Vi. A New Model Based On Corporate Reputation

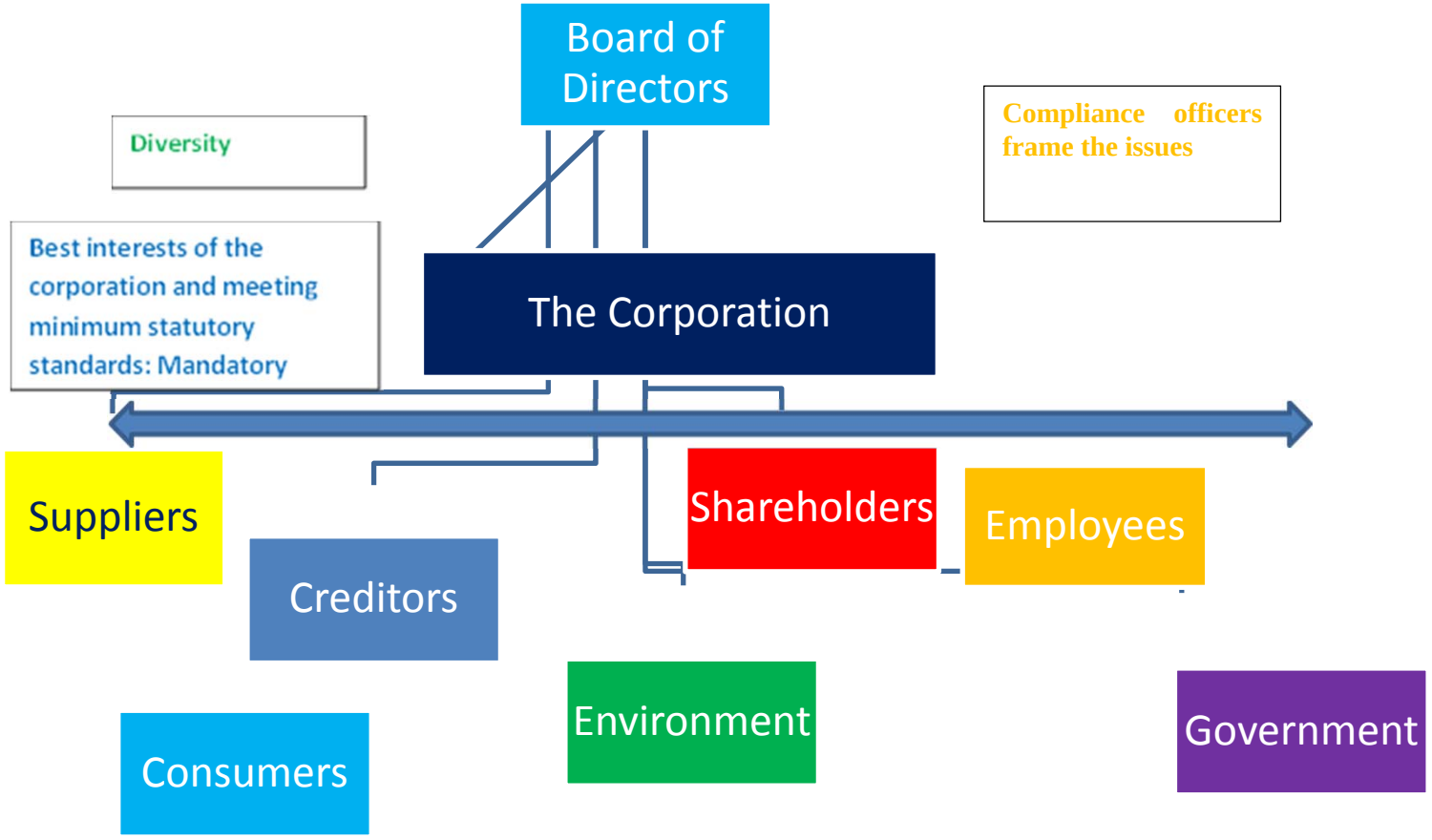
Chapter 26: Sentencing a Corporation: Imbedded Auditors, Secured Bonds, and Other Creative Strategies

Kenneth Jull

December 1, 2021

The views are those of the author and are not meant to represent the views of Gardiner Roberts LLP

§ Appendix 27A Risk Management Flowchart, Steps 1, 10



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Spectrum of Models

§ 10:1. Generally

U.K

- Directing Mind subject to specific legislation such as Corporate Manslaughter based on management failure
- Bribery—new strict liability offence of failing to prevent bribery

Canada

- Senior officer (middle manager of policy or operations)
- Party or fails to take all reasonable measures to prevent those under supervision

U.S.

- Vicarious Liability for acts of individuals
- Respondent Superior for Individuals acting in the course of employment

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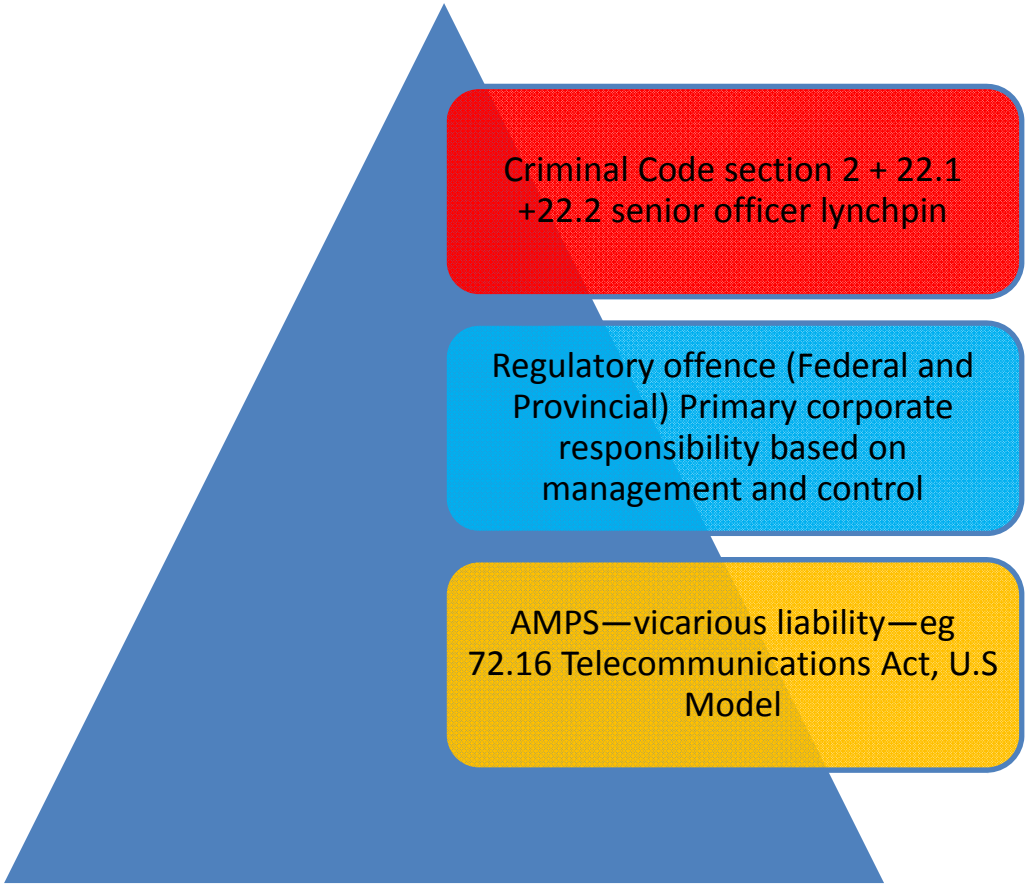
Types of Corporate Liability



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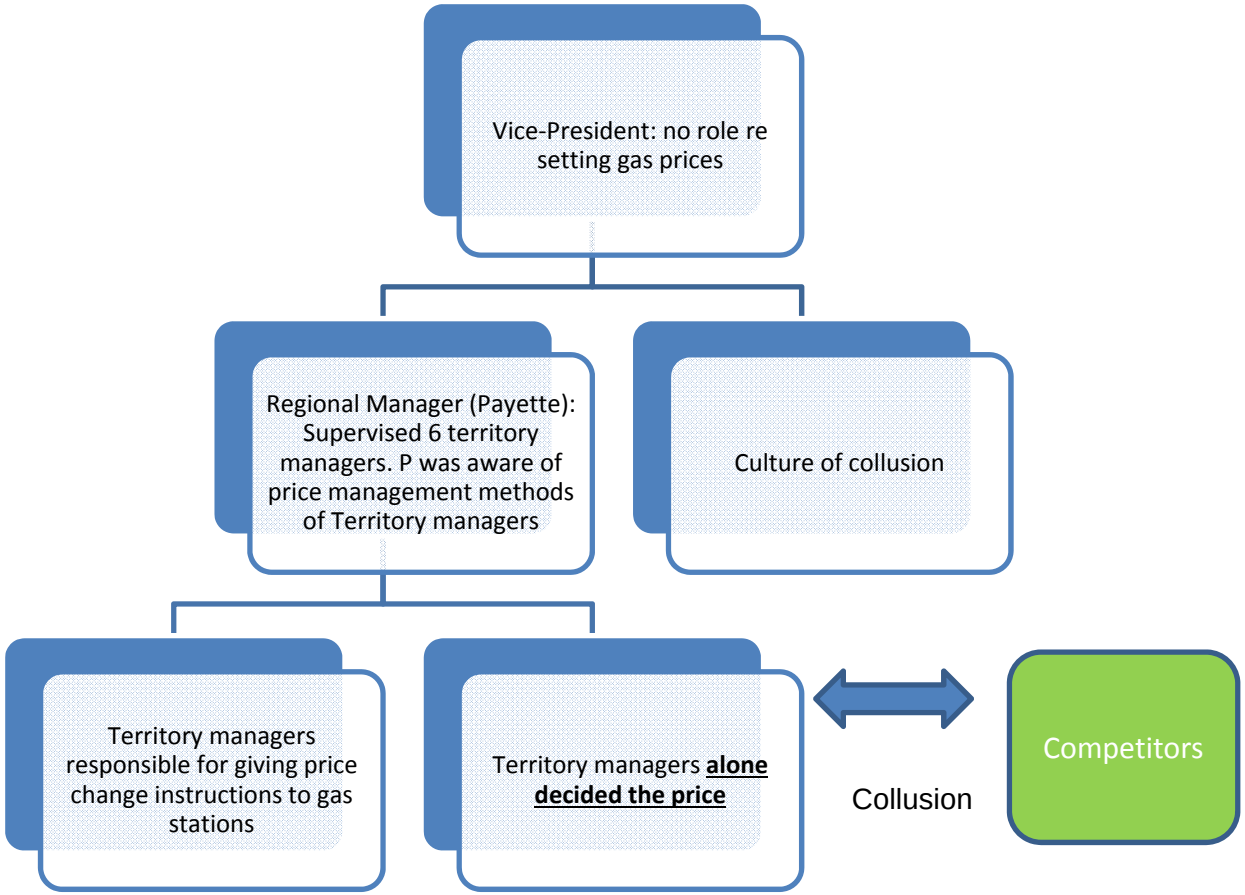
Global Fuels Example



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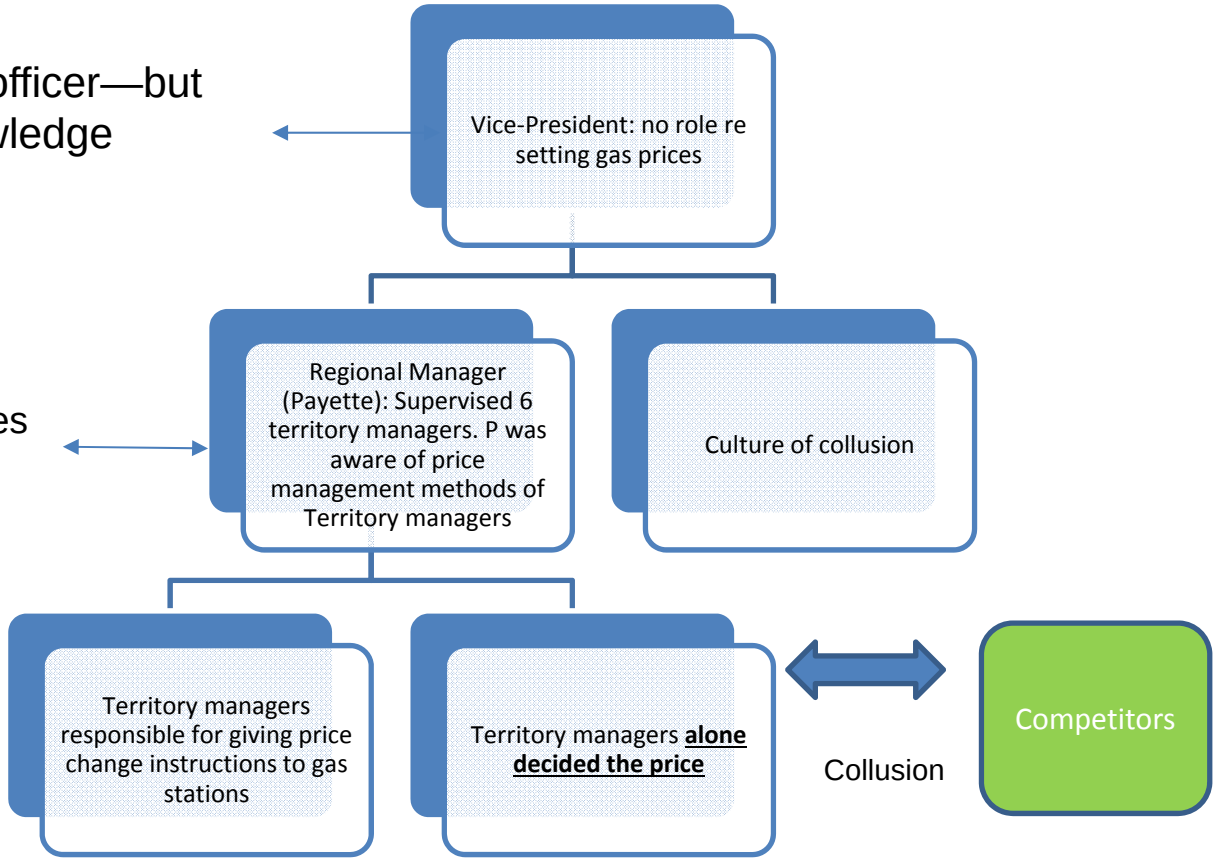
Archibald, Jull — The New Law Of Expanded Organizational Criminal Liability

Senior officer—but no knowledge

Senior officer with delegated responsibilities who did not take reasonable steps

No ruling on whether territory managers were senior officers



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§ 10:27 Wilful Blindness

SNC-LAVALIN CONSTRUCTION INC. (FORMERLY SOCODEC INC.)

AGREED STATEMENT OF FACTS Para 34:

- **Between September 2001 and January 2011, on behalf of SLCI, SLII paid a total of approximately $127,245,937 CAD to both Duvel and Dinova with respect certain projects listed above in paragraph 27 of this Agreed Statement of Facts of which**

- **(i) $47,689,868 CAD was paid, by Duvel and Dinova, to Saadi GADHAFI for exercising his influence as the son of the Libyan dictator Muammar GHADAFI for securing contracts for the benefit of SLCI, and (ii) $73,582,219 CAD was paid, by Duvel and Dinova, for the personal benefit of BEN AISSA and BEBAWI.**

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§ 26:17. Corporate Governance and Reputation

- *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, 395 C.C.C. (3d) 1, 451 D.L.R. (4th) 367 (S.C.C.) https://canlii.ca/t/jbf0p

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VI. A New Model Based on Corporate Reputation

- In *Quebec (Attorney General) v. 9147-0732 Québec inc.*,[1] the Supreme Court of Canada unanimously agreed that s. 12 of the *Canadian Charter of Rights and Freedoms* does not protect corporations from cruel and unusual punishment or treatment.
- The crux of the matter centered on whether the word "cruel" could apply beyond human beings to corporations.

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VI. A New Model Based on Corporate Reputation

- The court ruled that “cruel” denotes human pain and suffering, either physical or mental.[2] A corporation, as a non-human entity, cannot be subject to human pain or suffering. In other words, the legal fiction of a corporation benefitting from legal personhood does not mean that the corporation can be subject to cruelty. Therefore, the court ruled that cruel and unusual punishment cannot apply to corporations given their inability to feel human pain or suffering.

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VI. A New Model Based on Corporate Reputation

- In this case, at first instance 9147-0732 Québec inc. was found guilty before the Court of Québec for carrying out construction work without a proper licence, contrary to the provisions of the *Building Act*.[1] The Court of Québec imposed a mandatory minimum fine, as mandated under the *Building Act*, against 9147-0732 Québec inc. totalling $30,843.[2] The corporation appealed, challenging the mandatory minimum fine as unconstitutional under s. 12 of the *Charter*, which protects against cruel and unusual punishment.

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VI. A New Model Based on Corporate Reputation

- However, Justices Brown and Rowe, writing for the majority in *Quebec (Attorney General) v. 9147-0732*, seem to leave the door open when they write that under s. 12 of the Charter, "excessive fines (which a corporation *can* sustain), *without more*, are not unconstitutional".[9]
- For s. 12 to be triggered, fines must be incredibly excessive so as to be indecent and "abhorrent or intolerable", and that each are anchored in human dignity.[10]

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Chapter 26. Sentencing a Corporation: Imbedded Auditors, Secured Bonds, and Other Creative Strategies

VI. A New Model Based on Corporate Reputation

- We propose that s. 12 should apply to smaller, closely held corporations where an excessive fine might have severe consequences for the physical persons behind the corporation.
- These persons would not have any recourse under such a situation, since after the Supreme Court's ruling the company would rightly not be able to raise a cruel and unusual punishment argument, and the physical persons are not themselves charged. Each factor results in these physical persons not having proper standing to pursue recourse

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§ 26:16. Reverse Piercing of the Corporate Veil

- As Justice Carole J. Brown wrote in *Choc v. Hudbay Minerals Inc.*:
- Ontario courts have recognized three circumstances in which separate legal personality can be disregarded and the corporate veil can be pierced: (a) where the corporation is 'completely dominated and controlled and being used as a shield for fraudulent or improper conduct; … (b) where the corporation has acted as the authorized agent of its controllers, corporate or human … and (c) where a statute or contract requires it.

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§ 26:16. Reverse Piercing of the Corporate Veil

- In *Yaiguaje v. Chevron Corporation*,[2] the Ontario Court of Appeal has affirmed that corporate separateness is the governing rule subject to the exception where the corporate form is being abused to the point that the corporation is not a truly separate corporation and is being used to facilitate fraudulent or improper conduct.
- The Supreme Court of Canada has denied leave to appeal in *Chevron*.

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§ 26:16. Reverse Piercing of the Corporate Veil

- Nichols and Khimji conducted empirical analysis of the veil piercing cases in an article entitled “Piercing the Corporate Veil in the Canadian Common Law Courts: An Empirical Study”.[4]
- Government entities were the most successful with their claims at 45.76% success whereas shareholder, corporation, and related corporation piercing claims were the least successful.

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§ 26:16. Reverse Piercing of the Corporate Veil

- If it is appropriate to pierce the corporate veil to do justice on behalf of a government regulator, the mirror situation should also be considered by way of a reverse piercing argument.
- Imagine, for example, a large corporation which has created shell companies to hide assets offshore to evade taxes, hide incoming funds, pay bribes, or for other purposes contrary to criminal or regulatory law. If the corporation is being used to facilitate fraudulent or improper conduct, the Chevron test gives regulators the ability to pierce the corporate veil in order to associate shell companies with the parent company.

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§ 26:16. Reverse Piercing of the Corporate Veil

- Now, imagine a family-run construction business comprised of three people. The family members have poured all their life savings into ensuring the business gets off the ground and becomes viable. As newcomers to the construction and business worlds, the family members are relatively unsophisticated businesspeople.
- The company becomes caught up in a quasi-criminal or regulatory offense and gets fined $1,000,000, a fine which represents the loss of life savings that each family member poured into the corporation for its launch.

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§ 26:16. Reverse Piercing of the Corporate Veil

- If there is a bright-line rule that bars the physical persons behind corporations from bringing a claim under s. 12 for this fine levied against the corporation, then these physical persons may not have an ability to challenge the fine in court—despite the fact that the fine may be disproportionate to the regulatory offense committed and may in fact rise to the level of cruel and unusual punishment against those few persons who closely hold the family-run corporation.
- Unlike what the Supreme Court asserts,[5] a corporation cannot always sustain such excessive fines when it is smaller and closely held—indeed, the people behind a corporation sometimes certainly cannot.

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§ 26:16. Reverse Piercing of the Corporate Veil

- Allowing a reverse-pierce would allow the physical persons to go to court, so that the persons can argue that even though the business operates in a corporate form, the composition is really only the three people who cannot sustain such a disproportionate fine. This reverse-pierce of the corporate veil would allow the physical persons behind the corporation to have standing to make the argument that the fine is cruel and unusual treatment *for them*, the physical persons, even as the fine was directed towards the corporation.

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§ 26:16. Reverse Piercing of the Corporate Veil

- *Quebec (Attorney General) v. 9147-0732* should be interpreted as leaving the door open to harsh economic treatment rising to the level of triggering s. 12 protection. While the Court does specify that s. 12 does not apply to corporations and thus cannot protect corporations from high economic penalties,[15] the court also draws on *Boudreault* to clarify that surcharge punishments can violate s. 12 of the *Charter* when that penalty causes certain harms to individuals.

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§ 26:17. Corporate Governance and Reputation

- The recognition of corporate reputation in some ways paints a picture of corporations as almost human. Indeed, the advertising of many companies draws on human-like comparisons to evoke a bonding process with consumers. Sixteen years ago, Spike Jonze directed a quirky little ad for Ikea that quickly became a classic of modern advertising. “Lamp 1” played on your heartstrings, while amping up the melodrama of an old lamp being tossed onto the street by its owner. By the end of the spot, you actually felt sorry for the lamp.

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§ 26:17. Corporate Governance and Reputation

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§ 26:17. Corporate Governance and Reputation

- ….. until Swedish actor Jonas Fornander wanders onscreen and admonishes the viewer for being so easily manipulated.
- “Many of you feel bad for this lamp”, he says in one of the great rug-pulls in ad history. “That is because you're crazy. It has no feelings, and the new one is much better.”[5] “The genius was in how it so quickly was able to establish an emotional connection between the viewer and a lamp, then hilariously douse it all, with actor Jonas Fornander dropping a … truth bomb.”

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§ 26:17. Corporate Governance and Reputation

- Ikea Canada decided to resurrect the story for a sequel, while putting a modern twist on the sad little lamp's end. Made with agency Rethink Canada and directed by Mark Zibert, “Lamp 2” picks up where the original left off, but instead of the landfill, we get a serving of responsible consumerism when a little girl finds another use for our hero. Earnest optimism replaces the original wisecrack, but we still get Fornander dropping back in, this time to remind us that it is not crazy to reuse things.

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§ 26:17. Corporate Governance and Reputation

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§ 26:17. Corporate Governance and Reputation

- If a corporation can have emotional intelligence, and if corporate images can evoke powerful emotional reactions, is it not a logical extension that those same corporations could "suffer" from a cruel and unusual sentence that would damage that very corporate reputation? This is an issue that goes far beyond the narrow constitutional argument about whether a corporation can argue that it has been subjected to cruel and unusual punishment. We need to start thinking about new corporate roles, and maybe even new corporate paradigms.

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Questions?

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Contact Us

T **416.865.2964**

E **kjull@grllp.com**

W **grllp.com**

@KennethJull

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OECD'S Global Tax Reform 2021

Toolbox Webinar, December 1, 2021

Presented by: Lorne Saltman

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Topics to Discuss

1. Introduction: Domestic and International Tax Changes Are Far-reaching
2. Beneficial Ownership Transparency
3. Digital Services Taxes
4. Base Erosion and Profit Shifting Rules
    a. Formulary Approach to Allocating Income for Tax Purposes
    b. Corporate minimum tax of 15%

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Beneficial Ownership Transparency

"To catch those who attempt to launder money, evade taxes, or commit other complex financial crimes, law enforcement, tax and other authorities need access to accurate and up-to-date data on the individuals who own and control Corporations".

- Federal Budget 2021 proposes to provide $2.1 million over two years to Innovation, Science and Economic Development Canada to support the implementation of a publicly-accessible corporate beneficial ownership registry by 2025.

- Currently, access can be requested by the Director under the *Canada Business Corporations Act*, any shareholder or creditor, so long as they are to use the information in connection with any matter relating to the affairs of the corporation- not the general public

- Ontario's Fall Budget proposes amendments to the *Business Corporations Act (Ontario)* to require disclosure of beneficial ownership to law enforcement, tax authorities and certain regulators, such as the Ontario Securities Commission, but not to the general public

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Digital Services Taxes

- In order to capture some of the untaxed revenue from the digital economy, several countries have introduced digital services taxes, and Canada has proposed doing so as well:
  - The U.K. introduced a diverted profits tax of 25% of profits deemed to be artificially diverted from the U.K. to a lower-tax jurisdiction
  - India introduced a 6% equalization levy
  - Germany, Spain, Austria and France introduced digital services taxes of 3%-5% on revenue

- The proposed Canadian DST would apply to large foreign and domestic entities (including corporations, trusts, and partnerships) or members of a group that meet both conditions:

  - €750 million or more in global revenue from all sources in the previous calendar year, and
  - in-scope revenue associated with Canadian consumers of $20 million (CAD) in that year

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Digital Services Taxes …cont'd

Canada proposes to impose a tax of 3% on Canadian-source revenue from:

- **online marketplaces** – including services provided through an online marketplace that helps match sellers of goods and services with potential buyers
- **social media** – including services provided through an online interface to facilitate interaction between users or between users and user-generated data
- **online advertising** – generally includes services aimed at the placing of targeted online advertising based on data gathered from users of an online interface
- **user data** – generally, the sale of data gathered from users of an online interface

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Base Erosion and Profit Shifting Rules

In order to forestall the proliferation of DST's on a per-country basis, with the resulting risk of double or triple taxation, the OECD has proposed a new approach to international taxation- a formulary approach to replace the "arm's length standard" in transfer pricing

- Under BEPS Action 1, Pillar 1, it was agreed to adopt new profit allocation and *nexus* rules so that 25% of large multinational enterprises' residual profits are redistributed to the countries in which consumers are located. Market jurisdictions would then have a taxing right over those residual profits.

- While this is a major shift away from the requirement for a physical *nexus* to confer jurisdiction to tax, in today's digital world with its absence of physical presence, there is a principled basis for shifting to a market-based approach.

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Base Erosion and Profit Shifting Rules … cont'd

The formula contains two computations, Amount A and Amount B

- Amount A applies to companies with global turnover above €20 Billion, and profitability above 10%. A new *nexus* rule permits allocation of Amount A to a market jurisdiction in which the relevant MNE derives at least €1 Million in revenue from that jurisdiction.

- For such an MNE, 25% of residual profit (defined as profit in excess of 10% of revenues) will be allocated to the relevant market jurisdiction.

- Amount B continues to apply the arm's length principle to in-country marketing and distribution activities only.

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Base Erosion and Profit Shifting Rules … cont'd

- What is more troubling, however, is Pillar 2, under which the group of 141 countries seeks to impose a 15% minimum corporate tax on large multinational enterprises (having annual revenues of at least €750 million).

- In the case of Canada, this would mean that a Canadian-based MNE would face an additional 15% tax on top of its regular corporate tax of 26.5%, to the extent that any foreign affiliate faced a local income tax of less than 15% in its home country.

- If the foreign affiliate paid income tax at the rate of, say, 5.5% in Barbados for example, the Canadian parent would get a credit for the 5.5% and pay 9.5% to Canada.

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Base Erosion and Profit Shifting Rules … cont'd

- The following information from the OECD itself refutes the claim that Canada (or for that matter any other member of the OECD) is suffering the loss of corporate tax revenue resulting from a so-called "race to the bottom", which purports to justify this new tax.

- The OECD's global corporate tax statistics database reports that average corporate tax revenues have risen from 12.3% of total revenues in 2000 to 15.3% in 2018. Corporate taxes collected as a per cent of GDP have increased from 2.7% to 3.2%- a gain of 20%.

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Base Erosion and Profit Shifting Rules … cont'd

- For over 46 years, Canadian international tax policy has been to foster capital export neutrality, so that an expanding Canadian firm can make its business decisions based on good business practices and not on lower taxes.

- The method for doing so was the establishment of an international tax system anchored in the creation of a notional account called "exempt surplus" in a foreign affiliate that carried on an active business in a country with which Canada has a tax treaty or a tax information exchange agreement.

- If that corporate group paid less tax on foreign earnings than would have been the case if it had only operated domestically in Canada that was seen as a positive result, permitting the Canadian-based multinational to compete and expand.

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Base Erosion and Profit Shifting Rules … cont'd

- This system also recognized that good international tax policy tries to reduce barriers to entry, and so if a Canadian-based MNE wished to expand into Europe, Canada would not impede its decision to run its active foreign affiliate through Ireland where the corporate tax rate was 12.5% versus Germany where the corporate tax rate was 30%.

- However, by imposing a minimum tax of 15% on this corporate group, the Government of Canada would be launching a direct assault against that positive international tax policy, without a justifiable rationale, as demonstrated by the OECD's own statistics.

- Such a policy constitutes a "soak the rich" tax grab, in the absence of real world, principled, fiscal policy justification, and would cause serious harm to Canada's corporate sector, to the detriment of all Canadians.

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Base Erosion and Profit Shifting Rules … cont'd

- The new international tax rules are intended to be implemented through a multilateral convention

- In order to be successful, the OECD must get the U.S. to approve and implement the necessary legislation, which may be a major stumbling block given the apparent deadlock in the U.S. Congress over tax reform

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Base Erosion and Profit Shifting Rules … cont'd

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Questions?

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Contact Us

Lorne Saltman

T **416.865.6689**

E **lsaltman@grllp.com**

W **grllp.com**

@grllp

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Base Erosion and Profit Shifting Rules … cont'd

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Base Erosion and Profit Shifting Rules … cont'd

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Questions?

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Contact Us

Lorne Saltman

T **416.865.6689**

E **lsaltman@grllp.com**

W **grllp.com**

@grllp

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Proposed Replacement of the Ontario Securities Act

Presented by: Heather Zordel
December 1, 2021
Materials by: Eliane Leal da Silva, Associate

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Capital Markets Act

1. Background

- On February 2020 the Ontario government formed the Capital Markets Modernization Taskforce (the “Taskforce”) to seek advice and input from people and organizations on modernizing Ontario's capital markets and supporting economic growth and job creation;
- The Taskforce initial consultation report was released after listening to over 110 stakeholders about the challenges they face, including financial institutions, small and large publicly listed companies, independent investment dealers, industry associations, law firms and investor advocacy groups;
- The initial consultation report outlined more than 47 policy proposals to modernize the province's capital markets;

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Capital Markets Act

1. Background

- The CSA members (other than the OSC) provided their assessment of the recommendations in the initial consultation report;
- On January 22, 2021 the final report was published. It contains 74 consequential recommendations to the Ontario Minister of Finance on how to transform the regulatory landscape for capital markets in Ontario, considering over 130 stakeholder comment letters received in response to the Consultation Report;

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Capital Markets Act

1. Background

Taskforce recommendations: "Modernized Securities Legislation"

- The first recommendation of the Taskforce ("R1") is the introduction of the "Capital Markets Act" in Ontario that could be based on the draft proposed Capital Markets Act developed under CCMR, a modern statute to replace the Securities Act and the Commodity Futures Act;
- Consequently, an accompanying statute setting out a modernized governance and structure for the OSC would also be required;
- The Taskforce suggested that the Ministry of Finance work with the OSC towards implementing the Ontario version of the CMA by the end of 2021.

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2. Draft of the CMA

- On October 12, 2021, the Ontario government released a draft of the Capital Markets Act (Ontario) ("**CMA**") for consultation, which addresses some of the Taskforce recommendations in the final report;
- At this stage, the CMA draft is only intended for stakeholder consultation purposes, and comments received during the consultation will be considered prior to determining next steps;
- Comments are due on January 21, 2022;
- The CMA will not become law unless a bill is passed by the Legislative Assembly of Ontario;
- The CMA is new draft legislation intended to replace the OSA and the CFAO, if it comes into force.

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2. Draft of the CMA

The CMA :

- sets out the regulatory framework for capital markets participants;
- outlines the OSC's regulatory and enforcement powers, including the authority to make rules;
- provides for the Capital Markets Tribunal's adjudicative powers;
- modernizes Ontario's current capital markets legislation, retaining key components while introducing new elements to promote flexibility within a modern regulatory framework;

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Capital Markets Act

2. Draft of the CMA

- aligns with developments in a rapidly evolving sector and enhance Ontario's position as a globally competitive capital markets jurisdiction as part of the government's commitment to burden reduction and streamlining regulatory oversight.
- develops and implements legislation in a transparent manner;
- creates greater harmonization among jurisdictions;
- ensures that legislation is easily accessible and written in language that can be easily understood by the public and business;

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2. Draft of the CMA

- The CMA sets out the fundamental provisions of capital markets law while leaving detailed requirements, including requirements that are currently contained in legislation, to be addressed in the rules.
- This approach promotes regulatory flexibility, allowing the OSC to respond to market developments in a timely manner and appropriately tailor its regulatory treatment of various entities and activities.
- The OSC and the government will ensure stakeholders have the opportunity to familiarize and adapt to any changes resulting from the CMA and new and existing rules, while ensuring that this important work moves forward in a timely manner.

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3. Securities Commission Act, 2021

- The Securities Commission Act, 2021, S.O. 2021, c. 8, Sched. 9 ("SCA") outlines the governance and accountability of the OSC, including the board of directors, Chief Executive Officer and Tribunal.
- The SCA was introduced in March 2021 to implement the following OSC governance changes recommended by the Taskforce:
  - Separate the regulatory and adjudicative functions at the OSC;
  - Separate the current Chair and Chief Executive Officer position into two distinct positions;

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3. Securities Commission Act, 2021

- Currently Members of the OSC serve as the board of directors of the OSC, exercise adjudicative functions, and are responsible for policy and regulatory decisions. The Chair and Chief Executive Officer is a combined position and appointed by the Lieutenant Governor in Council;
- The SCA continues the OSC as a corporation without share capital and establishes a new specialized Tribunal as a separate division of the OSC;
- The Tribunal's adjudicators are appointed by the Lieutenant Governor in Council and are different individuals from the OSC's board of directors;

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3. Securities Commission Act, 2021

- The Tribunal is independent from the rest of the OSC except for administrative matters, and the Chief Adjudicator is responsible for supervising and directing the Tribunal's operations. Under the CMA, the Tribunal makes adjudicative decisions, such as orders in the public interest, and reviews of decisions of the Chief Regulator;
- The members of the OSC's board of directors are appointed by the Lieutenant Governor in Council and the board is responsible for managing or supervising the management of the OSC's affairs, other than matters relating to the Tribunal's adjudicative functions;

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3. Securities Commission Act, 2021

- The Lieutenant Governor in Council will appoint the CEO of the OSC for the first two years. The board of directors will appoint subsequent CEOs. The CEO is responsible for the management and administration of the OSC, other than matters relating to the Tribunal's adjudicative functions;
- The CMA assigns regulatory responsibilities to the OSC, to be exercised by the board of directors, or to the Chief Regulator, who is the CEO appointed under the SCA. The CEO of the OSC will be responsible for most of the regulatory duties and powers in the CMA, either assigned directly to them by the CMA or delegated by the OSC's board of directors;
- The SCA has been introduced and is expected to be proclaimed into force in the coming months;

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4. Overview of the CMA - Part I – Interpretation

- Part I – Interpretation includes the purposes of the CMA, the fundamental principles the OSC should follow in pursuing the purposes of the CMA, definitions, and exceptions from complying with the CMA for the Crown and Crown agents.
- The purposes of the CMA include the changes to the OSC's mandate introduced in spring 2021 to include fostering capital formation and competition in capital markets;

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4. Overview of the CMA - Part II – Recognized Entities

- Part II – Recognized Entities outlines the requirements for recognized entities, including self-regulatory organizations, exchanges, clearing agencies, trade repositories or persons engaged in activities prescribed in the rules. Recognized entities, and entities exempt from recognition, must comply with conditions, restrictions, and requirements prescribed in the rules.
- A recognized entity has a duty to provide information to the Chief Regulator. Recognized self-regulatory organizations and exchanges must regulate the operations, standards of practice, and business conduct of its members with a view to pursuing the public interest.
- The Chief Regulator can make recognition orders and decisions related to recognized entities in the public interest. The Chief Regulator may impose conditions, restrictions, and requirements in the recognition order, which provides the OSC with the ability to exercise accountability over recognized entities.

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4. Overview of the CMA - Part III – Designated Entities and Other Marketplaces

- Part III – Designated Entities and Other Marketplaces outlines the requirements for designated entities, including credit rating organizations, investor compensation funds, information processors, marketplaces, or persons engaged in activities prescribed in the rules. Designated entities, entities exempt from designation, and marketplaces that are not recognized exchanges or designated marketplaces must comply with conditions, restrictions, and requirements prescribed in the rules.
- Similar to recognized entities, a designated entity has a duty to provide information to the Chief Regulator.
- The Chief Regulator can make designation orders and decisions related to designated entities and marketplaces that are neither a recognized exchange nor a designated marketplace in the public interest.

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4. Overview of the CMA - Part III – Designated Entities and Other Marketplaces

- Part III also outlines the regulatory regime for benchmarks. The Chief Regulator can designate a benchmark or benchmark administrator in the public interest.
- Designated benchmark administrators, benchmark contributors, and benchmark users must comply with prescribed conditions, restrictions, and requirements and provide information to the Chief Regulator or another person or class of persons or the public in accordance with the rules.
- The Chief Regulator can also order a person to provide information to a designated benchmark administrator.

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4. Overview of the CMA - Part IV – Registration

- Part IV – Registration outlines the registration requirements for registrants, which include dealers, advisers, and investment fund managers. Registrants, their directors, officers, and auditors are required to comply with the conditions, restrictions, and requirements in the rules.
- The Chief Regulator can require more information and impose conditions, restrictions, or requirements on a registrant.
- The Chief Regulator can also require a registrant to direct its auditor to conduct an audit or financial review and deliver a report.
- Certain financial institutions are exempt from the requirement to be registered to act as a dealer, adviser, or investment fund manager. The exemptions are subject to conditions, restrictions, and requirements prescribed in the regulations.

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4. Overview of the CMA - Part V – Distribution of Securities

- Part V – Distribution of Securities outlines requirements for issuers, registrants, purchasers, and other prescribed persons with respect to activities related to a distribution of securities;
- A prospectus must provide full, true, and plain disclosure of all material facts related to the securities offered or proposed to be offered. A person must comply with the requirements in the rules about the contents, filing with the Chief Regulator, and sending of a preliminary prospectus, prospectus, or prescribed offering document to a purchaser;
- The Chief Regulator must issue a receipt if the prospectus or document is filed according to the rules unless the Chief Regulator considers that it would not be in the public interest to do so;

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4. Overview of the CMA - Part V – Distribution of Securities

- The Chief Regulator may order an issuer to give a person any information or records that the Chief Regulator considers necessary if the person is proposing to distribute an issuer's previously issued securities and is unable to obtain the information or records necessary to comply with this Part or related rules. The Chief Regulator may order that trading activities cease if they consider a preliminary prospectus does not comply with the requirements;
- The prospectus requirement does not apply to distributions of certain government debt securities, securities of certain financial institutions and government incentive securities.

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4. Overview of the CMA - Part VI – Trades of Derivatives

- Part VI – Trades of Derivatives outlines requirements for a dealer, adviser, counterparty to a trade, or other prescribed, including:
- filing a prescribed disclosure document that complies with the prescribed requirements and a receipt issued by the Chief Regulator if required by the rules;
- every person who trades in or provides a marketplace for trading in derivatives, every trade depository, and other prescribed persons are required to provide information relating to derivatives transactions to the Chief Regulator and other prescribed persons;
- a derivatives trade is not void, voidable, or unenforceable and a counterparty is not entitled to rescind the trade solely because the trade failed to comply with capital markets law, unless the terms of the derivative provide otherwise;
- Derivatives can be prescribed as securities for the purposes of any of the provisions in the CMA and the rules.

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4. Overview of the CMA - Part VII – Reporting Issuers and Prescribed Others – Disclosure and Governance Obligations

- Part VII outlines disclosure, governance, and other requirements for issuers and investment funds;
- For issuers, the requirements include composition of the board, board committees, code of conduct, procedures to regulate conflicts of interest, and meeting requirements for its security holders;
- For investment funds, the requirements include distribution and trading of its securities and the conduct of its operations;
- An issuer, auditor of an issuer, or other prescribed persons must comply with prescribed requirements with respect to accounting, reporting, auditing, internal controls, and disclosure controls.
- The Chief Regulator may require a director, officer, promoter, or control person of an issuer to provide information to the Chief Regulator. The OSC may set a limit on the amount that a person charges for compiling or distributing records relating to an issuer.

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4. Overview of the CMA - Part VIII – Take-over Bids, Issuer Bids and Certain Other Transactions

- Part VIII outlines requirements for early warning of acquisitions or dispositions of securities of a reporting issuer, take-over bids, issuer bids, insider bids, going-private transactions, related party transactions, business combinations, or similar transactions;
- A person must not make a take-over bid or issuer bid except in accordance with the rules, and issuers whose securities are the subject of a take-over bid or an issuer bid, and their directors or officers, must comply with conditions, restrictions, and requirements in anticipation of or during a bid, transaction, or business combination. A person must comply with the conditions, restrictions, and requirements as may be prescribed for going-private transactions, related party transactions, and business combinations or other similar transactions.

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Capital Markets Act

4. Overview of the CMA - Part VIII – Take-over Bids, Issuer Bids and Certain Other Transactions

- The board of directors of the issuer must determine whether to recommend acceptance or rejection of a bid and prepare a circular that sets out their recommendation.
- A director or officer may individually recommend acceptance or rejection of the bid.
- The rules may prescribe duties and requirements to disclose or manage conflicts of interest for an offeror, offeree issuer, issuer, and its directors and officers.
- The rules may also prescribe requirements when a person can and cannot acquire or trade in a security before, during, or after a transaction.

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4. Overview of the CMA - Part VIII – Take-over Bids, Issuer Bids and Certain Other Transactions

- On application by an interested person, the Chief Regulator may vary the time period in the rules related to this Part if it would not be prejudicial to the public interest.
- The Tribunal and the Superior Court of Justice may make interim or final orders if a person has acted or is acting contrary to the public interest or has not complied with or is not complying with this Part or the rules related to it.
- If the Chief Regulator is not the applicant, they must be given notice of these applications and is entitled to appear as a party to the application.

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4. Overview of the CMA - Part IX – Market Conduct

- Part IX outlines conduct requirements for market participants and other persons participating in capital markets, including:
- Records are required to be kept for 7 years. The Chief Regulator may require a person to provide these records;
- Registrants have a duty to deal fairly, honestly, and in good faith with their clients and meet such other standards as are prescribed;
- Investment fund managers have a duty to exercise their powers and perform their duties honestly, in good faith, and in the best interests of the investment fund and exercise the degree of care, diligence, and skill of a reasonably prudent person in the circumstances.

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4. Overview of the CMA - Part IX – Market Conduct

- Registrants and investment funds shall identify, manage, and disclose conflicts of interest;
- Certain persons shall comply with prescribed requirements relating to trading, clearing, and settlement of trades in securities or derivatives. A person engaging in promotional activities shall comply with prescribed requirements.
- Persons shall not make statements that are materially false or misleading and would reasonably be expected to have a significant effect on the market price or value of a security, a derivative, or the underlying interest of a derivative. Persons engaged in promotional activities shall not make false or misleading statements, or provide false or misleading information, about a reporting issuer or an issuer whose securities are publicly traded.

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4. Overview of the CMA - Part IX – Market Conduct

Under Part IV, persons are prohibited from making certain representations in relation to:

- a trade of a security, including that they will resell or repurchase a security or refund the purchase price of a security, give an assurance relating to the future value or price of a security, or that a security will be listed on an exchange unless the exchange has approved the listing or consented to the representation, that an application has or will be been made to list on an exchange unless consented by the;
- a trade of a derivative, including that they will refund an amount paid, assume all or part of the obligations under the derivative, give an assurance relating to the future value or price, or that the derivative will be traded on a marketplace, unless consented;

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4. Overview of the CMA - Part IX – Market Conduct

- Unfair practices are prohibited, e.g. (i) using the name of another registrant, (ii) representing that a person is registered under the CMA if untrue or without the person's category of registration, (iii) making false or misleading statements that are important for an investor to decide whether to enter into or maintain a trading or advising relationship, (iv) representing that the OSC or Chief Regulator has made certain approvals, (v) obstructing a hearing, opportunity to be heard, review or investigation, and making false or misleading statements to the Chief Regulator or Tribunal;
- A person and their agent who is placing an order for the sale of a security must declare to the dealer if they do not own the security at the time the order is placed;

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4. Overview of the CMA - Part IX – Market Conduct

- A person also must not take a reprisal against an employee for seeking advice, expressing an intention to provide, or providing information about a contravention of capital markets law to a regulator;
- A person must not convert another person's assets held in trust or any part of them to a use that is not authorized. Aiding, abetting, or counselling a contravention of capital markets law or conspiring with another person to contravene are prohibited;

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4. Overview of the CMA - Part X – Orders, Reviews and Appeals

Part X outlines the orders that the Tribunal, Chief Regulator, and Superior Court of Justice can make and how their decisions are reviewed and appealed.

Tribunal Orders:

- After a hearing, the Tribunal can make orders in the public interest and the Chief Regulator can make these orders without a hearing where the person subject to the order consents.
- The Tribunal can also make orders without giving the person subject to the order an opportunity to be heard where the person has had a prior capital markets-related conviction, or is subject to a prior order of, or has entered into a settlement agreement with, certain regulators (including international capital markets regulators and Canadian self-regulatory organizations (SROs) and exchanges).

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4. Overview of the CMA - Part X – Orders, Reviews and Appeals

- The Chief Regulator can make certain orders without giving an opportunity to be heard if they consider that a delay in making the order could be prejudicial to the public interest; these orders expire within 15 days;
- Most enforcement orders and settlement agreements by other capital markets regulators in Canada have automatic effect in Ontario and will apply without the OSC making an order to reciprocate these orders and agreements. The Chief Regulator or a person who is subject to these orders can apply to the Tribunal for clarification of the application of the order;
- The Tribunal can also make orders for a person to pay an administrative penalty up to a maximum of $5 million, to disgorge amounts obtained, or payments or loss avoided for contravening capital markets law and orders providing for settlement of a proceeding or potential proceeding;

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4. Overview of the CMA - Part X – Orders, Reviews and Appeals

- The Chief Regulator may apply to the Superior Court of Justice to appoint an administrator to administer and distribute the disgorged amounts received by the OSC.
- The OSC can also administer and distribute the disgorged amount in accordance with the rules. Once proclaimed, the SCA would address how the OSC uses amounts received from these orders.
- The Tribunal can make temporary freeze orders that must be continued by the Superior Court of Justice after ten days.

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4. Overview of the CMA - Part X – Orders, Reviews and Appeals

Chief Regulator Orders:

- Cease trade orders may be made in extraordinary circumstances and it must be confirmed by the OSC board of directors within 3 days. The Chief Regulator may also make cease-trade orders for failing to file required documents;
- Compliance orders for non-compliance with capital markets law. Persons who are directly affected by such orders must be given an opportunity to be heard;
- Exemption orders and designation orders, including recognizing an exchange or clearing agency or designating a marketplace for the purposes of a rule. Designation orders may only be made after giving the persons directly affected an opportunity to be heard.
- The Chief Regulator may also make orders to extend periods in Parts II to IX of the CMA.

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4. Overview of the CMA - Part X – Orders, Reviews and Appeals

Court Orders:

- The Chief Regulator may apply to the Superior Court of Justice for a declaration that a person has not complied with or is not complying with capital markets law and such court order as the court considers appropriate;
- The Chief Regulator may also apply to the Superior Court of Justice to appoint a receiver, receiver-manager, trustee, or liquidator for a person's property;

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4. Overview of the CMA - Part X – Orders, Reviews and Appeals

Appeals and Reviews

- Decisions of the Tribunal can be appealed to the Divisional Court. In most cases, a person directly affected by a decision of the Chief Regulator may apply to the Tribunal for a hearing and review of the decision. However, some Chief Regulator decisions are only subject to judicial review, such as decisions regarding recognition and designation orders, orders to provide information to designated benchmark administrators, cease trade orders in extraordinary circumstances, exemption orders, and orders when a distribution is concluded;
- OSC decisions that are final and not subject to appeal or review by the Tribunal are subject to judicial review by a court. Decisions of the Tribunal, Chief Regulator, or a recognized entity that can be appealed or reviewed are not subject to judicial review.

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4. Overview of the CMA - Part XI – Administration and Enforcement

- Part XI outlines the OSC's powers to administer and enforce compliance with capital markets law;
- The Tribunal can order a person to pay the OSC's investigation or hearing costs after conducting a hearing.

Reviews and Investigations:

- The Chief Regulator can make an order requiring market participants and other persons to provide information in the form and within the time specified in the order, designate a person or class of persons to review their business and conduct, and enter their business premises for their review during business hours;
- The Chief Regulator can designate a person to review the business and conduct of market participants and the reviewer can require certain persons to provide information

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4. Overview of the CMA - Part XI – Administration and Enforcement

- The Chief Regulator can apply to the Superior Court of Justice for a person to be committed for contempt where they have failed or refused to comply when compelled;
- A court order is required in order to search both a business premises and a place that is not a business premise;
- The Chief Regulator can make an order requiring that all information related to an investigation be kept confidential;
- The Chief Regulator may authorize disclosure in the public interest after giving the person from whom the evidence was compelled notice and an opportunity to be heard.

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4. Overview of the CMA - Part XI – Administration and Enforcement

Offences and Penalties

- A person found guilty of an offence is liable to a maximum fine of $10 million or imprisonment of up to five years less a day, or to both;
- For some offences, the maximum fine can be greater than $10 million if triple the amount of profit made or loss avoided is greater than $10 million;
- A court can order a person to pay compensation or make restitution to another person or to pay the OSC any amount obtained or the amount of payment or loss avoided as a result of the offence;
- Directors, officers, employees, or agents can be liable for an offence if they authorized, permitted, or acquiesced in the commission of the offence;
- An investment fund manager is a party to and guilty of an offence committed by an investment fund;

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4. Overview of the CMA - Part XII – Civil Liability

- Part XII outlines the rights of civil action for damages or rescission related to the purchasing and selling of securities for misrepresentation, if certain documents or other disclosures do not comply with statutory requirements, or a person has participated in insider trading or front running;
- There are defences available for persons with no knowledge of the misrepresentation or who were relying on an expert's authority or report, or if the misrepresentation is in forward-looking information;
- A person may apply for a court order requiring the Chief Regulator or authorizing an applicant to commence or continue an action on behalf of an issuer to enforce payment of benefits from insider trading, front-running, or improper use of information;
- The Chief Regulator may intervene in a proceeding;

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4. Overview of the CMA - Part XIII – Civil Liability for Secondary Market Disclosure

- Part XIII outlines the right of civil action for damages or rescission related to the secondary market for misrepresentation and failure to make timely disclosure;
- A plaintiff has to meet certain conditions to establish liability for these actions. There are also defences available for making reasonable investigations, forward-looking information, relying on the authority of an expert, unanticipated release of a document, if the plaintiff knew of the misrepresentation or material change, if the misrepresentation was corrected or the person immediately notified relevant persons of the failure to make timely disclosure and other circumstances.
- Leave of the court is required to commence actions. The plaintiff must send the Chief Regulator certain documents and notices and issue a news release disclosing that leave of the court has been granted. The Chief Regulator may intervene in a proceeding.

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4. Overview of the CMA - Part XIV – General

- Part XIV outlines additional powers and duties of the Tribunal, the OSC and the Chief Regulator to administer and enforce capital markets law;
- The Tribunal, OSC's board of directors, and the Chief Regulator may impose conditions, restrictions, or requirements in their decisions or revoke or vary their decisions. In certain circumstances, the Chief Regulator must provide an opportunity to be heard before revoking or varying a decision.
- The OSC's board of directors can delegate powers or duties to the Chief Regulator, other than the power to make rules. The Chief Regulator may delegate their powers or duties to an OSC employee or to a recognized entity. The Chief Regulator may also refer a material question affecting the public interest or a novel question of interpretation to the OSC's board of directors for determination.

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4. Overview of the CMA - Part XIV – General

- A person has a duty to comply with an undertaking they give to the OSC, Chief Regulator or Tribunal;
- The limitation period for proceedings under the CMA is 6 years but can be extended by agreement of the parties;
- The Chief Regulator may publish a list of persons not in compliance with capital markets law and exchange information with law enforcement agencies, other regulators, or a person providing services to the OSC.

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4. Overview of the CMA - Part XV – Regulations, Rules and Policies

- Part XV outlines the process and requirements for the OSC to make regulations, rules and policies.
- The Lieutenant Governor in Council may make regulations for any matter for which the OSC may make rules, and the regulation prevails over the rule if there is a conflict. The Lieutenant Governor in Council and the OSC may make a regulation or a rule respectively in extraordinary circumstances.
- The OSC must publish its rules in the Ontario Gazette and its bulletin. Before making a rule, the OSC must publish a proposed rule for public comment for at least 60 days, with exceptions. The OSC must submit rules to the Minister for approval. The Minister can approve, reject, or return a rule for consideration. The Minister may also request that the OSC consult on a matter and consider making a rule.
- The OSC may also specify forms and issue policy statements.

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4. Overview of the CMA - Part XVI – Transitional Matters

- The CMA provides the OSC with the authority to make rules to ensure a smooth transition for market participants;
- The primary goal of any associated transitional rule-making would be to address legal continuity issues so as to minimize the impact of the transition to the CMA on market participants and their businesses. It is the intention that market participants would not have to take any action to continue their reporting issuer, registration, recognition, designation, or other status or activities under the new legislative scheme, and all orders and proceedings will be continued. Any necessary changes would happen by operation of law.
- It is anticipated that OSC regulatory staff would work with market participants to facilitate the transition, as may be necessary.

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5. Key Differences Between the CMA and the OSA

- A significant difference from the OSA and the CFAO is the extent to which the CMA adopts a platform approach to capital markets regulation, in that the CMA is designed to set out the fundamental provisions of capital markets law while leaving detailed requirements to be addressed in the rules;
- The platform approach to regulation is also largely consistent with the current securities legislation in other provinces and territories.
- In some cases, authority to make rules replaces some areas that are currently contained in the OSA;
- Under the CMA, regulatory decision-making and decisions of the "Director" and "Executive Director" under the OSA have been assigned to the Chief Regulator;

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5. Key Differences Between the CMA and the OSA

- Under the OSA, the OSC's board of directors is responsible for key policy decisions, such as recognition and designation orders and certain cease trade orders. The Chief Regulator has, among other things, been assigned responsibility for recognition and designation orders under the CMA and will have authority to make cease trade orders in extraordinary circumstances, subject to confirmation by the OSC's board of directors. These and other specified decisions of the Chief Regulator would only be subject to judicial review. Regulatory decisions made by the Chief Regulator, however, would be appealable to the Tribunal;
- The CMA provides new information gathering tools, expanding the persons and companies from whom the OSC may require information. It also augments investigation powers and adds prohibitions to address existing issues in capital markets;

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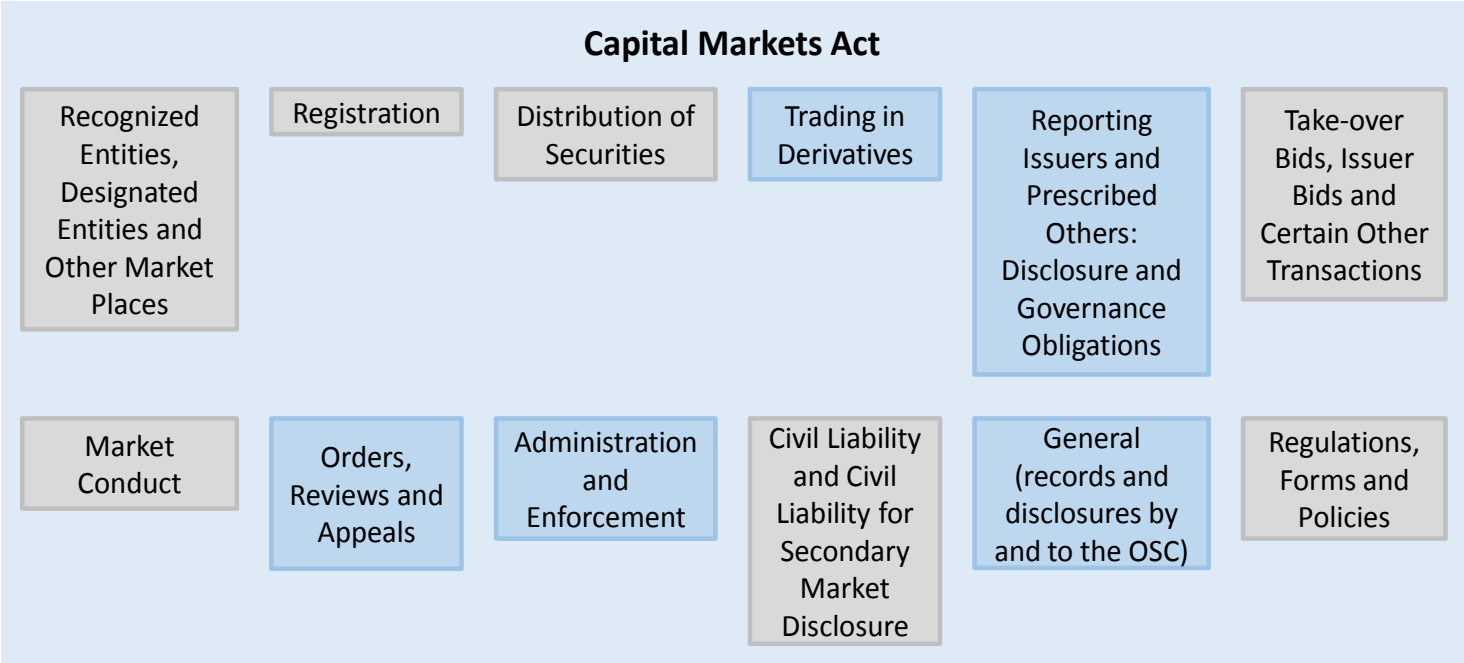
5. Key Differences Between the CMA and the OSA



Parts of the CMA generally consistent with existing *Securities Act* provisions

Parts of the CMA with significant changes from existing *Securities Act* provisions

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6. Key Differences Between the CMA and the CFAO

- Under the CFAO, any person or company that trades in or acts as an adviser with respect to “commodity futures contracts” or “commodity futures options” is required to register or to qualify for an exemption.
- If the CMA is enacted, the CFAO would be repealed, and commodity futures contracts and options would be regulated as derivatives under the CMA.
- The registration exemptions under the CFAO would no longer be available. However, the “trade trigger” for registration under the CFAO would be replaced with the CMA’s “business trigger”.
- Therefore, market participants who previously relied on exemptions under the CFAO for trading in exchange contracts would be subject to the dealer registration requirement under the CMA only if they are in the business of trading. Market participants currently relying on CFAO exemptions may be able to rely on registration exemptions in NI 31-103 that apply to exchange contracts.

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7. New Approach to Rule-Making Authority

- A general statement conferring rule-making authority would be set out in section 266 of the CMA, which would contain the operative rule-making authority for the entire CMA. Instead of the detailed list of heads of rule-making authority included in the 2015 consultation draft developed as part of the CCMR initiative ("2015 CMA Draft"), additional substantive provisions would be included throughout the CMA. These additional substantive provisions would support the general rule-making authority contained in section 266 of the CMA.
- This approach is intended to be flexible and would permit the OSC to make rules covering items that are not contemplated at the time the CMA comes into force, enabling it to respond to the ever-changing capital markets. Section 266(1) of the CMA sets out a general power to "make rules for carrying out the purposes and provisions of this Act", giving the OSC broad scope to make rules to further the purposes described in section 1 of the CMA.

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7. New Approach to Rule-Making Authority

- Sections 266(2) to (9) of the CMA include heads of authority usually required by the common law. Specific authority is necessary in order to, among other things, (i) impose different requirements on different classes; (ii) define words or expressions used in the CMA or a rule that have not been expressly defined in the CMA; (iii) regulate or prohibit conduct; (iv) establish exemptions from the application of the CMA; (v) prescribe defences and the availability of any defences; (vi) authorize sub-delegation; and (vii) impose fees and charges.
- The proposed new approach to rule-making represents a modern approach in contrast to the more prescriptive approach currently used in the OSA, which contains an itemized list of each and every head of rule-making that requires amendment whenever it is necessary to make a rule not covered in the list.
- This approach is intended to promote regulatory flexibility and would allow the OSC to respond to market developments in a timelier manner.

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8. Taskforce Recommendations Included in the Capital Markets Act

- The government is utilizing the CMA as a legislative vehicle to implement a number of Taskforce recommendations;
- The government notes that the Taskforce made additional recommendations;
- Many of the Taskforce's recommendations do not require explicit legislative provisions and could be implemented through OSC rules or otherwise.
- There are currently a number of OSC initiatives planned or underway that may partially or fully implement recommendations by the Taskforce:

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R5. Ensure the securities regulatory framework and OSC's regulatory functions are reviewed periodically.

- The CMA includes a provision requiring a periodic review every five years of the capital markets legislation and OSC rules.
- The government is considering the introduction of amendments to the SCA to ensure that the OSC's structure and mandate is also reviewed periodically and remains adapted to an evolving capital markets industry
- The CMA requires the Minister to appoint persons to review the operation of the CMA, regulations, and rules and make recommendations to the Minister and appoint persons to conduct a subsequent review no later than five years after the most recent appointment.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R7: Reduce the minimum consultation period for rule-making from 90 days to 60 days for consistency with provisions in other jurisdictions and to reduce delays.

- The CMA includes a minimum consultation period of 60 days for proposed OSC rules to allow the OSC (and, by extension, all CSA members in cases where changes are to multilateral or national instruments) to enact timelier rules that would respond to market changes and stakeholder feedback. 60 days is the minimum consultation period and the OSC would continue to set out longer consultation periods for rules where warranted.
- This change would also align Ontario's public consultation period for proposed rules with the public consultation period of other CSA jurisdictions.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R13: Provide OSC with additional tools for continuous disclosure and exemption compliance.

- The CMA allows the Chief Regulator to make compliance orders to address specific situations where an issuer is non-compliant with requirements. These compliance order powers are meant to help resolve compliance issues quickly, including issues that relate to continuous disclosure requirements and adherence to the terms of the prospectus exemptions.
- This power to make compliance orders would not be appropriate for serious breaches of capital markets law, which would continue to be addressed through enforcement processes.
- The compliance order power could be delegated to the staff of the OSC's Corporate Finance Branch.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R17. Develop a well-known seasoned issuer model.

- The CMA includes the rule-making authority to allow for the automatic issuance of prospectus receipts for issuers that meet certain requirements to be set out in OSC rules.
- Such requirements, which would be the subject of further consultation, may include that the issuers have a certain public float or have issued debt securities above a set amount in a specified time period and have established an appropriate disclosure record.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R23. Introduce additional Accredited Investor (AI) categories.

- The CMA includes rule-making authority that would allow the OSC to introduce additional categories under the accredited investor prospectus exemption.
- By moving all of the accredited investor categories to the OSC rules, the OSC would have more flexibility to tailor them and ensure they remain adapted to evolving capital markets. This would include conducting work on developing additional accredited investor categories that would be published for consultation as proposed OSC rules.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R30. Expand the civil liability for offering memorandum misrepresentation to extend to parties other than the issuer.

- The CMA includes broader civil liability recourse for investors in the exempt market. Currently, the rights of action for misrepresentations in an offering memorandum are more limited in Ontario than in other CSA jurisdictions. For example, in Ontario, claims may only be made against the issuer, not directors or promoters of the issuer;

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R31. Provide the OSC with rulemaking authority to adapt prospectus liability to address regulatory gaps resulting from new and evolving financing structures.

- The CMA addresses the absence of statutory civil liability recourse for investors in specific circumstances, e.g. when convertible or exchangeable securities are distributed under a prospectus, in multi-stage financings, in financing transactions involving plans or arrangements or other restructuring transactions, or in more complicated financing structures involving multiple related issuers.
- The CMA broadens civil liability recourse for investors who purchase a security under a prospectus or a prescribed offering document that contains a misrepresentation and provides additional rule-making authority to expand the scope of liability to certain influential persons.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R32. Give the OSC additional designation powers.

- The OSC, in partnership with other capital markets regulators across Canada, is addressing issues relating to crypto asset trading platforms' compliance with capital markets law.
- In March 2021, as a follow-up to previous publications, the CSA and the IIROC published a notice providing guidance on the requirements that apply to crypto asset trading platforms;
- The OSC also issued a notice for all crypto asset trading platforms to begin discussions on bringing their operations into compliance;
- Since then, the OSC has initiated enforcement proceedings against non-compliant platforms.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R32. Give the OSC additional designation powers.

- Providing the OSC with designation powers and rule-making authority for crypto assets that are not already securities or derivatives would allow the OSC to tailor requirements to new platforms and assets;
- The CMA includes broader designation powers and rule-making authority for the OSC intended to provide regulatory clarity to businesses with unique offerings and appropriate protection to investors.
- These designation powers and rule-making authority include the power to designate crypto assets as securities and/or derivatives and the power to prescribe crypto assets to be securities and/or derivatives.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R40. Require all publicly listed issuers to have an annual advisory shareholders' vote on the board's approach to executive compensation.

- The CMA includes the rule-making authority to allow for requirements to be placed on issuers to have an annual advisory shareholders' vote on the board's approach to executive compensation. Such voting provides critical input to boards and facilitates shareholder engagement in ensuring that approaches to executive compensation reflect the shareholders' best long-term Interests.
- However, others CSA jurisdictions have rejected mandating advisory votes on executive pay, and the OSC would be unlikely to go with it alone. Just because something can be more easily done via rule-making doesn't mean it will be.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R43. Amend securities law to provide additional requirements and guidance on the role of independent directors in conflict of interest transactions.

- The CMA includes the rule-making authority to allow for requirements to be placed on independent directors of issuers in the context of material conflict of interest transactions. For example, the rules may mandate the formation of independent committees to oversee material conflict of interest transactions. These transactions include insider bids, business combinations in which insiders are eliminating public shareholders, and significant related-party transactions with the issuer that could result in the transfer of value from minority shareholders to insiders.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R44. Provide the OSC with a broader range of remedies in relation to mergers and acquisitions (M&A) matters and modernize the private issuer take-over bid exemption.

- The CMA includes new Tribunal order powers related to M&A matters that may be exercised by the Tribunal upon an application by an interested person. Providing the Tribunal with these powers would provide market participants with an alternative to initiating a court proceeding for these remedies.;
- These new powers are similar in scope to the new powers given to the British Columbia Securities Commission in 2019;

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R57. Create a prohibition to effectively deter and prosecute misleading or untrue statements about public companies and attempts to make such statements.

- The CMA provides that the OSC may prescribe requirements and restrictions for persons engaging in promotional activities, which are defined to include communications that encourage or reasonably could be expected to encourage purchasing and trading securities and derivatives.
- It also specifically prohibits false or misleading statements about public companies in connection with promotional activity and attempts to make such statements.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R58. Increase the maximum for administrative monetary penalties to $5 million and increase the maximum fine for offences to $10 million.

- The CMA increases the maximum administrative monetary penalties that can be imposed by the Tribunal and the maximum fine for offences that can be imposed by the court.
- These amounts have not been adjusted since 2003.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R59. Modernize investigative tools by empowering the provincial Court to issue capital markets production orders.

- Under the Provincial Offences Act, search warrant power only provides a power to search for "things" such as paper records and objects. Therefore, to search for data within computer systems, enforcement investigators appointed by the OSC would have to take the invasive, disruptive, and often impractical step of entering premises and seizing computers or servers themselves;
- The CMA modernizes quasi-criminal investigations by allowing the OSC to apply to a judge or justice of the provincial court (justice) to obtain a production order;

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

- Production orders would require firms and individuals that are not under investigation, and who have possession or control of the relevant information or data, to gather or prepare the applicable documents, records, or electronic data to deliver to an investigator;
- A production order may require the record holder to gather or prepare the records, even if they are in off-site paper or stored electronically, and provide them to an investigator, within a certain period of time specified by the justice;
- These new investigation powers also include related preservation powers to ensure the preservation of evidence.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R60. Amend legislation to permit substituted and broader service provisions and remove the search exemption for private residences such that they can be searched during daylight hours with a warrant.

- The CMA includes changes that modernize the OSC's enforcement powers and give it more flexibility.
- They include removing the personal service requirement and giving the OSC the rule-making authority to set the service requirements that would include electronic service.
- They also include a new power for the OSC to obtain a warrant to search a dwelling-house during daylight hours.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R61. Codify certain OSC requirements relating to data delivery standards to ensure the preservation of evidence and address assertions of privilege.

- The CMA allows an authorized investigator to compel a summons recipient to preserve evidence for the purpose of an investigation. This power allows the OSC to enforce non-compliance with a request or demand to preserve evidence and help to ensure that evidence is not destroyed or altered in response to an OSC summons.
- This power would increase the effectiveness of OSC investigations and aligns with similar investigation tools in other provinces.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R63. Allow tolling agreements to enable the OSC and respondents to mutually agree to extend the limitation period to commence proceedings, and expand the limitation period for collections-related actions.

- The CMA includes a provision that allows the OSC and respondents to mutually agree to extend the limitation period to commence proceedings;
- In Ontario, the *Limitations Act,* and the *Real Property Act* guides limitation periods, including those pertaining to OSC collections-related actions. There is no limitation period for OSC collections-related actions concerning chattels and money, and there is a sixty-year limitation period for OSC collections-related actions concerning real property. Together with this legislation, the CMA supports the goal of OSC collections relating to its sanctions, including where assets may be intentionally hidden.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R65. Confirm that persons or companies who comply with a summons will not be in breach of any contracts they are a party to and that compliance with an OSC summons will not be a basis of contractual liability against them by third parties.

- The CMA includes a provision that clarifies that there is no contractual liability for disclosures to the OSC of information to comply with capital markets law. As such, if a person provides information to the OSC pursuant to a summons, this provision clarifies that this person is not subject to contractual liability for complying with the summons.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R66. Create prohibitions to effectively prosecute those who facilitate contraventions of Ontario securities law.

- The CMA prohibits aiding, abetting or counselling a contravention of capital markets law and conspiring with any other person to contravene capital markets law;
- These prohibitions would allow the OSC to take enforcement action against those who facilitate or assist in contravening capital markets law and provide the OSC with additional tools to enforce capital markets law and improve investor protection;
- Other CSA jurisdictions have similar prohibitions in their securities acts.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R67. Create a prohibition to prosecute front-running effectively.

- The CMA includes a prohibition against front-running: acting on knowledge of an order of a client or connected investor that would disadvantage the client or connected investor. The relevant defences, partially based on IIROC's Universal Market Integrity Rules, are also included and additional criteria for the defences may be prescribed in the rules;
- Prohibiting front-running allows the OSC to take enforcement action against this activity, enhancing confidence in the integrity of the capital markets and improving protection for clients, connected investors and other market participants.
- Section 104 Defences outlines the defences available for front-running.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R69. Broaden the confidentiality exceptions available for disclosing an investigation and examination order or a summons.

- The CMA does not include a provision equivalent to section 16 of the OSA requiring confidentiality of any information obtained pursuant to a summons, including information about the OSC's investigations. Instead of a broad prohibition against disclosing any information related to a summons, the CMA takes a different approach and provides that the Chief Regulator may make orders with respect to the confidentiality of investigations. This approach gives flexibility to the OSC when imposing confidentiality obligations with respect to investigations;
- There are certain limitations in the CMA on the confidentiality order power;

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R70. Clarify that the OSC may not require production of privileged documentation.

- The CMA includes a provision that reflects that the OSC may not require production of privileged documents. Under common law, respondents always have the right to not produce privileged documents, and the Supreme Court of Canada has made this a quasi-constitutional right.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R72. Require, in cases where there is sufficient evidence to establish that investors suffered direct financial losses, that amounts collected by the OSC pursuant to disgorgement orders be distributed to harmed investors through a Court-supervised process.

- The CMA includes provisions allowing the Tribunal to make disgorgement orders and allowing the Chief Regulator to apply to the court to appoint one or more persons to administer and distribute the disgorged amounts received by the OSC;
- OSC rules would specify matters such as the persons eligible for payments from the disgorged amounts and how the administrator will distribute the disgorged amounts;

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

- The OSC would be able to share compelled testimony with a court-appointed receiver to facilitate returning funds to harmed investors through a more efficient notice and claims process.
- The OSC can recover reasonable costs from administering the applications and payments. Any disgorged amounts remaining after payments are made to eligible persons and administrative costs are paid to the OSC belong to the OSC.
- A person is not entitled to participate in a disgorgement order proceeding solely on the basis that they may be eligible to receive a payment.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R73. Provide for automatically reciprocating sanction orders, cease trade orders and settlements from other Canadian securities regulators and granting the OSC a streamlined power to make reciprocation orders in response to criminal Court, foreign regulator, SRO, and exchange orders.

- The CMA includes automatic and streamlined reciprocation provisions similar to provisions in most CSA jurisdictions;
- The provisions would support a unified, streamlined and consistent approach to enforcement of orders and settlements across the country, enhance investor protection, and increase confidence in capital markets. It contains various safeguards to protect market participants who may be adversely impacted by automatic reciprocation of orders of other CSA jurisdictions.

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Capital Markets Act

8. Taskforce Recommendations Included in the Capital Markets Act

R74. Explicit exemption from freedom of information disclosures for whistleblower-identifying information.

- The CMA includes a statutory protection against the OSC disclosing information that would identify a whistle-blower. Currently, the OSC would rely on the disclosure exemptions in the FIPPA, to withhold this information;
- This explicit protection would provide potential whistle-blowers with greater certainty that their identity will not be disclosed in response to a freedom of information request and encourage whistle-blowers to come forward, supporting the OSC's enforcement activities.

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Capital Markets Act

9. Gap-Filling Rules

- Beyond implementation of Taskforce recommendations that require legislation to implement, the CMA largely carries forward the status quo from the OSA;
- As a result of the platform approach taken in the CMA, market participants can expect that new rules as well as rule changes would be necessary to ensure that no regulatory gaps are introduced into the securities regulatory regime, so that the status quo is indeed carried forward;
- Market participants can expect that:
  - (i) Prospectus and registration exemptions currently embedded in the OSA would be carried forward in rules;
  - (ii) Carve-outs from the definition of "clearing agency" in the OSA would be found in a rule;

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Capital Markets Act

9. Gap-Filling Rules

(i) With respect to registration requirements in relation to derivatives (both exchange-traded and over-the-counter derivatives), the CFAO would be repealed and replaced with a local rule that carries forward the registration regime in the CFAO into a local rule that applies to exchange-traded derivatives under the CMA;

(ii) In addition to the exemption from registration for specified financial institutions found in the CMA, the existing exemptions derivatives dealers currently rely on would be carried forward in rules, subject to a separate OTC derivatives business conduct rule that would apply to derivatives dealers and derivatives advisers, regardless of whether they are exempt from registration.

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10. Anticipated Costs

- While there are significant benefits of introducing the CMA in Ontario, there are costs to consider as well.
- Costs to stakeholders who participate in Ontario's capital markets would include the costs of transitioning from the OSA and the CFAO to the CMA, including costs with administration, procedures and policies, compliance systems, and training and educational requirements.
- The OSC would also incur costs, including administrative, operational, and educational costs as a result of the need to adapt staff knowledge and understanding, and update its processes, procedures, and internal systems.
- Costs to the government would include legislative and regulatory drafting work required to finalize an Ontario version of the CMA.

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11. Anticipated Benefits

- The CMA will be an effective tool in implementing the Taskforce's recommendations and modernizing Ontario's capital markets regulatory framework in a swift and timely manner;
- Ontario market participants and investors would benefit from modernized and flexible platform legislation that would allow for more timely rules as a result of the reduced need to amend legislation for new issues that arise in dynamic capital markets;
- Modernization of the regulatory framework could also help to incubate innovative companies, encourage economic activity among incumbents, increase investment from both Canadian and international institutional investors, and contribute to economic recovery and growth.

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Capital Markets Act

12. Stakeholders' Concerns

- Stakeholders are raising some real concerns with the platform approach model. In their view the CMA is not principles-based regulation or law because there are not sufficient principles in there to set the direction on regulatory policy, standards of conduct, licensing requirements or disclosure requirements. It is more like a table of contents than a securities law;
- Stakeholders argue that the legislation should at least include high-level requirements and principles that set a framework for the development of specific rules and regulations and that the government should not just state what will be regulated and delegate complete authority to the OSC to perform that regulation.
- In their view, the government should also set out a direction on policy and the types of requirements and standards that must be in place.

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Capital Markets Act

13. CMA Consultation Questions and Feedback Process

Policy Commentary:

- The Ontario Government also release a policy commentary that covers the following:
  - The framework and structure of the draft CMA;
  - The major changes from the current framework in Ontario in the OSA and the CFAO;
  - Consultation questions.

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Capital Markets Act

13. CMA Consultation Questions and Feedback Process

CMA Consultation Questions

- The CMA posed specific consultation questions to stakeholders and it is available in the Ontario's Regulatory Registry website;
- E.g. one of the questions is on how to treat ETF investors in civil liability claims. This is a result of the Ontario Superior Court decision in *Wright v. Horizons ETFs Management (Canada) Inc., 202*1, recent court decision that denied class-action certification against a fund manager after the court found that the “hybrid regulation” of ETFs makes it impossible to determine whether an investor in the secondary market bought “creation units” of an ETF or existing units. The court found the group of investors harmed by an alleged misrepresentation in a fund’s prospectus could not be defined, and the class action couldn’t proceed.

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Capital Markets Act

13. CMA Consultation Questions and Feedback Process

Feedback Process

- Written submissions addressing the draft CMA provisions and any or all of the questions in the consultation paper should be provided in electronic format by email to CMA.Consultation@ontario.ca or through Ontario's Regulatory Registry.
- Submissions should use subject line: "*Consultation – Capital Markets Act"* and must be received on or prior to January 21, 2022.

Gardiner Roberts LLP's capital markets & securities lawyers are constantly monitoring updates to the process and will be happy to discuss any questions you may have.

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Questions?

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Contact Us

T **416.865.6600**

E **info@grllp.com**

W **grllp.com**

@grllp

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Dealing with Digital Assets on Death: An Update

Who owns them? Who can access them? What can be done to protect them?

Presented by: Lindsay Histrop and Parish Bhumgara (Student-at-Law)
December 1st, 2021

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Digital Assets – Prologue

Bitcoin Example

- Of a capped total of 21 m. Bitcoins, 18.77 m. have been “mined”
- Some sources estimate that as many as 3 m. bitcoins (~$170 billion USD) are irretrievable
- Due to:
  - Lost retrieval codes (“private keys”)
  - Lost USB’s where the only records are stored
  - Owner death without leaving the private keys accessible to executors or next of kin

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Digital Assets – Prologue

Cryptocurrency Market Expanding

- Wealthsimple now offers 34 different cryptocurrencies on its investing platform
- Some popular ones include:
- **Etherium**
- **Litecoin**
- **Ripple**
- **Cardano**
- **Dogecoin**

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Digital Assets – Prologue

Non-Fungible Tokens

- Since our last Toolbox Non-Fungible Tokens have expanded into other asset classes.
- A Non-Fungible Token is a token stored on the blockchain
- Blockchain itself is a secure distributed database with redundancy, immutability, and clarity into tracking data or ownership.

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Digital Assets – Prologue

Non-Fungible Tokens Cont…

- A token proves ownership of an asset.
- For example, a deed to your house is a sign of ownership to that plot of land and building.
- In the case of the first digital token, Bitcoin, a single Bitcoin is the title of ownership to the underlying value of the Bitcoin.

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Digital Assets – Prologue

Non-Fungible Tokens Cont…

- Mike Winkelmann, known as @Beeple, is a renowned artist who has worked with Nike and Apple
- Winkelmann sold a collection of many of his works combined into a masterpiece, titled *EVERYDAYS: THE FIRST 5000 DAYS at Christie's* for **$69 million.**
- These transactions occurred on Ethereum, a blockchain.

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Digital Assets – Prologue

Non-Fungible Tokens Cont…

- Winkelmann's art itself was simply digital images.
- Why do people buy NFTs? it is feasible to collect royalties and resell the NFT in the future for profit
- see: https://www.thomsonreuters.com/en-us/posts/legal/non-fungible-tokens-legal/

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Digital Assets - Prologue

Death of a CEO

- In December 2018, Gerald Cotten, CEO of QuadrigaCX, Canada's largest cryptocurrency exchange died suddenly at age 30
- Mr. Cotten was the only person who had passwords to ~115,000 customers' digital wallets
- Approximately C$140m in digital currency held in safe keeping was deemed inaccessible
- Auditors found irregularities and managed to retrieve C$33 m. in missing funds
- RCMP asked to exhume the body (Dec. 2019)

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Defining and Categorizing

Digital Assets vs. Digital Accounts

- Classification is difficult: fluid, ever-growing
- Digital asset: a singular file
- Digital account: mechanism used to control and access the file

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Defining and Categorizing

What is a Digital Asset

- The file itself
- Photos, videos, blog posts, emails,
- Microsoft Office documents, music
- collections, playlists, tweets, etc.
- Potential value: customer invoices, health and medical records, tax documents

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Defining and Categorizing

Digital Accounts

- Used to access files
- Email accounts, social network accounts, file sharing accounts, software licenses
- Can be separated into three categories:
  - Currency Accounts
  - Virtual Property Accounts
  - Social Media Accounts

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Currency Accounts

Definition

- Holds currency that may be converted into fiat money
- PayPal, eBay, loyalty program accounts, cash-back programs, cryptocurrency (e.g. Bitcoin), etc.
- May be transferable to heirs or beneficiaries

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Virtual Property Accounts

Definition

- Accounts that hold digital content
- No ownership in assets – just a license to use
- iTunes music collections, Kobo or Kindle library
- Contra physical counterparts (CDs, physical books)
- May not be transferable to heirs or beneficiaries but this changing

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Social Media Accounts

Definition

- Accounts that contain information likely of personal or commercial interest
- Email, Facebook, Instagram, Twitter, Pinterest or LinkedIn account

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The Law in Canada

General

- No general right of survivorship
- No federal or Ontario legislation on estate administration of a person's digital assets
- Only Alberta has legislation specifically ensuring representatives of a deceased's estate have access to administer digital assets

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The Law in Canada

***Uniform Access to Digital Assets by Fiduciaries Act* (*UADAFA*)**

- Proposed in 2016 by the Uniform Law Commission
- Provides fiduciaries with default access to digital assets held by a deceased or incapable person
- Does not distinguish between types of fiduciaries (legal representatives, attorneys or guardians)

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The Law in Canada

Uniform Access to Digital Assets by Fiduciaries Act (*UADAFA*)

- Digital asset: any type of electronically stored information, including:
  - information stored on a computer or other digital device,
  - content on websites, and
  - digital property rights (e.g. domain names, material created online)
- Account holder: individual who has entered into a service agreement with a custodian
- Custodian: person who holds, maintains, processes, receives, or stores a digital asset of an account holder (i.e., an online service provider)

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The Law in Canada

***Uniform Access to Digital Assets by Fiduciaries Act* (*UADAFA*)**

- Fiduciary can access, control and copy the digital asset
- A power of attorney, trust, will or court order can alter this default position
- Any service agreement that limits the fiduciary's access would be voided, unless the account holder accepts its terms and consents in a separate agreement

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The Law in Canada

Privacy Laws

- Privacy rights continue after death
- Custodians are governed by the federal Personal Information Protection and Electronic Documents Act (PIPEDA)
- When does PIPEDA allow an organization to disclose personal information without that individual's consent?
- PIPEDA does not compel custodians to disclose personal information in estate administration

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Barriers to Access

Terms of Service and User Agreements

- Restrictive policies
- May prohibit access to estate trustees
- May deny estate trustees the ability to deal with content

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Barriers to Access

Specific Examples

- Virtual Currency / E-Commerce
- Accounts:
  - Amazon, Bitcoin, PayPal
- Virtual Property Accounts:
  - Apple, Kindle
  - Licensed, not owned

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Barriers to Access

Specific Examples Cont…

- Points:
  - Aeroplan, Air Miles, Shopper Optimum Points
- Social Media Accounts:
  - Google (includes Gmail), Microsoft, Hotmail, Facebook, Twitter, LinkedIn, Instagram

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Barriers to Access

Specific Examples Cont…

- No right of survivorship for digital assets

+

- Lack of legislation

+

- Privacy-oriented Terms of Service and User Agreements

=

- No immediate right to access, transfer or delete online accounts of a deceased

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Recent Changes – Barriers to Access

Apple

- Apple's website now alerts people to request a Court Order to obtain access to a deceased family member's account.
- The Court Order must state the following:
  - The name and Apple ID of the deceased person.
  - The name of the next of kin who is requesting access to the decedent's account.
  - That the decedent was the user of all accounts associated with the Apple ID.
  - That the requestor is the decedent's legal personal representative, agent, or heir, whose authorization constitutes "lawful consent."
  - That Apple is ordered by the court to assist in the provision of access to the decedent's information from the deceased person's accounts
- Apple no longer opposes these orders, they just want the public to do it so that Apple can say they never violated anyone's privacy willingly.

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Recent Changes – Barriers to Access

Facebook

- Facebook has a facility where you can designate someone to have access to your account posthumously/dormant
- Facebook also has an option to either remove or “memorialize” a deceased’s account

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Recent Changes – Barriers to Access

Gmail

- Gmail also allows access by an alternative person
- However Gmail is still governed by Google's policy:

  "We recognize that many people pass away without leaving clear instructions about how to manage their online accounts. We can work with immediate family members and representatives to close the account of a deceased person where appropriate. In certain circumstances we may provide content from a deceased user's account. In all of these cases, our primary responsibility is to keep people's information secure, safe, and private. We cannot provide passwords or other login details. Any decision to satisfy a request about a deceased user will be made only after a careful review."
- Very important to plan in advance

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Estate Planning Considerations

- Digital assets are taxable like any other asset:
  - subject to estate administration tax;
  - tax on capital gain on death, etc.
- Digital property will generally vest in the deceased's personal representative(s) (executor or estate trustee)

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Estate Planning Considerations

- Access to the digital property is typically a challenge for the estate trustee
- For example, crypto currencies which are
- accessed via virtual wallets needing a private key
- Access to password protected electronic devices can prove impossible

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Estate Planning Considerations

- It is possible to lose the Bitcoin wallet or delete the Bitcoins and lose them forever.
- There have also been thefts from websites that provide remote storage service for Bitcoins
- Owners are reluctant to give anyone the access codes, even loved ones

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Estate Planning Considerations

Steps to Consider

- An inventory of all digital assets should be maintained
- A record of usernames and passwords be maintained and kept up to date in a secure place
- Location of usernames and passwords should be shared with executor/next of kin (subject to contractual restrictions by digital providers)

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Steps to Consider

- Will should address the disposition of digital assets
- Will should provide the Executor with specific authorization to access digital assets, usernames and passwords
- (sample clause annexed)

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Estate Planning Considerations

Challenges for the Executor

- Practical challenges facing an Executor: Where and how does one locate and realize cryptocurrency?
- “Coin Cover”, for example, has created what it describes as one of the world's first cryptocurrency willshttps://www.coincover.com/wills
- They advertise an "indestructible" card which has information about the client’s cryptocurrency
- If the client dies, the executor contacts Coin Cover, with a unique number on the card, and a death certificate.

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Challenges for the Executor

- Another issue:
- Clarifying the source of funds.
- Some banks and foreign governments will be wary or accepting large cash deposits if the source of the funds cannot be traced due to money laundering and terrorist financing concerns

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Estate Planning Considerations

Sign of the Times? This is Not an Endorsement!

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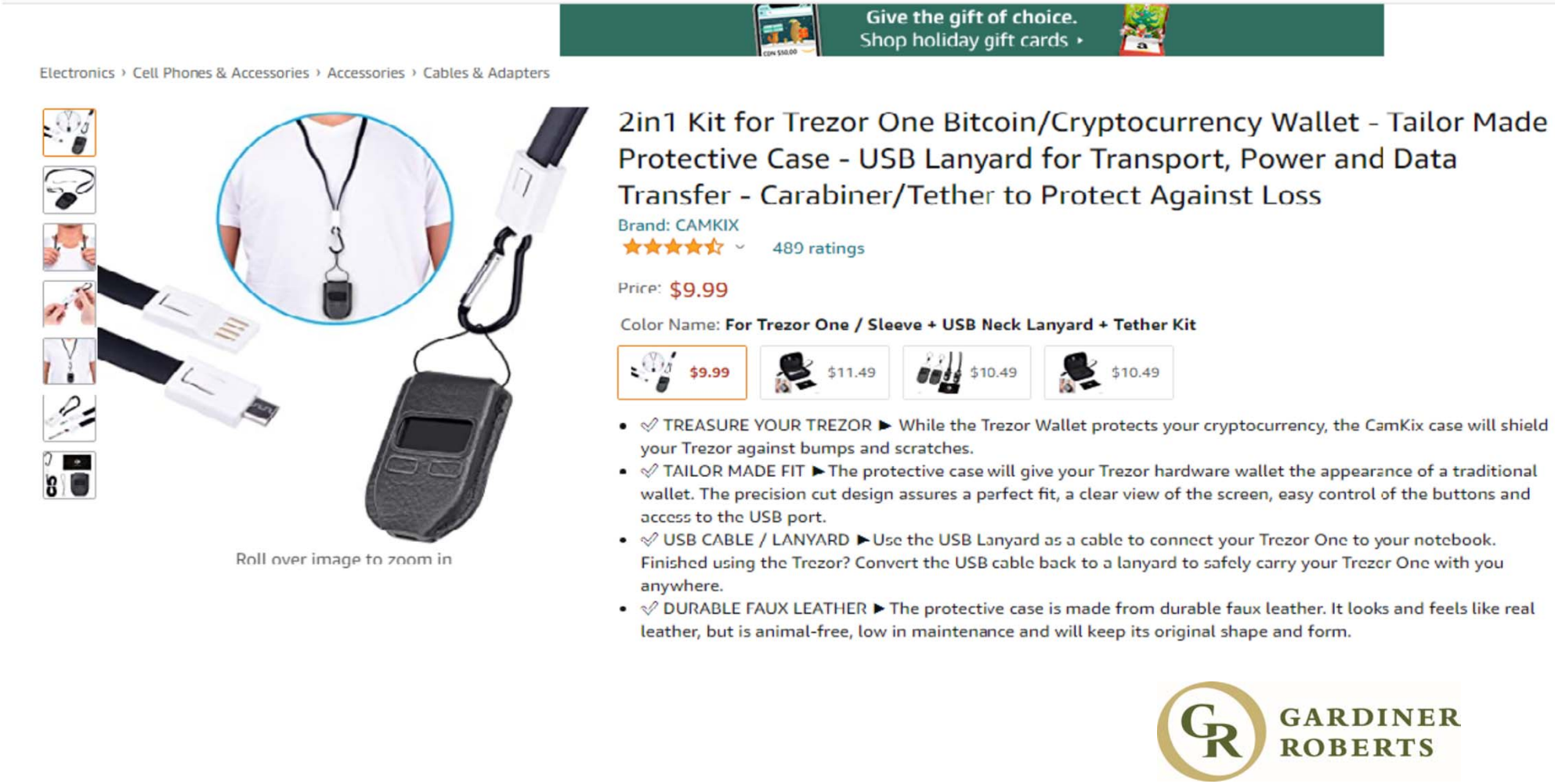
Estate Planning Considerations

Sign of the Times? This is Also Not an Endorsement!



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Contact Us

T **416.865.6600**

E **info@grllp.com**

W **grllp.com**

@grllp

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