

2022 developments in capital markets enforcement

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There were several notable developments in Canadian securities law over the course of 2022. The regulatory and adjudicative functions of the Ontario Securities Commission (OSC) were bifurcated by the enactment of the highly anticipated *Securities Commission Act, 2021* (the SCA). From a national perspective, the combination of the Mutual Fund Dealers Association of Canada (the MFDA) and the Investment Industry Regulatory Organization of Canada (IIROC) was approved with the new, amalgamated self-regulatory organization (SRO) slated for integrated operation beginning in January 2023. Both structural developments were aimed at increasing regulatory efficiency and independence and, as a by-product, enhancing investor protection.

While enforcement activity appeared to slow throughout the course of 2022, perhaps hampered by COVID-19-related impediments, several enforcement decisions that were issued will have a significant impact on the Canadian securities regulatory landscape. In Ontario, for instance, the OSC's decision in *Kitmitto* emphasized that circumstantial evidence in insider trading cases must be carefully considered and must not be relied upon in isolation. Separately, the Bridging Finance matter gave rise to an OSC [decision](#) determining that, while public disclosure of compelled testimony in OSC proceedings is improper, this impropriety may not be sufficient to warrant the revocation of an investigation order.

We discuss below the year's most notable capital markets regulatory developments. Additional related developments are included in our [Capital Markets](#) and [White Collar Defence](#) articles.

Enforcement-related legislative and regulatory developments

A new adjudicative division at the Ontario Securities Commission

The SCA came into force on April 29, 2022; it implements some of the recommendations in the Ontario Capital Markets Modernization Taskforce's January 2021 [final report](#) [PDF]. A key change implemented by the SCA is the separation of the regulatory and tribunal functions of the OSC. Specifically, the OSC maintains its regulatory authority, while the adjudicative function previously performed by the Tribunal at the OSC is now performed by a new adjudicative division: the Capital Markets Tribunal (CMT). A Chief Adjudicator was appointed to head the CMT, as well as nine individual adjudicators.

The SCA also prescribed structural changes at the OSC: the Chair of the Board of Directors (the Board) and the Chief Executive Officer (CEO) are now two distinct roles. The CEO is tasked with the execution of the mandate and operational management of the OSC, while the Chair is focused on strategic planning and corporate governance. Eight individuals were appointed to the Board.

With the creation of the CMT, the SCA establishes clear boundaries between regulatory and adjudicative roles, removing perceived potential conflicts that previously existed.

Amalgamation of the MFDA and IIROC

Members of the MFDA and IIROC approved a merger of the two organizations on September 29, 2022 by means of a special resolution. The merger, which was first announced in August 2021, is expected to be effective January 1, 2023, creating the temporarily-named New Self-Regulatory Organization of Canada (New SRO). The New SRO is anticipated to launch on January 1, 2023.

As a result of the amalgamation, the enforcement functions of both the MFDA and IIROC will be consolidated, including hearing panels. This will hopefully bring a degree of consistency to enforcement nationally across the platforms. The merger is discussed in more detail in our Capital Markets article.

Osler acted for the MFDA in this merger.

Use of circumstantial evidence in insider trading cases

In Kitmitto, a panel of the OSC (the Tribunal Panel) discussed the quality of evidence required to establish insider trading – in particular, when circumstantial evidence is acceptable. The case was heard by the Tribunal Panel prior to the CMT taking over the OSC's tribunal function. However, the decision was released after the creation of the new adjudicative body. A majority of the Tribunal Panel found that Kitmitto unlawfully tipped a number of other respondents who used the information to trade and/or tip others. Acknowledging that some of OSC staff's evidence was circumstantial, a majority of the Tribunal Panel emphasized that on its own, an opportunity to learn about material non-public information is insufficient to prove insider trading or tipping. Instead, the existence of such an opportunity must be examined alongside evidence of well-timed, uncharacteristic and profitable trades.

One panelist dissented on this point, questioning the sufficiency of the circumstantial evidence staff relied upon. Specifically, the dissenting panelist found that there were other equally likely conclusions that could be drawn from the evidence presented. The panelist therefore held that staff did not meet their burden to establish that tipping occurred.

This consideration of the use of circumstantial evidence in cases of this nature is mirrored south of the border. Earlier this year, a federal judge found [PDF] that the United States Securities and Exchange Commission (SEC) failed to offer persuasive circumstantial evidence to prove allegations of insider trading, potentially forcing the SEC to reevaluate its strategy in insider trading cases.

Jurisdiction over out-of-province defendants in cases involving allegations of securities law violations

Last year, the Court of Appeal of Québec rendered an important decision regarding the territorial jurisdiction of the Financial Markets Administrative Tribunal (FMAT). The issue arose in the context of an alleged transnational “pump and dump” scheme by which the alleged wrongdoers, who resided in British Columbia, committed wrongful acts through offshore companies both inside and outside the province of Québec. The Court notably held that the FMAT must have jurisdiction over transnational matters when there is a real and substantial connection with the province. In its reasons, the Court emphasized the role of the

FMAT, which is to protect Québec investors and to ensure the efficiency of Québec's securities market and public confidence therein.

On April 28, 2022, the Supreme Court of Canada granted applications for leave to appeal from this judgment. The Supreme Court of Canada will have the opportunity to confirm, with potential national significance, the circumstances in which a provincial tribunal could have jurisdiction over out-of-province alleged wrongdoers in securities matters. This will certainly have an impact on current investigations and enforcement proceedings both inside and outside Québec.

Enforcement activity

Administrative enforcement matters

The Canadian Securities Administrators (CSA) released the [Annual Enforcement Report for fiscal year 2021–2022](#) on June 29, 2022; it demonstrates a continuation of last year's slowdown in enforcement activity. CSA members imposed \$16 million in sanctions and penalties, which is a reduction of more than \$4 million from last year. The number of whistleblower tips is also down from last year, with 341 tips received by CSA members compared with 461 last year.

In contrast to these metrics, the 236 investor alerts issued, 61 interim cease-trade and asset-freeze orders issued, and 44 individuals banned from participating in the capital markets all increased when compared to last year. In the 2021-2022 fiscal year, 59 new matters were commenced involving a total of 139 new respondents. These matters primarily dealt with illegal distributions, disclosure violations and fraud.

Criminal and quasi-criminal enforcement

The OSC recently published its [2022 Annual Report \[PDF\]](#) which outlines the criminal and quasi-criminal proceedings initiated in the 2021-2022 fiscal year. During this period there were seven quasi-criminal proceedings involving 12 accused, and one proceeding initiated under the *Criminal Code of Canada* (the Criminal Code) involving one accused. Since last year's publication

- Marc Brunet, who was previously convicted of quasi-criminal offences under the *Securities Act*, was sentenced to two and a half years in jail. His wife, Helene Brunet, was sentenced to 12 months' probation. Both were ordered to pay over \$706,000 in restitution.
- Douglas DeBoer, who pleaded guilty to fraud and violating an OSC trading ban contrary to the *Securities Act*, was sentenced to three years in jail.
- Following his extradition to Canada, Bernard Justin Sevilla, who pleaded guilty to charges under the Criminal Code, including fraud over \$5,000, was sentenced to six years in jail.
- Mujahid Ali Syed and Sanjiv Katyal were charged with a number of offences under the *Securities Act*, including fraud. The accused allegedly facilitated a scheme in which investors were encouraged to borrow against their homes to raise funds to invest. These funds were then used personally by Syed and his family or paid to Katyal as a kickback for referring investors.
- Sei-Jin Ki, who was convicted of offences contrary to the *Securities Act*, including fraud,

was sentenced to 90 days in jail and 18 months' probation. Carlos DaSilva, who was convicted of the same offences as Ki, as well as an additional offence, was sentenced to 18 months in jail and 18 months' probation. Both were ordered to pay \$100,000 in restitution.

- David Singh, who was convicted of offences under the *Securities Act*, including fraud, was sentenced to three and a half years in jail, and ordered to pay more than \$4.8 million in restitution.

Enforcement activity relating to crypto trading platforms

Through 2022, there was a significant jump in the number of cryptoasset trading platforms (CTPs) that have registered as restricted dealers or investment dealers in accordance with the CSA's publication [PDF] last year of Staff Notice 21-329 Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements. Additionally, in keeping with the CSA's 2021 pledge to increase enforcement action against crypto market participants, 2022 saw a continued upward trend in enforcement actions against unregistered CTPs.

For a full update of this year's developments in crypto, including an in-depth discussion of enforcement actions, please see our article on Crypto.

Bridging Finance Inc.

One of the most notable matters of the year involved the enforcement action against Bridging Finance Inc. (BFI), a portfolio manager and exempt market dealer based in Toronto. While the investigation into BFI began in 2020, it did not become public until April 2021 when the OSC asked the court for permission to place BFI under the control of a receiver. On April 30, 2021, PricewaterhouseCoopers was appointed as the receiver and manager of BFI, and the OSC issued a temporary order stopping all trade in BFI securities.

As part of their April 2021 application for a receivership order, OSC staff publicly disclosed portions of the compelled testimony of David Sharpe, BFI's former CEO. Sharpe brought an application requesting a declaration that staff of the OSC violated the *Securities Act* in making the disclosure, and asked that the investigation into Sharpe and BFI be quashed as a result. Although the OSC panel held that the disclosure was improper, revocation of the investigation order was not found to be an appropriate remedy.

In March 2022, the OSC filed its Statement of Allegations [PDF] against BFI, David and Natasha Sharpe, and Andrew Mushore, alleging numerous breaches of the *Securities Act*, including fraud. Both the investigation and the receivership proceeding remain ongoing, with the receiver indicating it may still be some time before it is in a position to make a distribution to BFI unitholders.

Conclusion

There were many notable developments in Canadian securities law through 2022, including structural changes to the OSC and the merger of the MFDA and IIROC. It will be interesting to see if these developments lead to the enhanced regulatory efficiency and independence that are the stated objectives of these initiatives. It will also be important to monitor the precedential impact of the new case law discussed above. We will continue to report on developments into 2023 on our Risk Management and Crisis Response Blog.