

2023 OSLER LEGAL OUTLOOK



## Capital markets enforcement: innovative, and controversial, new directions

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There were a number of intersecting trends in the capital markets regulatory and enforcement landscape in 2023. These trends can serve as a window into the priorities and directions of capital market regulators for 2024.

As described in the Canadian Securities Administrators' (CSA) [Annual Year in Review](#) and the Ontario Securities Commission's (OSC) [2023 Annual Report \[PDF\]](#), there was a slight increase in enforcement activity across Canadian capital markets in 2023, with an increase in whistleblower activity and in the amount of administrative penalties and restitution imposed. Low rates of collection, however, continue to be a challenge.

Investors and capital market participants will likely see increasing, and increasingly aggressive, regulatory action directed against market players in developing market areas (such as the cryptocurrency space) and against activities that are perceived to be exploiting investor appetites for sustainable or innovative technologies. Securities regulators are seeking (and in some instances being granted) greater powers to impose penalties and to use penalty funds obtained through enforcement actions, some of which depart from widely accepted guardrails that have previously restrained such regulatory activity.

Securities regulators also continue to assert jurisdiction over certain market activities, such as crypto, even in the absence of legislative action or regulatory consensus on what should be done and by whom on a global scale.

### New enforcement tools: innovation or overreach?

In 2023, certain provincial governments granted or proposed new and innovative, and in some ways controversial, remedial tools intended to expand their ability to utilize fines from penalties and bolster their regulatory objectives.

As we [previously wrote](#), in April 2023, the British Columbia Securities Commission (the BCSC) introduced its latest, and more streamlined, mechanism for levying significant administrative monetary penalties for less serious violations of securities rules, referred to as the *Administrative Penalties Imposed by Notice* (APIN). Under s. 162.01 of the B.C. *Securities Act*,

the Executive Director can provide a written notice where, based upon information derived from a review, investigation or any source, the Executive Director considers that a person has contravened a provision of the *Securities Act*, regulation or a decision of the BCSC or Executive Director, or considers that a penalty is in the public interest.

The written notice must specify each contravention, the amount of the administrative penalty assessed for each contravention (assessed based on the facts and circumstances leading to the offence, coupled with a number of stipulated factors such as the person's past conduct and the need for deterrence) and the date by which the person must either pay or dispute the penalty. The Executive Director is not required to provide a person with an opportunity to be heard prior to issuing such a notice. Fines issued under the APIN can be levied in amounts of up to \$100,000 per violation for individuals and up to \$500,000 per violation for entities.

Parties receiving a notice have 30 days to dispute the notice by requesting a hearing before the Executive Director. If the Executive Director confirms the securities contravention and administrative penalty, the affected party can request that the BCSC conduct a full hearing to review the Executive Director's decision. If the person either pays the penalty or the 30 days lapse without payment or dispute, the person is deemed to have committed the contravention.

These novel approaches to enforcement are intended to reduce inefficiencies associated with pursuing less complicated matters, thus freeing up scarce resources to address more challenging alleged wrongdoing. Questions of procedural fairness will no doubt be raised by those affected by these streamlined processes in the year or so ahead – how often and in which types of cases will likely determine whether similar approaches are adopted in other Canadian jurisdictions.

The British Columbia legislature also introduced new enhanced enforcement powers for staff members of the BCSC. BCSC staff will no longer be required to apply for an order from the British Columbia Supreme Court to seek sanctions against individuals and businesses that staff believe have failed to abide by a summons or demand. Instead, BCSC staff members are now able to seek and obtain certain market conduct orders from the BCSC, rather than having to go to court in the event of such failure. These can include imposing a cease trade order and limiting an individual's ability to assume or maintain a position as a director or officer of an issuer or registrant. Staff of the BCSC are also able to order an administrative penalty of up to \$1 million for failure to comply with a summons or a demand. In all cases, these orders can only be made after the individual or entity has had an opportunity to be heard.

In Ontario, the Ministry of Finance proposed a controversial regulatory change to permit the OSC to expand the ways in which it can use money acquired through enforcement actions. Currently, the OSC can only allocate enforcement funds to reimburse harmed investors, fund investor education and advocacy organizations, and compensate whistleblowers. Pursuant to the proposed regulation, enforcement funds would also be deployed to contribute to re-tooling the OSC in various ways to strengthen oversight and lead to the early detection of securities law violations.

However, many objections have been raised in response to the proposed broadening of capital markets regulators' flexibility to deploy enforcement funds, citing the potential for conflicts of interest, and for undermining perceptions of fairness that ultimately led Ontario to separate the OSC's tribunal functions from its regulatory operations. While there may be institutional constraints that make it difficult to completely harmonize changes across the country, we expect that all regulators nationwide will continue to advocate for greater powers and more flexibility. Whether these increased powers result in more effective regulatory action remains to be seen.

## Continued efforts to enforce against crypto firms in the absence of regulatory clarity

Crypto assets and activity continue to be a key area of concern for, and the subject of enforcement activity of, securities regulators in Canada and elsewhere. As we have previously written and discuss in more depth in our *Digital assets and blockchain: the year of maturation* article, the question of how to regulate certain crypto assets, such as tokens, will continue to be the subject of debate.

The CSA has continued to issue staff notices setting out their members' expectations as to how crypto industry participants are expected to conduct themselves when offering products to Canadians. However, in the absence of greater clarity, either through legislation or, more likely, adjudication, some of the most basic questions about whether and how cryptocurrencies fit into the securities regulatory regime remain open. Perhaps 2024 will provide more certainty in this complex area.

## Impact of separate jurisdiction of Ontario's Capital Markets Tribunal

In Ontario, issues involving the new jurisdictional boundaries between the Capital Markets Tribunal and the OSC have arisen and will likely continue into 2024. While these are procedural issues, in certain cases they may have a meaningful impact on affected parties' substantive rights, as they implicate the avenues available to litigants to ensure that investigations are carried out fairly and within applicable legal constraints.

In one 2022 Ontario case, a series of court and tribunal challenges were pursued by Binance following the commencement of OSC staff's investigation into its activities and alleged breaches of an undertaking that it had previously given. In challenging the breadth of the OSC's summons power in that particular case, the various proceedings engaged the question of the respective jurisdictions of the relatively recently split OSC and Capital Markets Tribunal in overseeing staff during the course of an investigation. Ultimately, the Tribunal determined that its jurisdiction to oversee the investigative processes of the OSC staff was limited by the revised wording of the *Ontario Securities Act*, potentially excluding meaningful oversight of staff's summoning powers in its investigations. Notwithstanding this case, questions still remain concerning the role of the Tribunal at the investigative stage of a regulatory enforcement matter and will likely continue to be litigated into 2024.

These decisions, as well as the future decisions that will no doubt be required, are instructive. Even on their unique set of facts, they illustrate gaps resulting from legislative revisions intended to rationalize the structural changes to Ontario's former integrated agency. Affected litigants will be required to navigate this unfamiliar landscape and will need to be proactive in obtaining expert advice to do so.

## Outlook

Ultimately, although 2023 did not see a significant increase in enforcement activities, regulators' increased focus on developing innovative enforcement tools suggests that regulatory action may see an uptick in years to come – particularly with respect to less significant contraventions that can be dealt with in a more streamlined and automated fashion. Given market trends, we anticipate that a more streamlined response to lower-level offences will allow regulatory staff to focus more significant efforts on targeting conduct in

developing market areas, such as the cryptocurrency space.