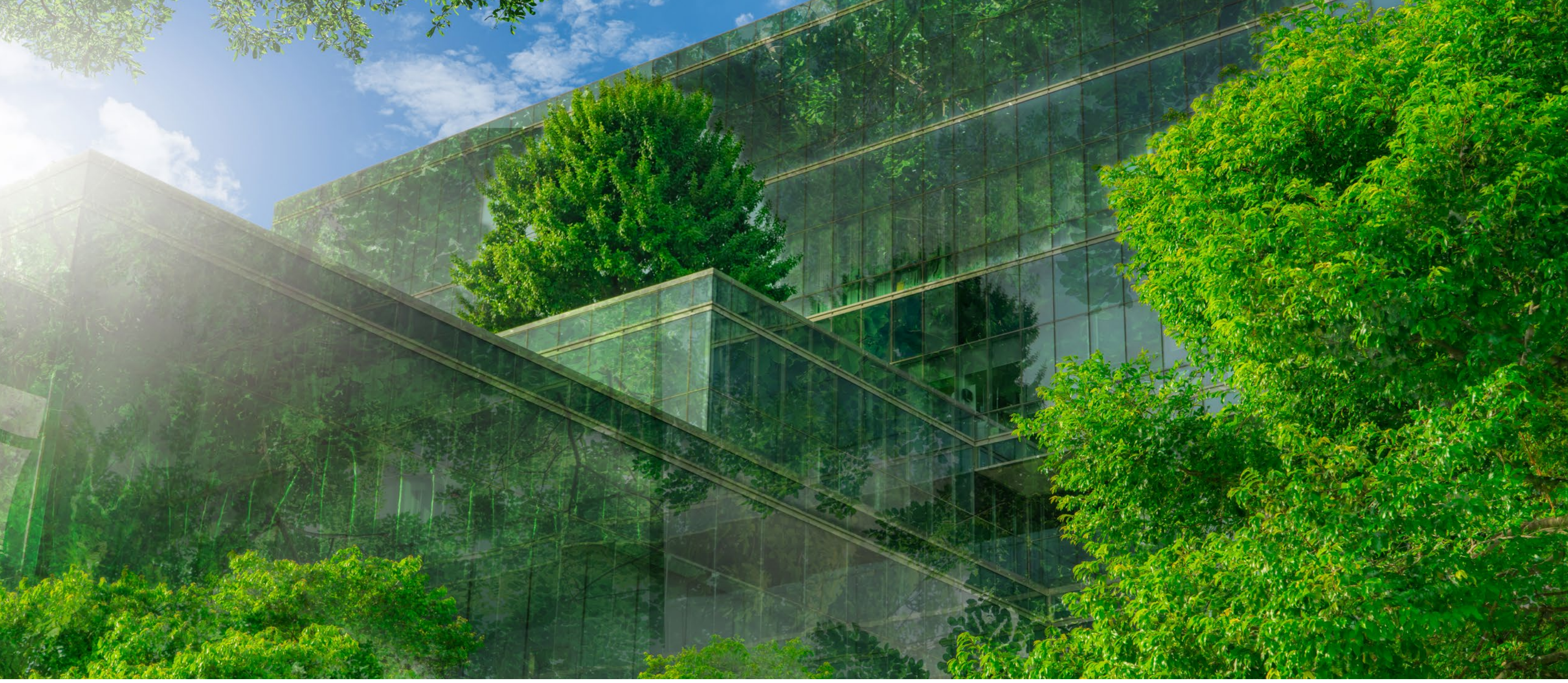
To date, the OSC has not joined the SEC in commencing proceedings against LBRY or **Ripple Labs, Inc.**, notwithstanding the likelihood that both underlying tokens (LBRY's LBC and Ripple's XRP) were purchased by Ontario residents. However, it is likely that the cross-border collaboration between the OSC and SEC continues to expand to deter offerings of crypto assets that could be characterized as securities on both sides of the border.

LOOKING AHEAD

The OSC's **2023-24 Statement of Priorities** confirms that it will continue to bring enforcement actions against crypto asset market participants to address non-compliance with securities laws, and that it will continue to add crypto firms to investor warning lists. The OSC's planned outcomes include increasing "public awareness of these complex products, platforms and potential frauds/scams", and achieving "an appropriate balance in supporting novel businesses and fostering innovation and competitive capital markets while promoting investor protection."

We expect the CSA to continue to monitor market developments and implement stricter Pre-Registration terms, together with more stringent custody and segregation requirements for platforms and prohibitions against offering margin or leverage to any client. These more stringent requirements pave the way for the OSC to commence further enforcement actions against platforms as well as CTPs that continue to offer services in Ontario without submitting a PRU.

2022 was a busy year for crypto-related enforcement by the OSC, and we expect this trend to continue in 2023.



ESG Shareholder Activism: Here to Stay?

By **Robert Richardson, Jennifer Longhurst, Shane D'Souza, William Main**, and **Brittany Cerqua**

Relative to prior year, 2022 witnessed an increase in ESG-related shareholder activism in Canada, even though overall activism activity was less robust than in previous years. While the results of such initiatives yielded mixed success,[1] dissidents generally achieved more wins than their management counterparts[2] and there is no doubt that they will continue. Canada has long been viewed by many as an activist-friendly jurisdiction. Whether or not that view is fair, we expect the composition of Canada's capital markets and the existence of some uniquely Canadian legal tools available to stakeholders to contribute to more investors and other stakeholders targeting Canadian companies with ESG-related activism.

CLIMATE ACTIVISM

Climate-related activism has increasingly become and will remain a key issue for reporting issuers, particularly in the mining, metals, energy, industrial and tech sectors, as well as for their lenders and key business partners.

- ***Shareholder proposals:*** Laurel Hill reported that "88% of all shareholder proposals in 2022 concerned [environmental and social] matters, up from an already strong 62% in 2021."[3] These proposals include so-called "say on climate" proposals that seek non-binding votes on a company's climate-related conduct and disclosures.

  In 2021, Canada's largest rail companies recommended and passed climate-related shareholder proposals and committed to hold annual climate votes. In 2022, each of Canada's five largest banks were subject to "say on climate" shareholder proposals that ultimately failed.

  However, say on climate initiatives may be "stalling", in part due to "considerable skepticism about the value of "say on climate" and the potential for unintended consequences".[4] This is in part due to the overly prescriptive nature of such proposals, and their entrenchment into areas better left to boards' and managements' exercise of their stewardship duties, which has caused some institutional investors[5] and proxy advisory firms to push back on them.

  Nevertheless, in our view environmental-related shareholder proposals will continue to abound, and more issuers, both large and small cap, across a wider range of industries can expect to receive proposals from investors pertaining to their advancement and disclosure of climate transition plans, progress, strategies and risk management oversight.

- ***Proxy campaigns:*** In the last few years, ESG-themed funds have attracted significant assets under management and many traditional activist investors have evolved to incorporate ESG-related objectives into their strategies. In addition, historically passive investors are continuing to show their propensity to become more vocal in ESG-related campaigns, whether themselves pushing for change or publicly or privately supporting initiatives led by others. In the near to medium-term, we expect such investors to target select Canadian issuers, particularly those that are underperforming their peers based on traditional metrics and that are perceived to having inadequate climate-related transition plans or other ESG-related financial metrics.

We expect an escalation in such activism, with shareholders seeking changes to boards of directors and/or terminations of C-suite executives, agitating for transformative transactions such as spin-offs and asset divestitures, and demanding more robust transition plans, greater progress on emissions reductions and improved climate-related disclosures.

> **Climate-related activism has increasingly become and will remain a key issue for reporting issuers, particularly in the mining, metals, energy, industrial and tech sectors, as well as for their lenders and key business partners.**

- ***Disclosure-related litigation*:** Outside Canada, there is a steady increase in environmental-related class actions and other proceedings globally against companies and their directors and officers by a wide range of stakeholders, including investors.[6] These claims have alleged, among other things: failure to adequately assess and develop strategies to address the impacts of climate change on the company's long-term business,[7] and "greenwashing".[8] Until recently, plaintiffs have been largely unsuccessful in maintaining these claims. However, we anticipate they will continue to adapt their approaches, especially with the proliferation of proposed mandatory climate disclosure regimes in Canada, the United States and globally.

- ***Fiduciary duty litigation*:** To date, there have been no derivative actions in Canada against directors and officers for failure to manage the climate impacts of their companies' operations, as has occurred in other jurisdictions.[9] Given the higher burden for commencing such claims, the likelihood of such claims being brought or being successful appears remote compared to other tools available to investors.

  One such tool is the "oppression remedy" – a claim available to investors (among other complainants) under Canada's federal and provincial corporate statutes – that may be brought against issuers and their directors and officers personally, when their conduct breaches the "reasonable expectations" of the investor with respect to the management or governance of the company and that breach is oppressive, unfairly prejudicial to or unfairly disregards the interests of the complainant.[10] While to date many oppression claims have proved unsuccessful, they remain a powerful tool available to investors to wield influence over the management and conduct of the companies in which they invest, and, as an equitable remedy, afford courts broad discretion to impose a wide range of remedies if successful.

- ***Regulatory enforcement actions:*** We also expect investors and other stakeholders will continue to bring formal complaints directly to regulators and other government agencies relating to the inadequacy of or misleading disclosures in respect of companies' climate-related plans or progress.

HUMAN CAPITAL

2022 saw activist campaigns that raised issues that included worker health and safety initiatives. The most prominent example in Canada was the successful campaign by an activist fund against a major oil company, which focused on missed production goals, high costs and safety failures, including employee fatalities and other safety incidents.[11] The human capital issues featured in the activist's campaign resonated with the investor and media community, ultimately resulting in, among other things, the resignation of the company's CEO and a 2022 settlement that gave the activist three new directors on the Company's board, with two of those appointees serving on a new CEO search committee and, subsequently in January 2023, an extension of the activist's option to appoint a fourth director in the event of continued underperformance by the Company relative to certain of its peers.[12]

Also, a number of public issuers received shareholder proposals related to forced labour and human rights impact assessments with respect to migrant workers; to increase employee participation in decision-making; and seeking disclosure related to employee or supply chain human rights.[13] We expect this trend to continue.

DIVERSITY IN GOVERNANCE

2022 also witnessed a continued focus on diversity and inclusion matters, both at the board and senior management levels. Social proposals saw an increase in filings in the US, with the topic of racial equity dominating investor engagement in the 2022 proxy season.[14] While racial equity audits have not yet become commonplace in Canada, shareholder proposals relating to equity, diversity and inclusion (**EDI**) continued to flourish in Canada in 2022, including relating to: reporting on Indigenous community relations, recruitment, advancement and education; producing disclosures on racial diversity within companies' workforce; reporting on workforce composition and compensation practices related to EDI efforts; and increasing diversity targets at the board level.[15]

> **A number of public issuers received shareholder proposals related to forced labour and human rights impact assessments with respect to migrant workers; to increase employee participation in decision-making; and seeking disclosure related to employee or supply chain human rights. We expect this trend to continue.**

While progress in gender diversity at the board and senior management levels is (slowly) being made, expectations related to diversity beyond gender continue to evolve.[16] For instance, in 2022, Institutional Shareholder Services (**ISS**)[17] and Glass Lewis [18] both enhanced their proxy voting guidelines on board gender diversity such that they will generally recommend voting against a board that does not have sufficient gender diverse directors. Looking forward at 2023 and beyond: (1) for meetings held after January 1, 2023, Glass Lewis will generally recommend voting against the chair of the nominating committee of a TSX-listed issuer if its board is not at least 30% gender diverse, or the entire nominating committee of its board has no gender diverse directors;[19] and (2) starting in 2024, ISS intends to vote against or withhold votes from chairs of the nominating committees (or equivalent) of S&P/TSX Composite Index issuers that have boards with no apparent racially or ethnically diverse members,[20] in each case, subject to certain exceptions.

EXECUTIVE COMPENSATION

Say-on-Pay votes for TSX-listed companies increased again in 2022, with 227 active votes in 2022 compared to 217 in 2021. Average support was down marginally at 95.0% in 2022, compared to 95.4% in 2021. Boards should continue to make executive compensation decisions that demonstrate pay-for-performance alignment, particularly as scorecards by proxy advisory firms on measuring compensation continue to evolve and become more nuanced and complex.

PREPARING FOR AND MANAGING ESG SHAREHOLDER ACTIVISM

- ***Risk oversight and risk management*:** A board's responsibility for risk oversight, derived from directors' statutory and common law duties remains a critical priority. In most circumstances, explicit board-level oversight of ESG issues is recommended. Existing structures, governance policies, plans and associated disclosure should be carefully reviewed to attempt to mitigate the risks of activism.

- ***Planning and crisis management*:** The board and senior management should regularly review, stress test and update, as necessary, a company's crisis management plan, to anticipate potential ESG-related issues or events and to ensure the company is adequately prepared to deal with them.

- ***Stakeholder engagement*:** Companies should ensure that shareholder engagement is treated as a key (and regular) feature of their overall governance program and, as appropriate, proactively engage with investors and other key stakeholders. Institutional shareholders have been increasingly adopting their own voting guidelines when dealing with ESG issues and proposals.

- ***Disclosure controls*:** Companies should treat ESG risk disclosures with a comparable level of care and scrutiny that is applied to other material financial, business and operational disclosures, keeping in mind that ordinary principles of materiality may no longer be sufficient for adequately assessing and preparing disclosures about climate risk matters.

- ***Stay ahead of the issues*:** Ensuring boards and senior management have the right expertise to understand and respond to these and other ESG-related issues, and are consistently evolving their practices and disclosures in this regard, is now a business imperative.

Securities Class Action Update

By Sarah Woods, Alexandra Cocks, Shane D'Souza, Marie Rondeau, Taraneh Ashrafi, and Amélie Boucher

This article summarizes some important trends and developments in securities class actions in Canada in 2022.

DEFENDANTS APPEAR MORE WILLING TO FIGHTING THE MERITS

Securities class actions have rarely proceeded to trial in Canada. The typical trend has been for defendants to focus their efforts on challenging the preliminary motions, namely the class certification and leave to proceed motions (the latter in the case of statutory secondary market representation claims), and if unsuccessful, settle in advance of trial. Two rare exceptions to this historical trend are the recent cases of *Wong v. Pretium Resources Inc.*[1] (***Pretium***) and *Turpin v. TD Asset Management Inc.*[2] (***Turpin***), where the defendants contested the allegations on the merits — and won.

In *Pretium*, the plaintiffs alleged secondary market misrepresentation for the company's failure to disclose concerns raised by a mining report. The defendants brought a motion for summary judgment after the case was certified. The same judge who found that the plaintiff had met the lower "reasonable possibility of success" threshold and granted leave to proceed as a statutory secondary misrepresentation action, dismissed the case on its merits in 2021. In 2022, the Court of Appeal for Ontario upheld the dismissal. *Pretium* is an important reminder that defendants should actively consider, and, when appropriate, bring motions to limit/dismiss actions on the merits.

Similarly in *Turpin*, the plaintiffs alleged primary market misrepresentation by an investment fund manager engaged in "closet indexing". Similar actions were initiated against several other investment fund managers. The defendant TDAM consented to certification and challenged the plaintiff's allegations in an eight-week trial. The defendant's strategy is an important reminder of the benefit of forcing plaintiffs to prove their allegations on the merits. *Turpin* is also a reminder of strategic and efficiency advantages from negotiating narrow common issues to settle certification and litigating at the "front of the line" when other similar cases have been commenced.

INCREASE IN CASES TARGETING THE WEALTH INDUSTRY

Canadian securities class actions have typically targeted public company issuers, their directors and officers, and gatekeepers, including legal advisors, auditors and underwriters. However, there is a recent trend in cases filed targeting the wealth industry. We have seen an increase in filings in our own practise. Three recent decisions in *Boal v. International Capital Management Inc.* (***Boal***), *Fisher v. Richardson GMP Ltd.*[4] (***Fisher***), and *Turpin v. TD Asset Management Inc.*[5] (***Turpin***) reflect this trend—and all examples where the defendants succeeded.

> **Pretium is an important reminder that defendants should actively consider, and, when appropriate, bring motions to limit/dismiss actions on the merits.**

In *Boal*, the plaintiff started a proposed class action against mutual fund advisors for losses associated with an investment in promissory notes. The plaintiff alleged the advisors breached their fiduciary duties. The Ontario Superior Court denied certification, finding that that the allegations did not support a fiduciary duty claim. On appeal, the Ontario Divisional Court upheld the decision, emphasizing that an advisor's fiduciary duty to a client is a "case-by-case" determination based on the traditional hallmarks of a fiduciary relationship, and that therefore the case could not be determined in a class action.

In *Fisher*, the plaintiff alleged that they suffered capital and opportunity losses from unsuitable and negligent investment advice. The Alberta Court of King's Bench denied certification due to the high degree of variability among the members of the proposed class. The court noted that the proposed class members had different factual circumstances and backgrounds, were owed different duties, and were alleged to have suffered different losses for different reasons.

In *Turpin*, the plaintiff alleged that a fund portfolio manager was not making active investment decisions (i.e., researching, using discretion and expertise), and was simply attempting to track and replicate the fund's benchmark index, also known as "closet indexing". The court ruled in favour of the defendant TDAM finding that throughout the class period the fund was actively managed with the objective of outperforming the benchmark index. The court found that each trust's unique context should be taken into account when interpreting the duties of investment fund trustees, and investment decisions made by professional portfolio managers should not be second-guessed.

Undisclosed fees class actions alleging breaches of consumer protection legislation are also continuing. However, there appears to be a trend in such lawsuits being brought against brokerages. Recently, in *Salko c. Financière Banque Nationale inc.*,[6] Superior Court of Quebec authorized a class action on behalf of persons who were parties to a non-advisory brokerage contract and who were charged currency conversion fees when trading foreign-listed securities. This case is the first class action in Quebec involving direct non-advisory brokerage accounts and the first to consider whether currency conversion and the disclosure of conversion fees are transactions governed by the Quebec *Consumer Protection Act* (**CPA**). Answering this question in the negative, the Court held that currency conversion is not a separate transaction from the purchase or sale of securities, which is itself governed by the *Quebec Securities Act* (**QSA**) and therefore excluded from the scope of the CPA. We expect class actions alleging undisclosed fees to be limited to historic allegations given changes made to CRM2 under NI 31-103.

GROWING INTERPLAY WITH CCAA PROCEEDINGS IN SECURITIES CLASS ACTIONS

In a distressed environment, there is growing interplay between class actions and insolvency proceedings.

In *Arrangement relatif à Xebec Adsorption Inc.*[7] before the Superior Court of Quebec, two shareholders sought a limited lifting of a stay in a proceeding under the *Companies' Creditors Arrangement Act* (**CCAA**) to seek leave to commence a class action alleging statutory misrepresentation against the company's underwriters and directors. Citing earlier precedent, the court refused the motion, holding that a stay "should only be lifted in circumstances where to do so is consistent with the goals of the stay" and that an "overriding consideration" is the impact of proceedings on the CCAA process and whether they would "seriously impair […] the debtor's ability to focus on the business purpose of negotiating the compromise or arrangement". Given the amount of secured and unsecured debt burdening the debtors, the court held

it was highly speculative, if not unlikely, that there would be sufficient proceeds for a compromise or arrangement to generate funds to satisfy all the secured and unsecured creditors. Accordingly, the Court concluded the plaintiffs would not suffer a significant prejudice if the authorization motion was delayed.

> **In a distressed environment, there is growing interplay between class actions and insolvency proceedings.**

Another interesting case is *Koroluk v. KPMG Inc.*[8] out of Saskatchewan. In the context of a voluntary liquidation, the liquidator argued that the plaintiff must provide his claim against the directors and auditors of the company through the liquation process even though he did not sue the company. The Court of King's Bench agreed with the liquidator. The Saskatchewan Court of Appeal disagreed, reasoning that the provisions of Saskatchewan's *Business Corporations Act* dealing with liquidation and dissolution were designed to ensure that the corporation's liabilities were identified and paid, and were not suited to the resolution of claims made against other parties.

In *CannTrust Holdings Inc., et al. (Re)*,[9] the Ontario Superior Court considered the fairness and reasonableness of a plan of arrangement in a CCAA processing that sought to settle class actions commenced in multiple provinces, US federal court and US state court. At issue was the broad bar order that released claims for all settling defendants, including contribution and indemnity claims against them, while maintaining joint and several claims against the non-settling defendant, the auditor. The auditor argued that the plan was not fair even though there was a judgment reduction provision that reduced any award of damages made against the auditor by an amount the court determined the auditor could have recovered from the company in a claim for contribution and indemnity. The company argued such a provision placed the auditor in an economically neutral position. The Court disagreed, holding that the plan failed to balance the interests of all stakeholders, favouring the interests of the plaintiffs over those of the auditor because the plaintiffs did not agree to limit their claims against the auditor to several liability.

WHERE DOES RELIANCE STAND AT CERTIFICATION/AUTHORIZATION?

The longstanding debate over reliance continues without clear resolution in Canadian securities class actions. In British Columbia, it was recently held by the Court of Appeal in *0116064 B.C. Ltd. v. Alio Gold Inc.*[10] that issues of causation and reliance are not a definite bar for certification. In that case, the Court of Appeal allowed an appeal from the lower court's refusal to certify class proceedings founded upon an allegation of misrepresentation brought by a former shareholder of Rye Patch Gold Corp, whose shares were sold to the respondent, Alio Gold Inc. In overturning the refusal to certify, the Court of Appeal acknowledged that many common law misrepresentation cases are unsuitable for certification, as they raise questions of causation and reliance that require an analysis to be made at an individual level that overwhelms common issues. However, the Court also found that in some cases, causation may not be a bar to certification. The case at bar involved a limited number of representations at issue, and a single transaction via plan of arrangement which compelled all shareholders to transfer their shares at a fixed exchange rate. Due to this singular nature and the circumstances of the case, the Court of Appeal concluded that there were common questions, and that certification of those questions by means of class action was strongly preferable to advancing numerous and lengthy individual claims.

In Quebec, however, in *Graaf v. SNC-Lavalin Group Inc.*[11] the Superior Court concluded that reliance is an essential component of a secondary market claim against an issuer and its officers and employees under Quebec civil law outside the QSA. The plaintiff sought authorization to institute a worldwide secondary-market securities class action in relation to alleged misrepresentations by the SNC-Lavalin Group (**SNC**). Dismissing the motion for authorization, the Court confirmed the necessity to establish reliance in the context of a class action based on Quebec civil law not covered by the QSA. Although reliance may be inferred based on a presumption of fact, it remains an essential component of the claim and failure to allege it will be fatal to the action. Consequently, the Court concluded that, given that the plaintiff had not alleged having relied on any information coming from SNC, whether individually or collectively, the action could not succeed.

The analysis of reliance continues to be a live issue at certification/authorization, and the facts are dispositive of the outcome.

WILL CANADA FOLLOW THE INCREASING US TREND IN CRYPTOCURRENCY FILINGS?

Several publications have reported an increasing trend in 2022 in cryptocurrency related filings in securities class actions in the United States, particularly in federal courts, including cases relating to crypto exchanges and allegations related to securitization. In Canada, 2022 showed early signs of an emerging trend with proposed class actions in Ontario against cryptocurrency exchanges Binance and Coinbase and their related companies, alleging that they sold cryptocurrency derivatives contracts contrary to Canadian securities laws.

As US filing trends are often a bellwether of future Canadian filings, it remains to be seen whether the pace of cryptocurrency filings will follow our neighbors to the south.

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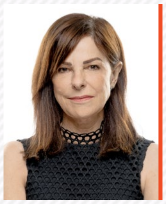

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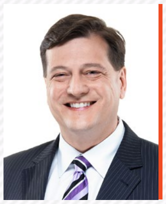

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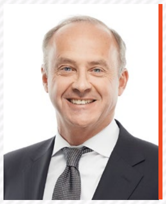

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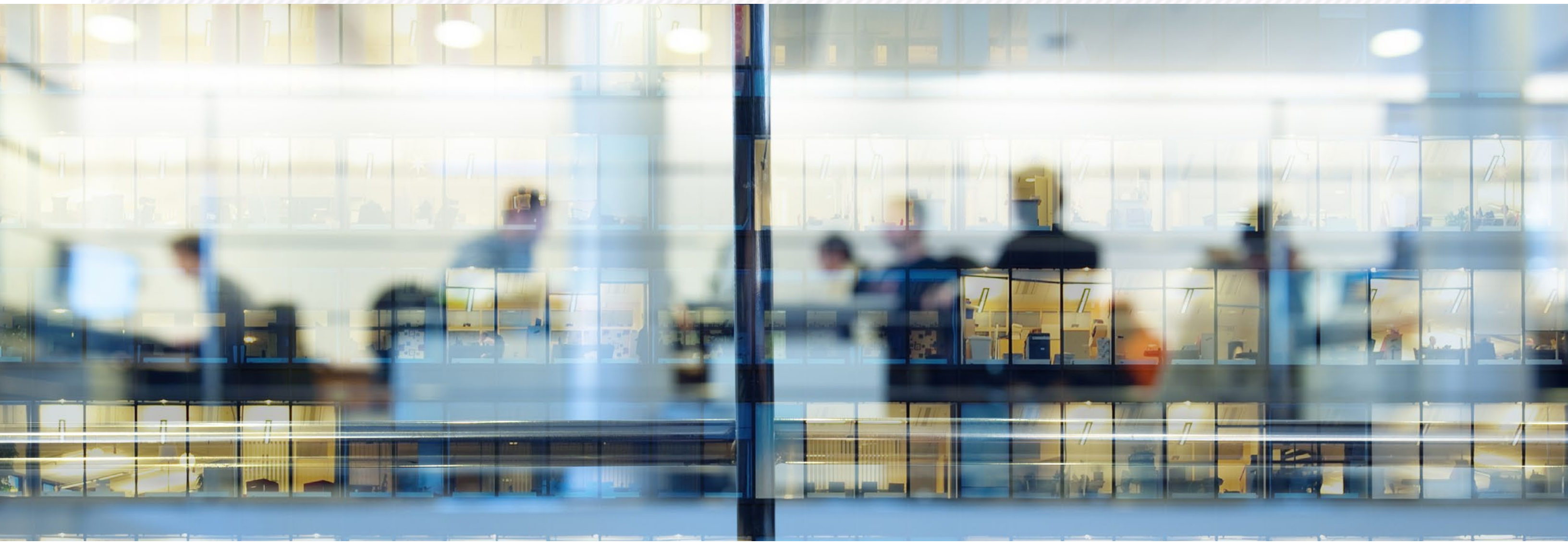

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Our Securities Litigation Group is widely recognized as a leader in the field with extensive experience in complex, high stakes matters before the courts and securities commissions, including contested mergers and acquisitions, shareholder activism, corporate governance matters, securities regulatory investigations and proceedings, securities class actions and investment products litigation. Clients trust and rely on our team to resolve matters that threaten their business and reputation.

Our lawyers have played prominent roles representing capital market participants in the largest and most complex securities litigation matters in Canada and contributed to major developments in Canadian securities laws in order to advance the interests of our clients. Our team also frequently represents clients in cross-border securities regulatory investigations and proceedings and collaborate closely with counsel in multiple jurisdictions.

We maintain strong working relationships with all Canadian financial and capital market regulators, as well as with numerous foreign regulators. Our practice group lead, Wendy Berman, also offers a unique perspective on the Canadian securities regulatory regime as the past Vice-Chair of the Ontario Securities Commission.

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Endnotes

Is Cyber-Related Securities Litigation Coming to Canada

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The Race to Green: A Perfect Storm for Heightened Scrutiny and Litigation

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Crypto Crackdown: OSC Enforcement in 2022 and Predictions for 2023

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ESG Shareholder Activism: Here to Stay?

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