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The Ontario Securities Commission exercises its regulatory oversight function through the administration and enforcement of Ontario's *Securities Act* (R.S.O. 1990, c. S.5) and *Commodity Futures Act* (R.S.O. 1990, c. C.20), and administration of certain provisions of the *Business Corporations Act* (R.S.O. 1990, c. B.16).

The Ontario Securities Commission
Cadillac Fairview Tower
22nd Floor, Box 55
20 Queen Street West
Toronto, Ontario
M5H 3S8

Contact Centre:
Toll Free: 1-877-785-1555
Local: 416-593-8314
TTY: 1-866-827-1295
Fax: 416-593-8122
Email: inquiries@osc.gov.on.ca

Capital Markets Tribunal:
Local: 416-595-8916
Email: registrar@osc.gov.on.ca

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19 Duncan Street
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THOMSON REUTERS
19 Duncan Street
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M5H 3H1
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1-416-609-3800 (Toronto & International)
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FILE NO.: 2023-28

IN THE MATTER OF
MITHAQ CANADA INC.

AND

IN THE MATTER OF
AIMIA INC.

NOTICE OF HEARING
Sections 8, 21.7, 104 and 127 of the *Securities Act,* RSO 1990, c S.5

PROCEEDING TYPE: Transactional Proceeding

HEARING DATE AND TIME: October 19, 2023 at 8:30 a.m.

LOCATION: By videoconference

PURPOSE

The purpose of this proceeding is to consider the Application filed by Mithaq Canada Inc. dated October 17, 2023, requesting an order to cease trade Aimia Inc.'s shareholder rights plan and private placement and other relief related to the private placement.

The hearing set for the date and time indicated above is the first attendance in this proceeding, as described in subsection 7(1) of the *Capital Markets Tribunal Practice Guideline.*

REPRESENTATION

Any party to the proceeding may be represented by a representative at the hearing.

FAILURE TO ATTEND

IF A PARTY DOES NOT ATTEND, THE HEARING MAY PROCEED IN THE PARTY'S ABSENCE AND THE PARTY WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDING.

FRENCH HEARING

This Notice of Hearing is also available in French on request of a party. Participation may be in either French or English. Participants must notify the Tribunal in writing as soon as possible if the participant is requesting a proceeding be conducted wholly or partly in French.

AVIS EN FRANÇAIS

L'avis d'audience est disponible en français sur demande d'une partie, que la participation à l'audience peut se faire en français ou en anglais et que les participants doivent aviser le Tribunal par écrit dès que possible si le participant demande qu'une instance soit tenue entièrement ou partiellement en français.

Dated at Toronto this 18th day of October 2023.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For more information

Please visit capitalmarketstribunal.ca or contact the Registrar at registrar@osc.gov.on.ca.

IN THE MATTER OF
MITHAQ CANADA INC.

AND

IN THE MATTER OF
AIMIA INC.

APPLICATION OF MITHAQ CANADA INC.

(In connection with a transactional proceeding under Rule 16 and
under Sections 8, 21.7, 104 and 127 of the *Securities Act*, RSO 1990, c.S.5)

A. ORDER SOUGHT

The Applicant, Mithaq Canada Inc. (the "Offeror"), requests that the Tribunal make the following order(s):

1. **Orders relating to the Shareholder Rights Plan (defined below) as follows:**

   (a) An order pursuant to section 127 of the *Securities Act* cease trading all securities issued, or that may be issued, under the Shareholder Rights Plan (defined below) and under any replacement shareholder rights plan that may be adopted by the board of directors of Aimia (the "Board").

2. **Orders relating to the Private Placement (defined below) as follows:**

   (a) An order setting aside any decision of the Toronto Stock Exchange that does not require Aimia to obtain shareholder approval of the Private Placement (the "TSX Decision") pursuant to section 21.7 of the *Securities Act*;

   (b) A stay of any TSX Decision pursuant to sections 8(4) and 21.7(2) of the *Securities Act* until such time as the Ontario Securities Commission (the "Commission") determines the issues herein;

   (c) An order pursuant to sections 8(3), 104 and 127 of the *Securities Act* directing that Aimia obtain shareholder approval of the Private Placement with the following four conditions:

      (i) the Board delay the closing of the Private Placement until after shareholder approval is obtained at the required shareholder meeting,

      (ii) the Board obtain shareholder approval of the Private Placement by asking shareholders either to ratify the Private Placement or to instruct the Board to reverse the Private Placement,

      (iii) only uninterested shareholders in the Private Placement, namely shareholders who are not proposed investors in the Private Placement nor any voting rights obtained through the Private Placement, be permitted to vote at the required shareholder meeting, and

      (iv) that if the shareholders vote to instruct the Board to reverse the Private Placement that the Board implement those instructions by taking all necessary steps to reverse the Private Placement;

   (d) An order permanently cease trading the Private Placement pursuant to section 127(1)2 of the *Securities Act*; and

   (e) A temporary cease trade order pursuant to section 127(5)2 of the *Securities Act*, effective immediately, cease trading the Private Placement and restraining the exercise of any voting rights acquired thereunder until such time as the Commission determines the issues herein, and in the alternative, an order that any shares issued in the Private Placement not be included in the number of outstanding shares for the purpose of the Offeror satisfying the Statutory Minimum Tender Condition (as defined below).

3. An order for an expedited hearing; and

4. Such further and other relief as counsel may advise and the Commission may deem appropriate.

B. GROUNDS

The grounds for the request are:

Overview

5. This Application arises in the context of three defensive tactics that the Board has adopted in response to Mithaq Canada Inc.'s unsolicited take-over bid of Aimia, announced on October 5, 2023 (defined below as the "Offer"), and in response to Mithaq's exercise of its fundamental rights as a shareholder seeking review of the narrow margins of the Board's re-election at Aimia's annual general meeting on April 18, 2023 (the "Meeting"):

   (a) Aimia's continuance of meritless litigation brought against Mithaq in the Ontario Superior Court seeking remedies designed to entrench the Board's position, deny Mithaq a fundamental shareholder right to exercise corporate oversight powers, and impact the ability of shareholders to respond to the Offer;

   (b) Aimia's adoption (without shareholder approval) of the Shareholder Rights Plan (defined below) that no longer serves any purpose in light of the Private Placement, and in any event, is more restrictive than the applicable statutory requirements with the result that neither the Offer (nor any other unsolicited take-over bid) will be likely to succeed; and

   (c) Aimia's recent announcement of the Private Placement (again without shareholder approval), with a target closing date of October 19, 2023, will have a material dilutive effect on existing shareholders and will effectively prevent the Offer (or any other value enhancing transaction, including at a higher price than the Offer, as a result of the pricing of the Warrants (defined below)) from succeeding.

6. These three defensive tactics adopted by the Board are designed to frustrate an open and even-handed take-over bid process and to deny shareholders the opportunity to respond to the Offer (or any other take-over bid or value enhancing transaction) while entrenching a Board that is subject to an ongoing review of their recent election. None of the defensive tactics have any *bona fide* corporate objectives. They were not designed to maximize value to shareholders "in a genuine attempt to obtain a better bid." In the circumstances, the Commission's public interest mandate is engaged. The Commission ought to exercise its discretion to intervene to remedy the harmful consequences to all Aimia shareholders from the defensive measures adopted and to preserve the integrity of Ontario's capital markets.

Background

7. Mithaq Canada Inc. (the "Offeror") is a wholly-owned subsidiary of Mithaq Capital SPC ("Mithaq"). Mithaq is the largest shareholder of Aimia Inc. As of May 25, 2023, Mithaq owns or controls 30.96% of the common shares of Aimia ("Aimia Shares"). Its share acquisitions and potential plans in respect of its Aimia shareholdings have been disclosed in accordance with Ontario securities law.

8. On February 21, 2023, Mithaq disclosed that it owned or controlled 19.99% of Aimia Shares.

9. On March 3, 2023, Aimia filed its notification of its 2023 Annual General Meeting for a record date of March 6, 2023 (the "Meeting"), effectively providing no notice to shareholders. Although Aimia was permitted to abridge the requirement that notification of meeting and record dates be sent 25 days before the record date, Aimia failed to file the abridgement certificate as required under Ontario securities law contrary to the requirements of section 2.20 of National Instrument 54-101 *Communications with Beneficial Owners of Securities of a Reporting Issuer*.

10. Aimia called the Meeting for April 18, 2023, weeks earlier than Aimia had historically held its annual general meetings.

11. Leading up to the Meeting, Mithaq and other shareholders, including Milkwood Capital (UK) Ltd. ("Milkwood") and Christopher Mittleman, communicated about their investments in Aimia and concerns they had with the Board. The law encourages such communications as part of the regime allowing shareholders to oversee and hold management accountable.

12. Mithaq and other Aimia shareholders explored whether to nominate an alternative slate of directors in connection with the Meeting. No agreement was reached to pursue a dissident slate and no joint actor relationships, as defined in securities law, and requiring disclosure to the market, were formed.

13. On April 6, 2023, Mithaq issued a press release disclosing that it intended to vote against the re-election of the Aimia Board of Directors (the "Board"). Mithaq encouraged other shareholders to vote "no".

14. Mithaq promoted the vote "no" campaign before the Meeting. In doing so, it cited Mithaq's concerns that Aimia was plagued by mismanagement and poor governance and that the Board was not suited to act in the best interests of Aimia and its stakeholders. In addition to problematic capital allocation decisions and acquisitions, Mithaq was concerned about

Aimia's disappointing performance, misaligned investment strategies and misguided focus on private markets, the low share ownership of the Board (in the aggregate, less than 3% of the Aimia Shares), and unfair compensation structure.

15. Aimia responded by issuing numerous press releases and filing a complaint with the Commission alleging that Mithaq had failed to disclose that it was acting jointly or in concert with other Aimia shareholders, including Milkwood and Mittleman. Mithaq denied (and continues to deny) the undisclosed joint actor allegations and responded to the complaint on April 14, 2023.

16. In advance of the Meeting, Mithaq requested that an independent chair, not affiliated with Aimia and whose position was not at stake in the Meeting, chair the Meeting to ensure impartiality. Aimia did not respond.

17. The Meeting went ahead on April 18, 2023. Mithaq's procedural fairness concerns were not addressed. The Meeting was chaired by Lehmann, a director and member of Aimia senior management. Mr. Lehmann was not an independent chair: a "no" vote at the Meeting would have led to him resigning as a director and a new set of directors could have removed him from senior management.

18. Mithaq voted against the re-election of the Board at the Meeting.

19. On April 19, 2023, Aimia reported that the chair of the Board was not re-elected at the Meeting and none of the other director nominees received greater than 52.41% of the votes cast at the Meeting in their favour.

20. In light of the closeness of the results and the lack of independence governing the vote at the Meeting, Mithaq requested the ability to review the proxies voted in connection with the Meeting. Aimia repeatedly rejected that request primarily on the basis of shareholder privacy.

21. On April 27, 2023, Mithaq filed an Application in the Ontario Superior Court seeking various relief to facilitate its requested proxy review. Notwithstanding its shareholder privacy objection to the proxy review, Aimia produced certain proxy records to Mithaq without taking any steps to redact or protect any shareholder personal information.

22. On the basis of a preliminary review of the proxy records produced by Aimia, Mithaq has concerns that the Board improperly excluded proxies to manipulate the results of the Meeting in its favour.

23. In response to Mithaq's attempts to conduct the proxy review, Aimia commenced litigation in the Ontario Superior Court to prevent Mithaq from, among other things, requisitioning a special shareholder meeting, voting its Aimia Shares, and acquiring additional Aimia Shares.

24. Since the Offer, Aimia has proposed additional grounds of relief and raised additional allegations in an amended pleading, which Mithaq has not consented to and for which a Court order will be required before the amendments can be made.

25. The amended allegations repeat the allegation that leading up to the Meeting Mithaq was in an undisclosed joint actor relationship with Milkwood and Mittleman. However, there are no allegations that Mithaq is currently in an undisclosed joint actor relationship nor are there any allegations that the Offer was made as part of any undisclosed joint actorship.

26. On May 25, 2023, Mithaq disclosed its ownership of 30.96% of Aimia Shares. At the same time, Mithaq disclosed that it was contemplating a number of alternatives with respect to its investment in Aimia (the "May 25 Early Warning Report"). This was a continuation of its disclosure made in its February 3, 2023 Early Warning Report, in which Mithaq disclosed that it may explore, "alternatives with respect to its investment in Aimia, including, but not limited to, developing plans or intentions or taking actions itself or with joint actors".

27. In light of the above steps taken by the Board and Mithaq's related concerns, on June 5, 2023, counsel to Mithaq wrote to the TSX advising of its concerns that the Board might adopt additional defensive tactics to further entrench itself and to hinder corporate democratic processes.

28. Of particular concern to Mithaq was the possibility that the Board would adopt a shareholder rights plan or commence a private placement of Aimia Shares, without shareholder approval, to dilute Mithaq's holdings and to materially affect control of Aimia. Doing so would permit the Board to manipulate the outcome of any proxy contest or take-over bid, possible alternatives Mithaq had outlined it was considering in the May 25 Early Warning Report.

29. With respect to Aimia's shareholders, there is: (i) no evidence of an Aimia shareholder complaint or concern about Mithaq, the Meeting or Mithaq's share ownership, even after Aimia's allegations were well-publicized by it before the Meeting; (ii) no evidence of an Aimia shareholder making a regulatory or civil litigation complaint; and (iii) no evidence of an Aimia shareholder supporting Aimia's litigation against Mithaq despite Aimia well-publicizing the litigation.

The Offer

30. On October 3, 2023, the Offeror announced its intention to make an offer for all the issued and outstanding common shares of Aimia that it or its affiliates did not already own.

31. On October 5, 2023, the Offeror made an all-cash offer for all Aimia Shares at a price of $3.66 per share (the "Offer"). The Offer represents a premium of 20% over the October 2, 2023 unaffected, pre-announcement trading price of Aimia Shares and a 23% premium over the 20-day VWAP. The Offer was validly commenced by the Offeror, publishing an advertisement as contemplated by section 2.9(1)(a) of NI 62-104, and in connection with commencing the Offer, the Offeror satisfied the requirements of sections 2.10(1) and 2.10(2)(a) of NI 62-104. The Offeror has also taken the necessary steps to ensure that the requirements of section 2.10(2)(b) are satisfied by the deadline contemplated therein.

32. The Offer will remain open for acceptance until 11:59 p.m. (Vancouver time) on January 18, 2024, unless otherwise extended, accelerated, or withdrawn by the Offeror. The Offer is subject to customary conditions, including, among others, the non-waivable condition that there have been validly deposited under the Offer and not withdrawn that number of Aimia Shares representing more than 50% of the outstanding Aimia Shares, together with the associated rights, excluding those Aimia Shares beneficially owned, or over which control or direction is exercised, by the Offeror, any associate or affiliate of the Offeror, or any person acting jointly or in concert with the Offeror. This condition is consistent with the minimum tender condition provided for in Ontario securities law (the "Statutory Minimum Tender Condition").

33. Aimia issued a press release on October 10, 2023 indicating that it had formed a special committee of the Board to assess the Offer. Aimia advised that a director's circular setting out the Board's recommendation with respect to the Offer is expected to be filed by October 20, 2023, as required by applicable securities laws. However, the Board's decision to proceed with the Private Placement, which is expected to close around October 19, 2023, and the commentary on the Offer contained in Aimia's October 10, 2023 press release indicate that the Board and special committee have prejudged the Offer.

34. Aimia's October 10 press release states that "the Offer is subject to unprecedented terms that create significant uncertainty with respect to whether the Offer will be completed." This statement is misleading. There is nothing unprecedented about the number or scope of bid conditions, which are consistent with other unsolicited takeover bids. The conditions are necessary to protect all shareholders' investment in the company, including Mithaq's, as they discourage the Board and Aimia management from taking more self-interested defensive actions that could further depreciate company value and deprive shareholders of the Offer.

Aimia's litigation against Mithaq is an abuse of process

35. Since the Offer, as noted above, Aimia has broadened the scope of its litigation against Mithaq. In particular, Aimia makes a number of allegations and seeks various relief designed to frustrate the Offer, including allegations that the Offer fails to comply with various securities law requirements, such as the formal valuation requirement for insider bids, the pre-bid integration rule, the mandatory early warning regime, and the moratorium provisions. There is no basis for these allegations. Contrary to Aimia's allegations, the Offer complies with the requirements of Ontario securities law.

36. A fundamental allegation in Aimia's litigation against Mithaq is that Mithaq received material non-public information from an alleged joint actor. Since first raising this allegation, Aimia's President Michael Lehman, has acknowledged on cross-examination that the allegation is baseless. Aimia's counsel has similarly confirmed there is no merit to the allegation on the basis of the evidence Aimia has received.

37. In the circumstances, Aimia's litigation against Mithaq is an abuse of process and a clearly abusive defensive tactic serving no *bona fide* corporate objective.

No requirement for formal valuation

38. In its litigation against Mithaq, Aimia incorrectly asserts that a formal valuation was required to be included in the take-over bid circular for the Offer.

39. While the Offer is an "insider offer", as defined in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* ("MI 61-101"), no formal valuation was required to be included in the take-over bid circular because neither the Offeror nor any of its affiliates or joint actors has or has had any board or management representation of Aimia or knowledge of any material information concerning Aimia or Aimia shares that has not been generally disclosed. As a result, the Offeror was entitled to rely on the exemption under section 2.4 of MI 61-101.

40. As set out above, the Offeror was not, and is not, in a joint actor relationship with Milkwood and/or Mittleman, nor any other person. Mithaq did not fail to disclose any such relationship in accordance with Ontario securities law.

41. Even if the Offeror and any of Milkwood and/or Mittleman were joint actors, none of them have or have had, in the past 12 months prior to the Offer date, any board or management representation in respect of Aimia or knowledge of any material information concerning Aimia that has not been generally disclosed.

42. Mittleman ceased to be an officer of Aimia on March 29, 2022 and ceased to be a director of Aimia on May 6, 2022. After that time, he was an officer of a subsidiary of Aimia until March 27, 2023; however, a subsidiary of an offeree does not qualify as an "offeree issuer" for purposes of MI 61-101.

43. In addition, the Offer was not made by Mithaq with knowledge of any material information concerning Aimia that has not been generally disclosed.

44. Although Aimia alleges in its litigation that Mithaq received material non-public information from Mittleman, Aimia and its counsel have since conceded that, based on the evidence available to Aimia, Mithaq was not provided with any such material non-public information.

No requirement for a "higher price" in the Offer

45. Under the Ontario securities law pre-bid integration rule in section 2.4(1) of National Instrument 62-104 *Take Over Bids and Issuer Bids* ("NI 62-104"), the law imposes a minimum floor for the consideration offered in a takeover bid, namely the highest price paid by the offeror for common shares of the offeree in the 90 days leading up to the date of the take-over bid.

46. In its litigation against Mithaq, Aimia wrongly asserts that Mithaq's acquisition of shares in Q1 2023 triggered a formal takeover bid as a result of its alleged joint actorship with Milkwood and/or Mittleman. Aimia also alleges that the price that would have been required at that time for a take-over bid, as a result of Mithaq's purchase history in the 90 days leading up to the triggering of the mandatory take-over bid requirements in Q1 2023 and the application of the pre-bid integration rule, would have been higher than Aimia Share's trading price on October 2, 2023, which is the basis of the Offer.

47. The implication of these allegations is that the Offer is at a lower price than the price that would have been offered to shareholders had Mithaq complied with the mandatory take-over bid requirements and the pre-bid integration requirements in Q1 2023. There is no basis for this.

48. As set out above, the joint actorship allegations are without foundation.

49. In any event, even if the mandatory take-over bid requirements were triggered in Q1 2023, Mithaq was entitled to rely on the exemption to the pre-bid integration requirements under 2.6 of NI 62-104, because the purchases made by the Offeror were made in the normal course on a published market and satisfied all of the following conditions:

    (a) no broker acting for the Offeror performed services beyond the customary broker's functions in regard to the purchases;

    (b) no broker acting for the Offeror received more than the usual fees or commissions in regard to the purchases than are charged for comparable services performed by the broker in the normal course;

    (c) the Offeror or any person acting for the Offeror did not solicit or arrange for the solicitation of offers to sell securities of the class subject to the bid, except for the solicitation by the Offeror or members of the soliciting dealer group under the bid; and

    (d) the seller or any person acting for the seller does not, to the knowledge of the offeror, solicit or arrange for the solicitation of offers to buy securities of the class subject to the bid.

No breach of the early warning regime or the moratorium provisions by the Offeror

50. Aimia's litigation against Mithaq also contains baseless allegations relating to the Offeror's breach of the early warning regime and the moratorium provisions set out in NI 62-103 and in NI 62-104.

51. For the reasons set out above, because Mithaq was not in an undisclosed joint actor relationship at any time (including prior to the Offer), it has not failed to comply with the early warning regime set out in NI 62-103 and in NI 62-104 nor did its purchases of Aimia Shares on or after December 6, 2022 breach the moratorium provisions in section 5.3 of NI 62-104.

Shareholder Rights Plan is an abusive defensive tactic

52. On June 7, 2023, the Board adopted a shareholder rights plan (the "Shareholder Rights Plan" or the "SRP").

53. In its press release announcing the SRP, Aimia indicated that the SRP was adopted in response to Mithaq increasing its stake from 19.9% to its current 30.96% position. The purpose of the SRP was to ensure that "all shareholders are treated fairly in connection with any offer to acquire the outstanding common shares of Aimia and that the Board has the opportunity to identify, solicit, develop and negotiate value-enhancing alternatives to any unsolicited take-over bid."

54. The SRP is more restrictive than applicable Ontario securities law. In particular, the SRP imposes on prospective takeover bids a minimum tender condition that is broader than the minimum tender condition provided for in NI 62-104 (the "Statutory Minimum Tender Condition"). The Statutory Minimum Tender Condition requires that the bid be subject to a minimum tender condition of more than 50% of the common shares excluding only those common shares held by the offeror or anyone acting jointly or in concert with the offeror.

55. By contrast to the Statutory Minimum Tender Condition, under the SRP, to be a permitted take-over bid (*i.e.*, one that will not trigger the SRP), the bid must be subject to a minimum tender condition of more than 50% of the Aimia Shares held by "independent shareholders", a defined term in the SRP which extends significantly beyond the requirements of the Statutory Minimum Tender Condition to exclude, for example, Aimia Shares held by Aimia employees under various benefit plans. These plans are controlled by Aimia and could thus be manipulated to impact the minimum tender condition under the SRP in the Board's discretion.

56. In the case of the Offer, the effect of this broad minimum tender condition in the SRP is that the take-up of Aimia Shares under the Offer would almost certainly trigger the SRP.

57. Additionally, the shareholder ratification requirement in the SRP is inconsistent with the TSX rules as it fails to require a vote that would both include and exclude Mithaq as a securityholder that is exempted from the SRP (as a result of Mithaq holding in excess of the 20% triggering threshold contained in the SRP).

58. These elements of the SRP, in addition to the timing of its adoption to respond to Mithaq's current ownership of Aimia Shares, suggest that rather than providing an opportunity for identifying value-enhancing alternatives to unsolicited takeover bids, the true aim of the SRP is to prevent any unsolicited takeover bid, particularly one from Mithaq, from succeeding.

59. As of the date of the Offer, Aimia had not announced an intention to seek approval of the SRP by December 7, 2023, six months from adopting the SRP in accordance with TSX rules. However, it is not clear that the Board will not adopt a Replacement SRP to become effective December 7, 2023.

60. Subsection 1.1(2) of National Policy 62-202 *Take-Over Bids – Defensive Tactics* ("NP 62-202") provides that the primary objective of the take-over bid provisions of the *Securities Act* is "the protection of the *bona fide* interest of shareholders of the target company." A secondary objective is "to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment."

61. Section 127 of the *Securities Act* provides the Commission with a "broad discretion" and jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public interest to do so. In the context of take-over bids, the Commission's public interest jurisdiction affords it the ability to preserve an "open take-over bid process" by preventing defensive measures by a target's management that are abusive of shareholder rights without furthering a *bona fide* corporate objective.

62. NP 62-202 expressly states that the issuance of securities representing a significant percentage of the outstanding securities of the target, such as occurs when a shareholders rights plan is triggered, could constitute a defensive tactic warranting the Commission's oversight. A shareholders rights plan will no longer serve a *bona fide* corporate objective when the plan no longer serves the purpose of maximizing shareholder value.

63. In this case, the SRP does not serve the purpose of maximizing shareholder value and choice, and instead has the effect of denying shareholders the ability to participate in the Offer (and any other unsolicited takeover bid). Although the Offer complies with the requirements for a takeover bid under Ontario Securities law, the effect of the broad minimum tender condition in the SRP is that the take-up of Aimia Shares under the Offer would trigger the SRP.

64. Further, the commencement of the Private Placement confirms that there is no longer any *bona fide* corporate objective for the SRP.

65. As such, the Shareholder Rights Plan is an improper defensive tactic within the meaning of NP 62-202. To ensure that Aimia's shareholders have the opportunity to respond to the Offer, the Commission ought to exercise its public interest jurisdiction to cease trade the rights issuable under the SRP. In the event that a replacement shareholder rights plan is adopted that also frustrates the ability of Aimia's shareholders to respond to the Offer, the rights issuable under it must also be cease traded.

Private Placement is an abusive defensive tactic

66. On October 13, 2023, Aimia announced a private placement of up to 10,475,000 Aimia Shares and 10,475,000 Aimia Share purchase warrants (the "Warrants") to a new group of undisclosed investors (the "Private Placement"). The terms of the Private Placement provide this investor group with up to 3 out of 8 Board seats.

67. As disclosed in Aimia's press release announcing the Private Placement, each Aimia Share and accompanying Warrant is intended to be issued at $3.10 and each Warrant will be exercisable at $3.70 per Aimia Share. Assuming the Private Placement is fully subscribed and all Warrants are exercised, the maximum number of Aimia Shares issuable under the Private Placement represents 24.89% of the currently issued and outstanding Aimia Shares (on an undiluted basis).

68. Aimia claims that the Private Placement is expected to raise gross proceeds of up to $32.5 million, which Aimia says is required and which it will use to fund its operations over the next 12 to 24 months and to support its strategic investment plan and other contingencies.

69. Aimia also claims the Private Placement will not materially affect control of Aimia and that no investor will beneficially own more than 10% of the issued and outstanding Aimia Shares as a result of the Private Placement.

70. Aimia's disclosure of the Private Placement omitted significant material information, including the identities of the proposed investors, whether or not the proposed investors are existing Aimia shareholders, and the respective terms of their investments. There was also insufficient disclosure justifying the need for the capital with only a vague reference to Aimia's capital needs.

71. Contrary to Aimia's claims, the Private Placement is not designed to maximize value to shareholders and is instead an abusive defensive tactic intended to (i) entrench the Board, (ii) manipulate the outcome of the Offer (or subsequent offers), and (iii) materially affect control of Aimia. The following support these conclusions:

    (a) The dilutive effect of the Private Placement will materially affect shareholders' voting rights, including in connection with any meeting of shareholders to vote on the election of directors (as Mithaq is seeking from the Ontario Superior Court in its ongoing litigation against Aimia) and in connection with ratification of the SRP (if it is sought).

    (b) The issuance of a material number of additional Aimia Shares in the face of the Offer, which requires satisfaction of the Statutory Minimum Tender Condition, materially raises the bar for such condition to be satisfied and accordingly raises the possibility that the Offer (or any other subsequent offer) will not succeed.

    (c) The price of the Warrants is $3.70 per Aimia Share, just four cents higher than the Offer price of $3.66 per Aimia Share, which effectively discourages anyone from making a take-over bid (or from proposing another value-enhancing transaction) at a price higher than $3.70, because if such an offer were made the Warrants would likely be immediately exercised resulting in a material dilution thereby increasing the likelihood that any such offer would not succeed.

    (d) Aimia did not extend the Private Placement opportunity to existing Aimia shareholders (contrary to Aimia's commitment at the time of the SRP to treat all shareholders fairly in connection with any offer to acquire the outstanding common shares of Aimia).

    (e) The proposed new investor group will receive up to 3 out of 8 Aimia board seats, amounting to disproportionate board representation.

72. The effects of the Private Placement outlined above are contrary to the purposes of acceptable defensive measures, as set out in NP 62-202, which are ones designed to enhance and maximize value to shareholders "in a genuine attempt to obtain a better bid."

73. Moreover, contrary to the TSX Manual (as set out below), Aimia failed to obtain shareholder approval of the Private Placement where the issuance of rights in the Private Placement will materially affect Aimia's control. Given the effect that the Private Placement will have on the Offer, failing to require shareholder approval for the Private Placement has the effect of depriving shareholders of making a fully-informed collective decision on the Offer. Such an effect is contrary to the take-over bid rules and expressed as a concerning feature of a defensive measure in NP 62-202.

74. When exercising its discretion to review a private placement in accordance with NP 62-202 and section 127 of the *Securities Act*, the Commission needs to balance the extent to which the private placement serves *bona fide* corporate objectives with the securities law principles of facilitating shareholder choice with regard to corporate control transactions and promoting open and even-handed bid environments.

75. Weighing against the abusive effects of the Private Placement outlined above, which includes the effect of frustrating shareholders choice and ability to consider the Offer, are no *bona fide* corporate objectives for the Private Placement. The financing to be derived from the Private Placement is not necessary to support Aimia's operations.

76. While Aimia's press release announcing the Private Placement refers to an undisclosed "independent" opinion confirming Aimia's need for capital as of September 5, 2023, no additional details are provided, including in respect of Aimia's capital needs. Such an opinion is highly unusual and the fact that it was sought raises an inference that the need for the purported financing was not supported by Aimia's cash position disclosed in Aimia's most recent financial statements.

77. In any event, any alleged need for financing is not supported by the cash position disclosed in Aimia's most recent financial statements and is contrary to recent statements made by Aimia management.

78. For example, Aimia's second quarter earnings release, issued on August 11, 2023, note that as of June 30, 2023, Aimia had $116.9 million in cash, cash equivalents, and liquid securities. Further, on September 27, 2023 Aimia management disclosed that during 2023 to 2024 investors should expect "re-initiation of NCIB [normal-course issuer bids] and aggressive share buybacks." Such plans are inconsistent with the need for additional financing. Moreover, these capital plans and business strategies are diametrically opposed in effect on existing shareholders to the materially dilutive Private Placement.

79. As such, the Private Placement is an improper defensive tactic within the meaning of NP 62-202. To ensure that Aimia's shareholders have the opportunity to respond to the Offer, the Commission ought to exercise its public interest jurisdiction to cease trade the Private Placement. In the alternative, the Commission ought to make an order that the shares in the Private Placement not be included in the number of outstanding shares for the purpose of the Statutory Minimum Tender Condition.

80. Section 604(a)(i) of the TSX Company Manual (the "Manual") sets out that security holder approval will generally be required if an issuance materially affects control of the listed issuer. "Materially affect control" is defined in the Manual as the ability of any security holder or combination of security holders acting together to influence the outcome of a vote of security holders.

81. The record suggests that the undisclosed investors in the Private Placement may be acting together, whether in a joint actor relationship or otherwise. Together with the dilutive impact the Private Placement will have on existing shareholders rights as well as the number of Aimia Shares that are issuable under the Private Placement, there can be no doubt that the undisclosed investors in the Private Placement will act together to influence the outcome of a vote of Aimia shareholders. Shareholder approval is therefore required pursuant to section 604(a)(i) of the Manual.

82. Section 603 of the Manual gives the TSX further discretion to impose conditions on the issuance of securities. This requires TSX to consider the effect that the Private Placement will have on the quality of the marketplace, including factors such as the involvement of insiders or other related parties and the material effect on control of the listed issuer.

83. In response to Aimia's announcement of the Private Placement, on October 16, 2023, Mithaq's counsel wrote to the TSX outlining its concerns with the Private Placement and its view that the Private Placement will require that Aimia obtain shareholder approval.

84. In its letter to the TSX, Mithaq disclosed its intention to commence this Application. On the basis of the Commission's broad public interest jurisdiction to address absusive defensive measures and with a view to ensuring an efficient process, Mithaq requested that the TSX defer any consideration of the Private Placement until after this Application has been heard.

85. Section 104 of the *Securities Act* provides the Commission with jurisdiction to make an order requiring compliance with Part XX of the *Act* and the regulations related to this Part, including NP 62-202. Subsection 8(3) of he *Securities Act* confers upon the Commission the authority to review a decision of the TSX and to "make such other decision as the Commission considers proper."

86. Together with the Commission's public interest jurisdiction under section 127, the Commission's jurisdiction under sections 8(3) and 104 is broader than the TSX's jurisdiction. The Commission is entitled to review any TSX Decision under Section 603 or 604 of the Manual on a *de novo* basis. If the TSX does not defer and does not require shareholder approval of the Private Placement, the Commission ought to exercise its jurisdiction to require that Aimia obtain shareholder approval of the Private Placement before it closes on the four conditions set out above.

87. The four conditions sought by the Applicant are required to give practical and legal effect to a decision by the Commission requiring a shareholder vote on the Private Placement. These conditions are as minimally intrusive as is reasonably possible in the circumstances and are not unduly burdensome.

88. The shareholder vote must ask shareholders to either ratify the Private Placement or to instruct the Board to reverse the Private Placement.

89. If the shareholders vote against the Private Placement at the requested shareholders' meeting, a reversal of the Private Placement will be required to give effect to the shareholder vote to which they would be entitled to under TSX rules. A failure to reverse in such circumstances would reward Aimia for its inadequate process in seeking to close the Private Placement.

90. The factors relevant in determining whether it is in the public interest for the Commission to impose the reversal condition sought by the Applicant weigh in favour of imposing such a condition, including for the following reasons:

    (a) Aimia reasonably ought to have known of the Offeror's objections to the TSX Decision without shareholder approval but nonetheless deliberately chose to close the Private Placement without sufficient time to permit shareholders to effectively communicate their objections to the TSX or the Commission;

    (b) the proposed investors in the Private Placement reasonably ought to have known of the Applicant's objections in light of the proxy review, the Offer, and the ongoing litigation between the parties and ought to have known that the TSX, and the Commission upon a review of the TSX decision, has discretion to require shareholder approval in appropriate circumstances;

    (c) Aimia failed to adequately disclose material information relating to the Private Placement in its public announcement of the transaction; and

    (d) there will be no impracticalities or hardship suffered by the reversal in the circumstances.

91. Fairness dictates that only those shareholders who are not proposed investors in the Private Placement ought to be entitled to vote at a shareholder meeting seeking ratification of the Private Placement or its reversal. Moreover, the shareholder vote should not include any voting rights obtained through the Private Placement.

Expedited hearing and cease trade orders are required

92. Given the date that Aimia intends to close the Private Placement (October 19, 2023), Mithaq seeks a temporary cease trade order pursuant to section 127(5) of the *Securities Act* and an expedited hearing.

93. In the absence of a temporary cease trade order, the Private Placement will materially impact the Offer and will also serve the Board's entrenching aims in the context of other shareholder votes that are or may be required in the coming months by diluting the relative voting power of Mithaq and other shareholders dissatisfied with the Board and Aimia management's performance. These votes include ratification of the SRP (if it is sought) as well as any new vote on the election of Aimia directors that may be ordered by the Court in Mithaq's litigation against Aimia. Both are votes in which the Board has a clear interest in the outcome.

94. In addition, the cease trade order pursuant to section 127(5) is required to give practical effect to the requested order sought under subsection 8(3) of the *Securities Act* to require a shareholder vote on the Private Placement.

95. The Applicant requests the record of any TSX Decision and any written reasons for the Decision.

96. The Applicant reserves the right to supplement its grounds for this Application, including once it has received any TSX Decision.

C. EVIDENCE AND SUBMISSIONS

The Applicant intends to rely on written submissions and the following evidence at the hearing:

    (a) the Affidavit of Asif Seemab to be affirmed;

    (b) any TSX Decision, together with the record of the Decision and any written reasons for the Decision; and

    (c) such other evidence as counsel for the Applicant may advise.

Dated: October 17, 2023

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

Andrew Gray (LSO #: 46626V)
Tel: 416.865.7630
agray@torys.com

Sarah Whitmore (LSO #: 61104E)
Tel: 416.865.7315
swhitmore@torys.com

Hanna Singer (LSO #: 81994W)
Tel: 416.865.7664
hsinger@torys.com

Lawyers for the Applicant
Mithaq Capital SPC

A.1.2 Charles DeBono – s. 127(1), (10)

FILE NO.: 2023-30

IN THE MATTER OF
CHARLES DEBONO

NOTICE OF HEARING
Subsections 127(1) and 127(10) of the *Securities Act,* RSO 1990, c S.5

PROCEEDING TYPE: Inter-jurisdictional Enforcement Proceeding

HEARING DATE AND TIME: In writing

PURPOSE

The purpose of this proceeding is to consider whether it is in the public interest for the Capital Markets Tribunal to make the orders requested in the Statement of Allegations filed by Staff of the Commission on October 18, 2023.

Take notice that Staff of the Commission has elected to proceed by way of the expedited procedure for a written hearing provided for by Rule 11(3) of the *Capital Markets Tribunal Rules of Procedure and Forms*.

Staff must serve on you this Notice of Hearing, the Statement of Allegations, Staff's hearing brief containing all documents Staff relies on, and Staff's written submissions.

You have **21 days** from the date Staff serves these documents on you to file a request for an oral hearing, if you do not want to follow the expedited procedure for a written hearing.

Otherwise, you have **28 days** from the date Staff served these documents on you to file your hearing brief and written submissions.

REPRESENTATION

Any party to the proceeding may be represented by a representative at the hearing.

FAILURE TO PARTICIPATE

IF A PARTY DOES NOT PARTICIPATE, THE HEARING MAY PROCEED IN THE PARTY'S ABSENCE AND THE PARTY WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDING.

FRENCH HEARING

This Notice of Hearing is also available in French on request of a party. Participation may be in either French or English. Participants must notify the Tribunal in writing as soon as possible if the participant is requesting a proceeding be conducted wholly or partly in French.

AVIS EN FRANÇAIS

L'avis d'audience est disponible en français sur demande d'une partie, que la participation à l'audience peut se faire en français ou en anglais et que les participants doivent aviser le Tribunal par écrit dès que possible si le participant demande qu'une instance soit tenue entièrement ou partiellement en français.

Dated at Toronto this 23rd Day of October, 2023

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For more information

Please visit capitalmarketstribunal.ca or contact the Registrar at registrar@osc.gov.on.ca.

IN THE MATTER OF
CHARLES DEBONO

STATEMENT OF ALLEGATIONS
(Subsections 127(1) and 127(10) of the *Securities Act,* RSO 1990, c S.5)

A. OVERVIEW

1. An inter-jurisdictional enforcement order using the expedited procedure for inter-jurisdictional proceedings set out in Rule 11(3) of the Capital Markets Tribunal (the **Tribunal**) *Rules of Procedure and Forms* is sought based on a conviction entered by the Ontario Superior Court of Justice against the Respondent, Charles DeBono (**DeBono**), for defrauding investors of approximately $29 million.

B. FACTS

2. On February 17, 2022, DeBono pleaded guilty to one count of fraud over $5,000 contrary to section 380(1)(a) of the *Criminal Code* (***Code***) and one count of money laundering contrary to section 462.31(2)(a) of the *Code* before the Honourable Justice M.K. Fuerst. On June 28, 2022, Justice Fuerst sentenced DeBono to imprisonment for 51 months and 19 days, net of pre-sentence custody, on the fraud count, and the same term of imprisonment, to be served concurrently, on the money laundering count. Additionally, the sentence included a restitution order totalling $26,910,772 and a fine in lieu of forfeiture in the amount of $26,910,772.

3. DeBono, an Ontario resident, was the owner of Debit Direct Canada (**Debit Direct**), an entity that purported to be in the business of providing point of sale debit terminals to merchants. In fact, Debit Direct was a Ponzi scheme. DeBono has never been registered with the OSC in any capacity.

4. After being solicited by DeBono, investors supplied capital to Debit Direct, whose role was to place debit terminals in businesses. Investors expected to profit from each payment processed through the terminals, making them dependent on the managerial efforts of Debit Direct affecting the success or failure of the enterprise. These were investment contracts. Consequently, DeBono's convictions arose from transactions, business or a course of conduct related to securities.

5. The Tribunal is requested to make an inter-jurisdictional enforcement order reciprocating DeBono's conviction, pursuant to paragraph 1 of subsection 127(10) of the Ontario *Securities Act,* RSO 1990, c S.5, as amended (the **Act**).

6. Justice Fuerst sentenced DeBono based on his admissions as set out in a Statement of Agreed Facts in Support of Guilty Plea, covering misconduct DeBono committed between September 2012 and July 2017. Those admissions include the following:

   (a) DeBono raised between $40 and $48 million from investors who contracted to buy point of sale debit terminals from Debit Direct. These transactions involved investment contracts, which are securities under the Act.

   (b) Investors paid approximately $2,500 to $3,100 per terminal and then made a return on their investment by receiving $0.15 per transaction that went through the terminals. Investors received monthly payouts that varied depending on the number of debit terminals they owned and the number of transactions that Debit Direct claimed they registered. DeBono portrayed the company as a "passive business opportunity". The company claimed to take full responsibility for placing the debit terminals at high volume businesses across Canada, as well as all costs and maintenance associated to the debit terminals.

   (c) Despite beginning with approximately 10 terminals, the Debit Direct business turned into a large Ponzi scheme. Debit terminals were never actually placed anywhere, nor did they process any payments. Apart from the initial 10 terminals, there is no evidence that Debit Direct ever owned any others. There is also no evidence that the company maintained, profited or placed any debit terminals with any businesses.

   (d) At least approximately $10.1 million of the between $40 and $48 million raised from investors was used for DeBono's personal use or benefit. Debit Direct used new investors' funds to pay the returns on earlier investors; a forensic accountant estimated payments by Debit Direct to terminal purchasers to range from approximately $5,864,000 to $16,962,000. Approximately 515 people contracted to buy point of sale terminals from Debit Direct. The forensic accountant estimated losses to investors to range from approximately $23,972,000 to $41,897,000.

7. Justice Fuerst found many aggravating factors, including that:

   (a) DeBono, driven by pure greed, set out to cheat investors from the outset;

   (b) the magnitude of the fraud was extreme and the scheme was sophisticated, involving considerable planning and very deliberate conduct;

(c) DeBono engaged in other criminal activity to perpetrate the fraud;

(d) DeBono attempted to destroy evidence and fled to the Dominican Republic when the Ponzi scheme collapsed; and

(e) DeBono's victims, who did nothing wrong in pursuing what they believed to be an honest investment opportunity, suffered devastating economic losses as well as concomitant detrimental effects on their health and emotional well-being.

8. By contrast, the mitigating factors were few: DeBono pleaded guilty, but only after a trial date had been set; he had no prior criminal record; and he experienced harsher than usual conditions during custody because of the COVID-19 pandemic.

C. JURISDICTION OF THE CAPITAL MARKETS TRIBUNAL

9. Pursuant to paragraph 1 of subsection 127(10) of the Act, DeBono's conviction for offences arising from transactions, business or a course of conduct related to securities or derivatives may form the basis for an order in the public interest made under subsection 127(1) of the Act.

10. It is in the public interest to make one or more preventive and protective orders against DeBono.

D. ORDER SOUGHT

11. The Tribunal is requested to make the following inter-jurisdictional enforcement order, pursuant to paragraph 1 of subsection 127(10) of the Act:

(a) against DeBono that:

(i) pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by DeBono cease permanently;

(ii) pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by DeBono be prohibited permanently;

(iii) pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to DeBono permanently;

(iv) pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act, DeBono resign any positions that he holds as a director or officer of any issuer or registrant, including an investment fund manager;

(v) pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act, DeBono be prohibited permanently from becoming or acting as a director or officer of any issuer or registrant, including an investment fund manager;

(vi) pursuant to paragraph 8.5 of subsection 127(1) of the Act, DeBono be prohibited permanently from becoming or acting as a registrant, as an investment fund manager or as a promoter; and

(b) such other order or orders as the Tribunal considers appropriate.

12. These allegations may be amended and further and other allegations may be added as the Tribunal may permit.

DATED at Toronto this 18th day of October 2023.

ONTARIO SECURITIES COMMISSION
20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Sean Grouhi
Litigation Counsel
Enforcement Branch

Tel: 416-602-8437
Email: sgrouhi@osc.gov.on.ca

A.2
Other Notices

A.2.1 Mithaq Canada Inc. and Aimia Inc.

FOR IMMEDIATE RELEASE
October 18, 2023

MITHAQ CANADA INC. AND
AIMIA INC.,
File No. 2023-28

TORONTO – On October 18, 2023, the Tribunal issued a Notice of Hearing pursuant to sections 8, 21.7, 104 and 127 of the *Securities Act,* RSO 1990, c S.5, to consider the Application filed by Mithaq Canada Inc. dated October 17, 2023, requesting an order to cease trade Aimia Inc.'s shareholder rights plan and private placement and other relief related to the private placement.

A preliminary attendance will be held on October 19, 2023 at 8:30 a.m.

A copy of the Notice of Hearing dated October 18, 2023 and the Application dated October 17, 2023 are available at capitalmarketstribunal.ca.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

1-877-785-1555 (Toll Free)
inquiries@osc.gov.on.ca

A.2.2 Go-To Developments Holdings Inc. et al.

FOR IMMEDIATE RELEASE
October 19, 2023

GO-TO DEVELOPMENTS HOLDINGS INC.,
GO-TO SPADINA ADELAIDE SQUARE INC.,
FURTADO HOLDINGS INC., AND
OSCAR FURTADO,
File No. 2022-8

TORONTO – The Tribunal issued an Order in the above named matter.

A copy of the Order dated October 19, 2023 is available at capitalmarketstribunal.ca.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

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For General Inquiries:

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inquiries@osc.gov.on.ca

A.2.3 Mithaq Canada Inc. and Aimia Inc.

FOR IMMEDIATE RELEASE
October 19, 2023

MITHAQ CANADA INC. AND
AIMIA INC.,
File No. 2023-28

TORONTO – The Tribunal issued an Order in the above-named matter.

A copy of the Order dated October 19, 2023 is available at capitalmarketstribunal.ca.

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For General Inquiries:

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inquiries@osc.gov.on.ca

A.2.4 Bridging Finance Inc. et al.

FOR IMMEDIATE RELEASE
October 20, 2023

BRIDGING FINANCE INC.,
DAVID SHARPE,
NATASHA SHARPE AND
ANDREW MUSHORE,
File No. 2022-9

TORONTO – Take notice that the merits hearing in the above-named matter scheduled to be heard on October 23, 2023 will not proceed as scheduled.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

1-877-785-1555 (Toll Free)
inquiries@osc.gov.on.ca

A.2.5 Highland Capital Management, L.P. and NexPoint Hospitality Trust

FOR IMMEDIATE RELEASE
October 20, 2023

HIGHLAND CAPITAL MANAGEMENT, L.P. AND
NEXPOINT HOSPITALITY TRUST,
File No. 2023-25

TORONTO – The Applicant, Highland Capital Management, L.P. filed a Notice of Withdrawal in the above named matter.

A copy of the Notice of Withdrawal dated October 20, 2023 is available at capitalmarketstribunal.ca.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

1-877-785-1555 (Toll Free)

inquiries@osc.gov.on.ca

A.2.6 Highland Capital Management, L.P. and NexPoint Hospitality Trust

File No. 2023-25

IN THE MATTER OF
HIGHLAND CAPITAL MANAGEMENT, L.P.

AND

IN THE MATTER OF
NEXPOINT HOSPITALITY TRUST

NOTICE OF WITHDRAWAL

(In connection with a transactional proceeding under Rule 16 and
Under Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)

The applicant, Highland Capital Management, L.P., withdraws the Application filed October 2, 2023.

DATED this 20th day of October, 2023.

POLLEY FAITH LLP
TD North Tower
77 King St. W., Suite 2110
Toronto ON M5K 2A1

Andrew Faith (47795H)
afaith@polleyfaith.com

Jeffrey Haylock (61241F)
jhaylock@polleyfaith.com

Jeffrey Wang (85736W)
jwang@polleyfaith.com

Tel: 416.365.1600

Lawyers for the applicant

A.2.7 Troy Richard James Hogg et al.

FOR IMMEDIATE RELEASE
October 20, 2023

TROY RICHARD JAMES HOGG,
CRYPTOBONTIX INC.,
ARBITRADE EXCHANGE INC.,
ARBITRADE LTD.,
T.J.L. PROPERTY MANAGEMENT INC. AND
GABLES HOLDINGS INC.,
File No. 2022-20

TORONTO – The Tribunal issued an Order in the above-named matter.

A copy of the Order dated October 20, 2023 is available at capitalmarketstribunal.ca.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

1-877-785-1555 (Toll Free)
inquiries@osc.gov.on.ca

A.2.8 Go-To Developments Holdings Inc. et al.

FOR IMMEDIATE RELEASE
October 23, 2023

GO-TO DEVELOPMENTS HOLDINGS INC.,
GO-TO SPADINA ADELAIDE SQUARE INC.,
FURTADO HOLDINGS INC., AND
OSCAR FURTADO,
File No. 2022-8

TORONTO – The Tribunal issued its Reasons and Decision and Order in the above-named matter.

A copy of the Reasons and Decision and the Order dated October 20, 2023 are available at capitalmarketstribunal.ca.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

1-877-785-1555 (Toll Free)
inquiries@osc.gov.on.ca

A.2.9 Michael Paul Kraft and Michael Brian Stein

FOR IMMEDIATE RELEASE
October 23, 2023

MICHAEL PAUL KRAFT AND
MICHAEL BRIAN STEIN,
File No. 2021-32

TORONTO – The Tribunal issued its Reasons and Decision in the above named matter.

A copy of the Reasons and Decision dated October 20, 2023 is available at capitalmarketstribunal.ca.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

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For General Inquiries:

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inquiries@osc.gov.on.ca

A.2.10 Charles DeBono

FOR IMMEDIATE RELEASE
October 23, 2023

CHARLES DEBONO,
File No. 2023-30

TORONTO – The Tribunal issued a Notice of Hearing pursuant to Subsections 127(1) and 127(10) of the *Securities Act* in the above-named matter.

A copy of the Notice of Hearing dated October 23, 2023 and Statement of Allegations dated October 18, 2023 are available at capitalmarketstribunal.ca.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

1-877-785-1555 (Toll Free)
inquiries@osc.gov.on.ca

A.2.11 Mark Odorico

FOR IMMEDIATE RELEASE
October 24, 2023

MARK ODORICO,
File No. 2022-18

TORONTO – Take notice that an attendance in the above named matter is scheduled to be heard on November 7, 2023 at 9:00 a.m.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

1-877-785-1555 (Toll Free)
inquiries@osc.gov.on.ca

A.2.12 Bridging Finance Inc. et al.

FOR IMMEDIATE RELEASE
October 24, 2023

BRIDGING FINANCE INC.,
DAVID SHARPE,
NATASHA SHARPE AND
ANDREW MUSHORE,
File No. 2022-9

TORONTO – Take notice that the merits hearing in the above-named matter scheduled to be heard on October 25 and 26, 2023 and December 12 and 13, 2023 will not proceed as scheduled.

Registrar, Governance & Tribunal Secretariat
Ontario Securities Commission

For Media Inquiries:

media_inquiries@osc.gov.on.ca

For General Inquiries:

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A.3
Orders

A.3.1 Go-To Developments Holdings Inc. et al.

IN THE MATTER OF
GO-TO DEVELOPMENTS HOLDINGS INC.,
GO-TO SPADINA ADELAIDE SQUARE INC.,
FURTADO HOLDINGS INC., AND
OSCAR FURTADO

File No. 2022-8

Adjudicator: M. Cecilia Williams (chair of the panel)

October 19, 2023

ORDER

WHEREAS on October 19, 2023, the Capital Markets Tribunal held a hearing by videoconference to consider a motion by Oscar Furtado to (i) adjourn the merits hearing; (ii) extend certain deadlines previously set in the Order issued July 20, 2023, and Reasons and Decision issued September 7, 2023; and (iii) file part of the motion record confidentially;

ON READING the Notice of Motion and motion record of Furtado, and on hearing the submissions of the representatives for Furtado, Staff, and the receiver of Go-To Developments Holdings Inc., Go-To Spadina Adelaide Square Inc., and Furtado Holdings Inc., and on considering that Staff do not oppose the adjournment request, and that the receiver takes no position on the adjournment request;

IT IS ORDERED THAT:

1. the previously scheduled merits hearing dates of November 3, 6, 7, 8, 10, 13, 14, 15, 16, and 17, 2023 are vacated;

2. by 4:30 p.m. on January 31, 2024, Furtado shall serve every other party with a hearing brief containing copies of the documents, and identifying other things, that he intends to produce or enter as evidence in the merits hearing;

3. by 4:30 p.m. on January 31, 2024, Furtado shall deliver a further and better witness summary to all other parties;

4. by 4:30 p.m. on April 8, 2024, Furtado shall:

    a. advise Staff and the Registrar that he is fit to proceed to the merits hearing as scheduled; or

    b. serve and file any motion requesting accommodations relating to, or seeking a further adjournment of, the merits hearing;

5. by 4:30 p.m. on June 3, 2024, each party shall provide the Registrar a completed copy of the *E-Hearing Checklist*;

6. a final interlocutory attendance in this matter will be heard by videoconference on June 10, 2024 at 10:00 a.m., or on such other date and time as may be agreed to by the parties and set by the Governance & Tribunal Secretariat;

7. by 4:30 p.m. on July 2, 2024, each party shall provide to the Registrar the electronic documents that the party intends to rely on or enter into evidence at the merits hearing, along with an index file containing hyperlinks to the documents in the hearing brief, in accordance with the *Protocol for E-Hearings*;

8. the merits hearing shall take place at 20 Queen Street West, 17th Floor, Toronto, Ontario, commencing on July 8, 2024, and continuing on July 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 2024, at 10 a.m. each day, or on such other dates and times as may be agreed to by the parties and set by the Governance & Tribunal Secretariat; and

9. pursuant to subsection 2(2) of the *Tribunal Adjudicative Records Act, 2019* and Rule 22(4) of the *Capital Markets Tribunal Rules of Procedure and Forms*, Exhibit 1, the Confidential Motion Record of Oscar Furtado, shall be kept confidential and only Exhibit 2, the Redacted Motion Record of Oscar Furtado, shall be available to the public.

"M. Cecilia Williams"

A.3.2 Mithaq Canada Inc. and Aimia Inc. – s. 127(1), (2)

IN THE MATTER OF
MITHAQ CANADA INC.

AND

IN THE MATTER OF
AIMIA INC.

File No. 2023-28

Adjudicators: Timothy Moseley (chair of the panel)
James D. G. Douglas
Dale R. Ponder

October 19, 2023

ORDER
(Subsections 127(1) and (2) of the
Securities Act, RSO 1990, c S.5)

WHEREAS on October 19, 2023, the Capital Markets Tribunal held a hearing by videoconference, regarding Mithaq Canada Inc.'s request for interim relief pending the hearing of its application dated October 17, 2023, for an order cease trading a shareholder rights plan and a private placement announced by Aimia Inc. on October 13, 2023 for up to 10,475,000 Aimia Inc. shares and 10,475,000 Aimia Inc. share purchase warrants (the **Private Placement**);

WHEREAS counsel for Aimia Inc. represented that no securities would be issued under the Private Placement, other than the common shares and share purchase warrants mentioned above;

AND WHEREAS Aimia Inc. has undertaken to the Tribunal that:

1. If Mithaq Canada Inc.'s application is successful, then upon the direction of the Tribunal:
   a. Aimia Inc. shall rescind the Private Placement forthwith and return to the investors any consideration paid under the Private Placement;
   b. Aimia Inc. shall cancel the common shares and warrants issued under the Private Placement as well as all common shares issued upon the exercise of the warrants (collectively, the **Securities**); and
   c. all agreements entered into in connection with the Private Placement including, for greater certainty, all agreements providing for any rights granted by Aimia Inc. to an investor in connection with the Private Placement, shall be terminated;
2. Unless and until such time as the application has been heard and a decision rendered, the Securities: (i) may not be traded, (ii) may not be voted at any Aimia Inc. shareholders' meeting, and (iii) in the event that the deposit period is shortened for Mithaq Canada Inc.'s pending unsolicited take-over bid of Aimia Inc. announced on October 5, 2023, will not be included for the purposes of Mithaq Canada Inc. satisfying the minimum tender condition contained in section 2.29.1(c) of National Instrument 62-104 – *Take-Over Bids and Issuer Bids* (**NI 62-104**); and
3. Aimia Inc. will advise the proposed investors of this undertaking; and

ON HEARING the submissions of the representatives for Mithaq Canada Inc., Aimia Inc., Staff of the Ontario Securities Commission (**Staff**) and Eagle 1250 Investments Group LLC;

IT IS ORDERED, for reasons to follow, that:

1. pursuant to rule 21(4) of the *Rules of Procedure and Forms*, Eagle 1250 Investments Group LLC was granted intervenor status for the purpose only of making oral submissions at the October 19, 2023 hearing;
2. pursuant to s. 127(1)2 of the *Securities Act*, unless by 12:00 p.m. on October 20, 2023, Aimia Inc. undertakes to the Tribunal that the Securities may not be tendered to any alternative take-over bid or issuer bid that may be commenced by a third party or Aimia Inc. in respect of the Aimia Inc. common shares, the Private Placement is cease traded;
3. pursuant to s. 127(2) of the *Securities Act,* if Aimia Inc. gives the additional undertaking referred to in paragraph 2 above, Aimia Inc. shall forthwith issue a news release that includes disclosure of that additional undertaking;
4. Mithaq Canada Inc., Aimia Inc., Staff or any person directly affected by this Order may apply to the Tribunal for directions as to the interpretation and application of the undertakings referred to in this Order or any other matter related to this Order; and
5. by 4:30 p.m. on October 23, 2023, the parties shall provide to the Registrar one or more sets of submissions regarding dates for the hearing of the merits of Mithaq Canada Inc.'s application, and at the parties' option, regarding a timeline for the exchange of materials, and regarding the allocation of time at the merits hearing.

"Timothy Moseley"

"James D. G. Douglas"

"Dale R. Ponder"

A.3.3 Troy Richard James Hogg et al.

IN THE MATTER OF
TROY RICHARD JAMES HOGG,
CRYPTOBONTIX INC.,
ARBITRADE EXCHANGE INC.,
ARBITRADE LTD.,
T.J.L. PROPERTY MANAGEMENT INC. AND
GABLES HOLDINGS INC.

File No. 2022-20

Adjudicators: Sandra Blake (chair of the panel)
Andrea Burke
M. Cecilia Williams

October 20, 2023

ORDER

WHEREAS on October 20, 2023, the Capital Markets Tribunal held a hearing by videoconference to consider, among other things, a motion by O'Toole Advocacy to be removed as representative of record for the respondents;

ON READING the materials filed by O'Toole Advocacy, and on hearing the submissions of O'Toole Advocacy, Staff of the Ontario Securities Commission, and Troy Richard James Hogg, appearing on his own behalf and on behalf of Arbitrade Exchange Inc., T.J.L. Property Management Inc. and Gables Holdings Inc., no one appearing on behalf of the remaining respondents;

IT IS ORDERED THAT:

1. pursuant to Rule 21(2) of the *Capital Markets Tribunal Rules of Procedure and Forms*, O'Toole Advocacy is removed as representative of record for the respondents Hogg, Arbitrade Exchange Inc., T.J.L. Property Management Inc. and Gables Holdings Inc.;

2. a further attendance in this matter is scheduled for October 30, 2023, at 10:00 a.m., by videoconference, or on such other date and time as may be agreed to by the parties and set by the Governance & Tribunal Secretariat; and

3. by 4:30 p.m. on November 14, 2023, Staff shall serve and file any witness affidavits it intends to enter as evidence at the merits hearing.

"Sandra Blake"

"Andrea Burke"

"M. Cecilia Williams"

A.3.4 Go-To Developments Holdings Inc. et al. – Rule 22 of the CMT Rules of Procedure and Forms and s. 2(2) of the Tribunal Adjudicative Records Act, 2019

IN THE MATTER OF
GO-TO DEVELOPMENTS HOLDINGS INC.,
GO-TO SPADINA ADELAIDE SQUARE INC.,
FURTADO HOLDINGS INC., AND
OSCAR FURTADO

File No. 2022-8

Adjudicators: M. Cecilia Williams (chair of the panel)
Geoffrey D. Creighton
Dale R. Ponder

October 20, 2023

ORDER

(Rule 22 of the *Capital Markets Tribunal Rules of Procedure and Forms* and
Subsection 2(2) of the *Tribunal Adjudicative Records Act, 2019*, SO 2019, c 7, Sch 60)

WHEREAS on June 2, 2023, the Capital Markets Tribunal held a hearing by videoconference to consider an adjournment motion by Oscar Furtado, which included a request to keep certain documents in the adjudicative record confidential;

AND WHEREAS a portion of the hearing proceeded on a confidential basis at the request of Furtado, with the issue of what portion, if any, of the corresponding hearing transcript would be kept confidential, to be determined by the Tribunal following submissions in writing from the parties;

ON READING the written submissions of each of Furtado and Staff, and on hearing the submissions of the representatives for Furtado and of Staff;

IT IS ORDERED, that pursuant to s.2(2) of the *Tribunal Adjudicative Records Act* and Rule 22(4) of the *Capital Market Tribunal Rules of Procedure and Forms*, the portions of the Adjudicative Record Documents and the June 2, 2023 transcript as attached to this order at “Appendix A” are to be made confidential.

“M. Cecilia Williams”

“Geoffrey D. Creighton”

“Dale R. Ponder”

Appendix A

List of Redactions to the June 2, 2023 Transcript

- Page 7 at line 24 the word between “list of” and “medications”
- Page 7 at lines 26-27 the words between “worsening” and “for which”
- Page 9 at lines 15-16 the words between “he has to” and “in order to”
- Page 10 at lines 17-18 the words from “counsel without” to the end of line 18
- Page 10 at lines 21-22 the words between “he has to” and “It’s not”
- Page 27 at line 25 the words between “Mr. Furtado was” and “at the time”
- Page 51 at line 20 the words between “requiring” and “was there”
- Page 51 at line 24 the words between “know what” and “to”
- Page 51 at lines 26-27 the words between “assert that” and “What are”
- Page 61 the word below “anticipated” in the index
- Page 63 the word below “denied” in the index
- Page 63 the word below “directly” in the index
- Page 66 the two words below “medically” in the index

List of Redactions to Adjudicative Record Documents

Hearing Exhibit 1 – Motion Record of Oscar Furtado

Affidavit of Oscar Furtado, sworn May 10, 2023

- Page 3 in paragraph 10 the words between “time and” and “Accordingly”

Exhibit “E” to Affidavit of Oscar Furtado, sworn May 10, 2023

- Page 36 the four lines of information, including an address, following the date and “Oscar Furtado”
- Page 37 the four lines of information, including an address, following the date and “Oscar Furtado”
- Page 37 everything following item 2
- Page 37 following item 3, the words between “Medical Issues:” and “this is worsening”
- Page 37 following item 3, the words from “1 to 3 months” to the end of the paragraph

Hearing Exhibit 3 – Affidavit of Michelle Spain, affirmed May 17, 2023

Exhibit “F” to Affidavit of Michelle Spain, affirmed May 17, 2023

- Pdf page 57, the three lines of information, including address, following “Re: Oscar Furtado”
- Pdf page 57 in the 12th line of text on the page the words between “This patient was” and “on Thursday”

Exhibit “G” to Affidavit of Michelle Spain, affirmed May 17, 2023

- Pdf page 59 in the second line the words between “continue to test him” and “Please note”
- Pdf page 59 the words between “your client is” and “and estimates”
- Pdf page 61 the three lines of information, including address, following “Re: Oscar Furtado”
- Pdf page 61 the two words between “This patient was” and “on Thursday, May”

- Pdf page 61 all the words following “Additional Notes:”

Exhibit “H” to Affidavit of Michelle Spain, affirmed May 17, 2023

- Pdf page 64 the words between “your client is” and “and estimates”

Exhibit “J” to Affidavit of Michelle Spain, affirmed May 17, 2023

- Pdf page 79 at line 7 the words between “Mr. Furtado was” and “which”
- Pdf page 79 at line 8 the words between “he was” and “that”
- Pdf page 79 at line 19 the words between “letter said” and “I don’t know”

List of Redactions in Oscar Furtado’s Moving Submissions, dated May 25, 2023

- Pdf page 5 at para 17 the words between “attesting to his” and “in their responding record”

List of Redactions in Staff’s Responding Submissions, dated May 30, 2023

- Page 7 para 15 at sub (b) the words from “that he” to the end of the line
- Page 7 para 15 at sub (c) the words between “Medical Issues:” and “this is worsening”
- Page 8 para 15 at sub (c) the words from “1 to 3 months” to the end of the paragraph
- Page 8 para 18 the words between “stating that he was” and “and “suffering”
- Page 15 para 38 everything in the second bullet
- Page 15 para 38 everything in the third bullet
- Page 15 para 38 everything in the fourth bullet

A.4
Reasons and Decisions

A.4.1 Go-To Developments Holdings Inc. et al. – Rules 22(2), (4), 29(1) of the CMT Rules of Procedure and Forms

Citation: *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 35
Date: 2023-10-20
File No. 2022-8

IN THE MATTER OF
GO-TO DEVELOPMENTS HOLDINGS INC.,
GO-TO SPADINA ADELAIDE SQUARE INC.,
FURTADO HOLDINGS INC., AND
OSCAR FURTADO

REASONS AND DECISION
(Rules 22(2), 22(4) and 29(1) of the *Capital Markets Tribunal Rules of Procedure and Forms*)

Adjudicators:	M. Cecilia Williams (chair of the panel) Geoffrey D. Creighton Dale R. Ponder	
Hearing:	June 2, 2023, by videoconference; final written submissions received July 17, 2023	
Appearances:	Erin Hoult Braden Stapleton	For Staff of the Ontario Securities Commission
	Melissa MacKewn Dana Carson Asli Deniz Eke	For Oscar Furtado

REASONS AND DECISION

1. OVERVIEW

[1] On June 22, 2023, we granted a motion by Oscar Furtado filed on May 11, 2023, to adjourn the merits hearing in this proceeding (the **Adjournment Motion**), scheduled to commence on August 21, 2023 (the **Merits Hearing**), with reasons to follow.

[2] We granted the Adjournment Motion, but not for an indefinite period as requested by Furtado. Furtado persuaded us that his health issues constituted extraordinary circumstances requiring a delay to the start of the Merits Hearing. In our Order dated June 22, 2023,[1] we vacated the first eight hearing days and, after considering panel availability, ordered that the merits hearing commence on November 3, 2023.

[3] Furtado requested that the motion hearing take place without the public present (the **Confidential Hearing Motion**) and that certain documents filed on this motion be treated as confidential (the **Confidential Documents Motion**).

[4] We conclude that some small portions of the documents filed with respect to these motions concern Furtado's personal dignity and should remain confidential. The appropriate balance between the public interest in preserving Furtado's dignity and the public interest in open hearings can be achieved in these circumstances by redacting the portions of the documents that deal with specific symptoms, diagnosis and treatment. The public disclosure of these portions could reasonably be considered to result in an affront to Furtado's dignity. However, how health issues affect the respondent's ability to prepare for and participate in a proceeding is information that should be in the public domain if core to a decision rendered by the Tribunal.

[5] We allowed the motion to be heard as a confidential hearing because we were persuaded that Furtado's health was central to the motions, and the issues to be determined in the motions could not be discussed without revealing personal information that Furtado indicated was highly sensitive and went to Furtado's personal dignity. The balancing of Furtado's

[1] *Go-To Developments Holdings Inc (Re)* (2023), 46 OSCB 5469

privacy interests against the fundamental principle of public access to Tribunal proceedings could be achieved, we concluded at the time, through redactions of the hearing transcript to protect any such personal information.

[6] However, upon review of the transcript very little content involved personal information that might put Furtado's dignity at risk. We conclude that the balancing of the private and public interests regarding the Confidential Hearing Motion could have been achieved with a more nuanced approach.

[7] The transcript of the confidential hearing will be made public subject to redactions to the transcript of language that deals with specific symptoms, diagnosis and treatment that could reasonably be considered to result in an affront to his dignity.

[8] These are our reasons for the Adjournment Motion, Confidential Documents Motion, and Confidential Hearing Motion. Other requests contained in Furtado's May 2023 motion have subsequently been dealt with.[2]

2. BACKGROUND

[9] On May 11, 2023, Oscar Furtado brought a motion for an adjournment of the Staff's motion for a further and better witness summary (the **Witness Summary Motion**) scheduled to proceed on June 2, 2023, the Adjournment Motion, an order that the evidence-in-chief to be tendered at the Merits Hearing by Staff's witness and Furtado be filed by affidavit in advance of the Merits Hearing, the Confidential Documents Motion, and the Confidential Hearing Motion.

[10] Furtado also requested that the final interlocutory attendance scheduled for July 20, 2023 be used to schedule new dates for the Witness Summary Motion and the Merits Hearing, if Furtado's health permits.

[11] The parties agreed to argue the Adjournment Motion on June 2, 2023.

[12] On June 22, 2023 we issued an order, with reasons to follow, granting Furtado an adjournment of the Merits Hearing. We denied Furtado's request for an adjournment of the Witness Summary Motion and subsequently dealt with it in writing, issuing our order and reasons on September 7, 2023.

[13] The parties agreed that certain evidence in chief of their respective witnesses in the Merits Hearing be provided by affidavit, negating the need for an order to that effect.

3. ADJOURNMENT MOTION

[14] Furtado requested that the Merits Hearing, scheduled to start in August 2023, be adjourned because of serious medical circumstances which make it impossible for him to meaningfully prepare for or participate in that hearing. Furtado sought to have the Merits Hearing delayed indefinitely and to use the final interlocutory attendance, scheduled for July 20, 2023, to reschedule the hearing, if Furtado's health permitted.

[15] We concluded, as discussed below, that Furtado's health in the circumstances constituted exceptional circumstances warranting a delay to the start of the Merits Hearing as currently scheduled. However, the balancing of the Tribunal's objectives of ensuring fair, efficient, and expeditious proceedings does not, in our view, warrant an indefinite delay to an uncertain date to be set in the future.

[16] We consider the law relating to adjournments before turning to the parties' positions and our analysis.

3.1 Law

[17] Rule 29(1) of the *Capital Markets Tribunal Rules of Procedure and Forms* (the **Rules**) provides that every merits hearing shall proceed on the scheduled date unless the party requesting an adjournment "satisfies the Panel that there are exceptional circumstances requiring an adjournment."[3]

[18] The Tribunal has ruled that the standard set out in rule 29(1) is a "high bar" that reflects the important objective set out in rule 1, that Tribunal proceedings be conducted in a "just, expeditious and cost-effective manner". The objective must be balanced against the parties' ability to participate meaningfully in the hearing and present their case.[4]

[19] The balancing of these objectives is necessarily fact-based.[5]

3.2 Parties' positions and our analysis

[20] Furtado submits that he is the sole responding witness in this proceeding, which involves very serious allegations, including fraud. He intends to defend the allegations against him. However, he is not currently medically fit to effectively prepare for and testify at the Merits Hearing as scheduled.

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2 *Go-To Developments Holdings Inc (Re),* 2023 ONCMT 29
3 Rule 29(1)
4 *Debus (Re)*, 2020 ONSEC 20 at para 16 (***Debus***)
5 *Debus* at para 17

[21] Furtado provided affidavit evidence, including a letter from his primary care physician stating that Furtado is "not currently medically fit to begin preparation for the hearing commencing in August 2023". Included in the medical history was the fact that Furtado had been a transplant recipient in 2011, was immunocompromised as a result and that COVID was another source of stress that had contributed to a decline in his mental health.

[22] The physician concludes "[a]s a result of Mr. Furtado's physical and mental health issues and the medications he is taking, he is currently experiencing significant problems with memory, concentration, focus and fatigue." The physician further advised that Furtado is awaiting referral to a psychiatrist, within one to three months, and that his condition may improve after that referral.

[23] In addition, Furtado's primary care physician stated that he is concerned that undergoing the stress associated with attempting to prepare for and attend the Merits Hearing at this time would be detrimental to Furtado's health.

[24] Furtado submits that the Tribunal has considered the following factors to determine whether circumstances rise to the level of exceptional to warrant an adjournment:

a. deliberate delay or an attempt to manipulate the process;[6]

b. reasons and explanation provided for the adjournment, including the respondent's responsibility, if any;[7]

c. seriousness of the consequences of the hearing for the respondent, including substantial financial sanctions and lengthy bans from participation in the capital markets;[8]

d. circumstances of the parties and the way the parties have conducted themselves in the proceeding, including any previous adjournments that have been requested or granted and whether previous adjournments could be considered "neutral" in nature (i.e., through no fault of the respondent);[9]

e. prejudice and costs to the Tribunal, Staff and other parties from rescheduling the hearing;[10] and

f. evidentiary basis for the adjournment request, which, in the case of a request for an adjournment for health reasons, includes proof of health condition and active course of treatment.[11]

[25] Furtado submits that he has established a proper and compelling evidentiary foundation for his adjournment request, including the medical assessment of his primary care physician. His physician has advised that Furtado is actively pursing a course of treatment. His serious health issues make it impossible for him to meaningfully prepare for or participate in the Merits Hearing currently.

[26] In addition, Furtado submits that none of the factors that often weigh against granting an adjournment are present in this case. This is his first request to adjourn the Merits Hearing. The reason for his request is solely for health reasons, which are beyond his control. Furtado is seeking the adjournment three months before the scheduled start of the Merits Hearing, because of ongoing and current medial assessments.

[27] The Tribunal, Furtado submits, has previously granted adjournments to reasonably accommodate a respondent's health issues and those of counsel.[12] Furtado also submits that given the seriousness of the allegations against him, the principles of natural justice require that he be medically fit to prepare for and attend the Merits Hearing to defend against the allegations.

[28] Staff submits that the exceptional circumstances threshold is a high bar and difficult to meet. In exercising its discretion to grant an adjournment, the Tribunal should consider all the circumstances, and be guided by the overarching public interests in i) having the proceeding heard expeditiously; and ii) natural justice, including the respondent's right to the opportunity to respond to the case against them.[13]

[29] Staff also cites the same factors as Furtado and submits that, in weighing these factors, the timeliness of the request, the applicant's reasons for being unable to proceed on the scheduled date, and the length of the requested adjournment should also be considered.

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6 *Pro-Financial Asset Management Inc (Re)*, 2018 ONSEC 18 at para 29 (***PFAM***); *Money Gate Mortgage Investment Corp (Re)*, 2019 ONSEC 40 at para 63 (***Money Gate***)

7 *Money Gate* at para 62

8 *PFAM* at para 29

9 *Debus* at paras 17-18; *Money Gate* at paras 55-56

10 *PFAM* at para 29

11 *Debus* at paras 22-25

12 *Patrick Fraser Kenyon Pierrepont Lett, Re,* 2003 CarswellOnt 4332; *Juniper Fund Management Corporation (Re)* (2011), 34 OSCB 11550; *Juniper Fund Management Corporation (Re)* (2012), 35 OSCB 2076; *Juniper Fund Management Corporation (Re)* (2012), 35 OSCB 3630; *White (Re)* (2009), 32 OSCB 824; *Bradon Technologies Ltd. (Re)* (2015), 38 OSCB 1569; *Mega-C Power Corp (Re)*, 2010 ONSEC 19 at para 67

13 *Cheng (Re)* 2018 ONSEC 13 at para 6; *Turbo Logistics Canada Inc. v HSBC Bank Canada*, 2016 ONCA 222 at paras 18

[30] Staff submits that the medical evidence Furtado adduced is not sufficiently detailed to justify an adjournment and that the medical issues he is facing are long standing, with no certainty of them improving, such that an adjournment may not make any difference to his preparation for and participation in the Merits Hearing. Staff submits that Furtado's medical information raises questions about the relevance of certain aspects of his medical history, the purpose of the medications he is on, when the medical issues started and whether they are worsening, the nature of the program that Furtado has indicated he is attempting to enrol in, what activities can Furtado do, and importantly, whether his issues can be accommodated.

[31] Staff cites several cases where a defendant sought to be excused from an oral examination where the adjournment was denied, or accommodations were accorded to the defendant to address the medical issues. In one instance, a plaintiff was excused from an oral examination for discovery on the basis of detailed observations and opinions from the plaintiff's psychiatrist that the plaintiff had a severe and chronic illness and there was "evidence of a real potential that the plaintiff could suffer psychological damage" from an oral examination.[14]

[32] Staff submits that the other factors to consider also collectively weigh against an adjournment, namely:

a. Furtado has known the case he must meet for at least 1.5 years and therefore has had time to prepare;

b. the circumstances underlying the adjournment request are long standing and therefore not unforeseen;

c. at the third attendance in December 2022, Furtado sought Merits Hearing dates in 2024, he scheduled two preliminary motions which delayed the start of the hearing and were subsequently withdrawn, and his health issues were not mentioned at that time as factors in the scheduling of the Merits Hearing;

d. the Adjournment Motion was filed three months in advance of the Merits Hearing but only a day before submissions were due on the Witness Statement Motion;

e. Furtado is asking for an indefinite adjournment and to revisit scheduling in July; and

f. an indefinite adjournment is not appropriate.

[33] Regarding Staff's submission that Furtado's two motions that were withdrawn delayed the start of the hearing, we do not consider this a factor against Furtado. Furtado is entitled to defend himself against Staff's allegations, including bringing preliminary motions. In our view, there was nothing about those earlier motions that were delay tactics or manipulative of the process.

[34] We conclude that the factors in this instance support a determination that the circumstances are exceptional warranting an adjournment to the start of the Merits Hearing. In particular:

a. Furtado's medical evidence establishes that he is under the care of his primary care physician for serious physical and mental health concerns and is awaiting referral to a psychiatrist, which is anticipated to be in the next three months;

b. those mental health concerns and the medication he is taking have caused issues with Furtado's memory, concentration, focus, and fatigue, all of which his doctor concludes makes him currently not medically fit to prepare for the Merits Hearing;

c. this is Furtado's first adjournment request, and the Adjournment Motion was brought three months before the start of the Merits Hearing, giving ample time for the motion to be considered, Furtado's course of treatment to proceed and for the parties to adjust, should the panel determine as we did, that an adjournment was appropriate;

d. the potential consequences of the Merits Hearing are very serious, and the principles of natural justice dictate that Furtado be given a fair opportunity to prepare for and participate in the Merits Hearing, although not a delay for an indefinite period; and

e. there is no prejudice to Staff or the Tribunal at this point in the proceeding from a delay to the start of the Merits Hearing, particularly given our conclusion that the adjournment will not be for an indefinite period.

[35] While we are satisfied that there are extraordinary circumstances warranting a delay to the start of the Merits Hearing as scheduled, we are not satisfied that an indefinite delay as requested is appropriate.

[36] We took the following into consideration:

[14] *Mohanadh v Thillainathan*, 2010 ONSC 2678 at paras 4-5, 8

a. the Merits Hearing was scheduled to start in August 2023 with eight hearing days that month and then continue in November 2023 for a further four days;

b. Furtado anticipates that his specialist referral will occur within three months;

c. by agreeing to deliver the in-chief evidence by affidavit, the parties have likely reduced the number of hearing days required.

[37] We therefore ordered that the initial eight hearing dates, starting in August be vacated and that the Merits Hearing will start instead on November 2, 2023 and continue for the three further days scheduled that month. We provided the parties with a deadline by which to file their submissions about the scheduling of what further, if any, dates were necessary for the hearing. Subsequently, we scheduled six additional dates in November and amended the start date to November 3 due to panel availability.

4. CONFIDENTIALITY REQUESTS

[38] Furtado seeks an order to redact certain personal information from documents in the adjudicative record of this matter on the basis that they contain his personal health information. Those documents are:

a. Furtado's affidavit sworn May 10, 2023;

b. Furtado's reply affidavit sworn May 24, 2023; and

c. Exhibits F, G, H, I, and J to the affidavit of Michelle Spain affirmed May 17, 2023.

[39] Furtado also requested that the motion hearing proceed as a confidential hearing, without the public present.

4.1 Law

[40] Rule 22(2) provides that the Tribunal may order that a hearing or part of a hearing be held without the public present if it appears that avoiding disclosure of intimate financial or personal matters or other matters during the hearing outweighs adherence to the principle that hearings should be open to the public.

[41] Further, rule 22(4) provides that a panel may order that an adjudicative record be kept confidential if it determines that avoiding disclosure of intimate financial or personal matters or other matters outweighs adherence to the principle that adjudicative records should be open to the public. The test for determining whether portions of the adjudicative record should remain confidential is the same as for determining if a hearing should be held in confidence.

[42] The Tribunal's *Practice Guideline* states that personal information relevant to the resolution of the matter is generally not treated as confidential.

[43] Court and tribunal proceedings are presumptively open to the public and court openness is protected by the constitutional guarantee of freedom of expression. The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility to protect other public interests that may arise.[15]

[44] Given the fundamental nature of the open justice principle, a high threshold must be met for a confidentiality order. The Tribunal has adopted the requirements for confidentiality orders established by the Supreme Court of Canada in *Sherman Estate,* which are:

a. court openness poses a serious risk to an important public interest:

b. the order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

c. as a matter of proportionality, the benefit of the order outweighs its negative effects.[16]

[45] Protection of privacy may be an "important public interest", where the information at issue reveals core aspects of a person's life, disclosure of which would result in an affront to their dignity.[17]

[46] To overcome the presumption of openness, the onus is on Furtado to establish that there is a serious risk that without a confidentiality order, he will suffer "an affront to his dignity" by virtue of the disclosure of his intimate personal matters during the hearing.[18]

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15 *Sherman Estate v Donovan*, 2021 SCC 25 at para 30 (***Sherman Estate***)
16 *Sherman Estate* at para 38; *Odorico (Re),* 2023 ONCMT 10 at para 36 (***Odorico***)
17 *Sherman Estate* at paras 32-35; *Odorico* at paras 37-38
18 *Odorico* at para 37, referring to *Sherman Estate*

[47] We now turn to the parties' positions and our analysis.

4.2 Parties' positions and our analysis on the Confidential Documents Motion

[48] Furtado submits that the portions of the adjudicative record he seeks to have redacted contain his personal health information and, as such, a confidentiality order is warranted. He submits that the Tribunal routinely makes sealing orders in respect of portions of the adjudicative record (and reasons for decision) containing intimate personal health information to protect the personal dignity and privacy interests of individuals. Furtado further submits that in granting the relief requested in the Adjournment Motion, it would be sufficient for the Tribunal to simply state it was satisfied that the "exceptional circumstances" test is met by the medical evidence filed.

[49] Staff submits that there's no exhaustive list of the type of information the disclosure of which will result in an affront to dignity, but information about stigmatized medical conditions is one example the Supreme Court has noted.[19] The Tribunal must still consider the necessity of the restrictions sought and whether imposition of them outweighs the harm to the open court principle.[20]

[50] Staff further submits that relevant personal information of respondents generally is not treated as confidential. Furtado's adjournment request is based on his asserted health issues. Details of those issues and their effects are relevant to his adjournment request, and ought to be public.

[51] We conclude that where a respondent is seeking relief based on asserted health issues, there needs to be sufficient details about those issues and their effects for the basis of the Tribunal's decision on the relief sought to be clear to the public. We agree that there are portions of the documents in question that go to issues of Furtado's dignity. However, they are more limited than Furtado proposes.

[52] The fact that the Furtado has certain health issues and how those issues impact his ability to participate in and prepare for the Merits Hearing are at the heart of the Adjournment Motion. The appropriate balance between the public interest in preserving Furtado's dignity and the public interest in open hearings is achieved, in our view, by redacting from the documents in question language that deals with specific symptoms, diagnosis and treatment, the public disclosure of which could reasonably be considered to result in an affront to his dignity.

[53] However, how physical and mental health issues affect the respondent's ability to prepare for and participate in a proceeding is information that should be in the public domain if core to a decision rendered by the Tribunal.

[54] We disagree with Furtado's submission that in granting the requested relief in the Adjournment Motion, it would be sufficient for the Tribunal to simply state it was satisfied that the exceptional circumstances test is met by the medical evidence filed. If large portions of the medical evidence were to be redacted and if the reasons for decision only referred to that redacted medical evidence, what the Tribunal considers "exceptional circumstances" would be unknown to the public and to future panels considering these issues.

[55] We also do not find that information about being immunocompromised because of being an organ transplant recipient, that COVID created additional stress for individuals who are immunocompromised, or that being a respondent in a regulatory proceeding causes stress rises to the level of personal information that goes to the dignity of an individual requiring confidential treatment. Being an organ transplant recipient is not a "stigmatized medical condition". Staff submits that it has been well documented and publicly discussed during the COVID pandemic that COVID created additional health issues for immunocompromised persons. The Supreme Court of Canada has commented on the fact that being the subject of a regulatory proceeding can cause stress.[21]

[56] For the reasons set out above, we order that the adjudicative records referred to above be redacted as noted in Appendix "A" to our accompanying order and that only the redacted versions of these documents shall be made available to the public.

[57] The relevant documents will need to be redacted, as indicated in Appendix "A" to the order, and refiled with the Registrar.

4.3 Parties' positions and our analysis on the Confidential Hearing Motion

[58] Furtado submitted that his health makes him medically unable to prepare for and participate in the Merits Hearing, and that given the nature of the information about his health and how much of that information had to be raised for purposes of the Adjournment Motion, it would be impractical to proceed in an open hearing. Furtado further submitted that as his health is fundamental to the Adjournment Motion, proceeding in open court and speaking only in general terms about "health issues" would disrupt the parties' ability to speak in detail about the issues and would, therefore, be inefficient and ineffective.

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19 *Sherman Estate* at paras 32-35, 63, 71-75, 77, 85; *Odorico* at paras 37-38

20 *Odorico* at paras 4-6

21 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 59

[59] The panel proposed that as much of the hearing as possible be conducted in public due to the strong presumption to open justice. We suggested there be a brief confidential session where the parties outlined the details of Furtado's health issues. The hearing would then proceed in public, and the parties would make their submissions regarding the Adjournment Motion with references generally to either "health issues" or "personal issues".

[60] Staff submitted that the hearing should be conducted entirely in public because the information in question does not rise to the level warranting a confidentiality order. The public has a right to know all the information before the Tribunal, unless it is shown that there is a serious risk to another important public interest.

[61] Staff further submits that medical details are routinely disclosed where a party seeks relief on that basis. Access to the details best allows the public to understand, and question, the decision made. General factual summaries (referring to "medical or health issues") may render a decision inscrutable. The relevant details may be of heightened importance where a decision affects others, like investors and witnesses, who have an interest in the progress of proceedings.

[62] Staff submitted there was nothing in the medical information filed in support of the Adjournment Motion that rose to the level of an affront to Furtado's dignity.

[63] Furtado proposed, as an alternative to the panel's proposed approach, that the hearing proceed in confidence subject to the transcript being made available to the public with appropriate redactions, if any.

[64] We concluded, based on the information before us at the time, that the hearing would proceed in confidence subject to a further order making the transcripts public with appropriate redactions, if any. Without knowing the details of the personal information that Furtado believed necessary to present to support his Adjournment Motion, we concluded that there was a potential serious risk to his personal dignity and that the benefit of proceeding in confidence outweighed the negative effect on the presumption of open justice. The hearing therefore continued as a confidential hearing.

[65] With the benefit of having heard Furtado's personal information and of reviewing the transcript of the hearing and the parties' submissions on appropriate redactions, we conclude that our decision at the hearing to proceed confidentially did not strike the right balance between the presumption of open justice and the protection of personal privacy. The risk to Furtado's dignity could have been reasonably protected by proceeding in a manner that allowed more of the hearing to proceed in public while dealing in a confidential setting with the detailed information that went to his dignity.

[66] Where the health of a party is central to the issues in a proceeding before the Tribunal, as it is to the Adjournment Motion, there needs to be sufficient information available to the public so it can understand the issues and the basis for the panel's decision. Consistent with our decision regarding the Confidential Documents Motion, the appropriate balance between the public interest in preserving Furtado's dignity and the public interest in open hearings is achieved, in our view, by redacting from the documents in question language that deals with specific symptoms, diagnosis and treatment, the public disclosure of which could reasonably be considered to result in an affront to his dignity.

[67] For the reasons set out above, we order that the transcript be redacted as noted in Appendix A to our accompanying order.

5. CONCLUSIONS

[68] For the reasons above we conclude that:

a. the documents at issue in the Confidential Documents Motion, including the transcript of the hearing on June 2, 2023, be redacted as indicated in Schedule A to the order; and

b. the Merits Hearing be adjourned to November 3, 2023.

Dated at Toronto this 20th day of October, 2023

"M. Cecilia Williams"

"Geoffrey D. Creighton"

"Dale R. Ponder"

A.4.2 Michael Paul Kraft and Michael Brian Stein – s. 127(1)

Citation: *Kraft (Re)*, 2023 ONCMT 36
Date: 2023-10-20
File No. 2021-32

IN THE MATTER OF
MICHAEL PAUL KRAFT AND
MICHAEL BRIAN STEIN

REASONS AND DECISION
(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Andrea Burke (chair of the panel) M. Cecilia Williams Sandra Blake	
Hearing:	By videoconference, November 28 and 30, December 1, 2, 5, 6, 7, 8 and 9, 2022 and February 14, 2023	
Appearances:	Alvin Qian Scott Hutchison	For Staff of the Ontario Securities Commission
	David A. Hausman Jonathan Wansbrough Tina Cody Lawrence Ritchie Marleigh Dick Jayne Cooke	For Michael Paul Kraft For Michael Brian Stein

REASONS AND DECISION

1. OVERVIEW

[1] Michael Paul Kraft was the Chairman and a director of WeedMD Inc. (**WeedMD**), a producer and distributer of cannabis and cannabis extracts, and a reporting issuer trading on the TSX Venture Exchange (**TSX-V**). Michael Brian Stein is Kraft's long-time friend and business associate. Staff of the Ontario Securities Commission (**Staff**) alleges that Kraft gave Stein material non-public information (**MNPI**) regarding WeedMD's planned expansion at Perfect Pick Farms Ltd. (**Perfect Pick**) in Strathroy, Ontario, on two separate occasions, contravening s. 76(2) of the *Securities Act* (the **Act**).[1] Staff also alleges that Stein, after receiving the MNPI from Kraft, purchased 45,000 WeedMD shares, contravening s. 76(1) of the Act. Stein sold those shares after the announcement of the transaction with Perfect Pick, resulting in a profit of $29,345.

[2] For the reasons set out below we find that:

a. by providing Stein with draft documents for the planned transaction with Perfect Pick on October 23, 2017, Kraft provided Stein with MNPI on one occasion in breach of s. 76(2) of the Act;

b. Kraft did not tell Stein about the date of the announcement of the transaction with Perfect Pick and therefore did not provide Stein with MNPI on the second occasion that is the subject of Staff's allegations; and

c. Stein traded shares of WeedMD while in possession of MNPI, in breach of s. 76(1) of the Act.

[3] Kraft submits that his selective disclosure of the draft documents to Stein was made in the "necessary course of business" (**NCOB**), an exception to the prohibition against illegal tipping. We find that Kraft cannot rely on the NCOB exception.

[4] Kraft brought a conditional challenge to the constitutionality of s. 76(2) of the Act. Kraft's position was that if s. 76(2) of the Act prescribes an objective test for the availability of the NCOB exception, rather than a subjective/objective test, his right to freedom of expression under s. 2(b) of the *Charter of Rights and Freedoms* (***Charter***) is infringed.[2] Under an objective test, the subjective belief of the tipper that selective disclosure was necessary, even if reasonably held, is insufficient to establish the NCOB exception where the selective disclosure is found not to be objectively necessary. Under a subjective/objective test, a tipper must have a subjective belief in the necessity of the disclosure, which subjective belief is objectively reasonable.

1 RSO 1990, c S.5
2 *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

[5] We find that s. 76(2) of the Act infringes s. 2(b) of the *Charter*, but the infringement is justified under s. 1 of the *Charter*. We therefore dismiss Kraft's challenge.

[6] Kraft sought to introduce expert evidence on a number of matters including specific corporate governance questions related to the NCOB exception and his conditional *Charter* challenge. We concluded that expert evidence was admissible only on a narrow issue related to Kraft's constitutional argument.

[7] Before turning to some relevant background and our analysis of the substantive issues, we begin by giving the reasons for our decisions on two preliminary issues: the admissibility of Kraft's expert evidence and Staff's request that we bifurcate the conditional *Charter* challenge from the merits hearing.

2. PRELIMINARY ISSUES

2.1 Admissibility of Kraft's expert evidence

2.1.1 Introduction

[8] Kraft sought to tender expert evidence through Edward Waitzer, a corporate and securities lawyer and a leading authority on corporate governance.

[9] In response, Staff filed a report from Stephen Halperin, another leading corporate and securities lawyer.

[10] Kraft's proposed opinion evidence seeks to have Waitzer respond to the following four questions:

a. **Question #1:** Is it out of the ordinary for the chair of a small-cap public issuer, acting as an executive director, to be directly involved in the negotiation of corporate transactions on behalf of the company?

b. **Question #2:** Is it inconsistent with good corporate governance practices for an officer or director of a corporation, including a public issuer, to seek advice (whether gratuitous or not) from a knowledgeable third party, where there is a reasonable expectation of confidentiality, even in the absence of a current written agreement with the third party?

c. **Question #3:** From a corporate governance perspective, and having regard for public issuer disclosure best practices, what considerations apply to a director or officer, acting in good faith, when seeking advice from a professional resource in connection with a transaction?

d. **Question #4:** What (if any) practical implications arise from a corporate governance perspective if a regulatory authority, after inquiry, were to impose its interpretation of whether such communications were "necessary" in the circumstances within the meaning of securities legislation, even though the director or officer acted in good faith and honestly believed that the advice sought would be helpful to them in the fulfillment of their duties?

[11] Staff challenged the admissibility of Waitzer's opinion evidence and took the position that Halperin's opinion evidence should only be admitted to the extent that it responds to any portions of Waitzer's opinion evidence that we might find admissible. Stein did not take a position on the issue. The parties agreed to argue the admissibility of the expert evidence at the start of the merits hearing. We therefore had the unredacted reports of Waitzer and Halperin before us for the purpose of hearing oral submissions.

[12] We provided our ruling with respect to the admissibility of the proposed expert evidence during the merits hearing. We determined that, subject to a limited exception relating to Kraft's conditional constitutional argument, we would not admit Waitzer's proposed evidence. In other words, we did not admit expert evidence responding to the first three questions posed to Waitzer, but we did allow expert evidence concerning the impacts or consequences that may flow should we conclude that the NCOB exception is determined on an "objective" basis. The opinion evidence of Staff's responding expert, Halperin, was also deemed to be admissible only to the extent that it related to the issues for which Waitzer's evidence was admitted.

[13] We concluded that we would not admit the proposed expert evidence for various reasons, including that portions of it were not relevant or necessary and also because much of it ran afoul of the exclusionary rule against opinion evidence on matters of domestic law and an ultimate legal issue for determination by us.

[14] In connection with the exclusionary rule, we concluded that we would not admit any opinion evidence of Waitzer as to:

a. how we should apply the law to the facts of this case;

b. the purpose or policy behind the NCOB exception; and

c. how we ought to interpret and apply s. 76(2) of the Act and the NCOB exception.

[15] Following our decision Kraft and Staff filed amended reports of Waitzer and Halperin, respectively, that reflected our decision about admissibility.

[16] These are our reasons for that decision.

2.1.2 Framework for admissibility of expert evidence

[17] Staff submitted that the criteria for accepting expert testimony, which have been adopted by the Tribunal on numerous occasions, are articulated in *R v Mohan* (***Mohan***) as follows:

a. the opinion evidence is relevant to a fact in issue in the proceeding;

b. the opinion evidence is necessary to assist the Tribunal to understand the significance of evidence that would otherwise be beyond the Tribunal's understanding;

c. the evidence is not otherwise subject to another exclusionary rule; and

d. the expert is properly qualified.[3]

[18] Staff did not dispute that Waitzer is qualified to give his expert opinion. Equally, Kraft does not dispute that Halperin is qualified to give his expert opinion in response. We agree.

[19] The applicability of the *Mohan* test as well as the first three parts of the *Mohan* test were in dispute between Staff and Kraft. We address these points of dispute below.

[20] Kraft submitted that s. 15 of the *Statutory Powers Procedure Act*[4] (***SPPA***) applies to the admissibility of evidence and allows a tribunal to admit as evidence any oral testimony or document that is relevant to the subject-matter of the proceeding. In other words, the only question is relevance.

[21] Further, Kraft submitted that *Mohan* does not apply and cites the Alberta Court of Appeal in *Alberta (Securities Commission) v Workum* (***Workum***).[5] The Court held that the *Mohan* test does not apply in administrative proceedings generally, and proceedings before the Alberta Securities Commission, specifically.

[22] We agreed with Staff that the decision in *Workum* was grounded on s. 29(f) of the *Alberta Securities Act*, which states: "the laws of evidence applicable to judicial proceedings do not apply" for the purposes of a hearing before the Alberta Securities Commission.[6] There is no similar provision under the Act and the decision in *Workum* has not been adopted in any proceedings under the Act.

[23] In contrast to s. 29(f) of the *Alberta Securities Act,* s. 15 of the SPPA does not restrict the Tribunal from applying the *Mohan* test or other laws of evidence. Further, if the only test is relevance, we could open the floodgates on opinion evidence, whether expert or not. Recently in *Paramount (Re)*[7] and *Solar Income Fund Inc (Re)*,[8] the Tribunal has made clear that opinion evidence is inadmissible in s. 127 proceedings except for expert opinions where the proponent of the evidence satisfies the panel that it meets the *Mohan* test. In this proceeding, and for the sake of consistency, we see no reason to depart from the *Mohan* test. We now turn to consider each of the four elements of that test.

2.1.3 Relevance

[24] We begin with relevance. We concluded that the first question put to Waitzer is not relevant and that opinion evidence on this question is therefore not admissible. We also concluded that the opinion evidence of Waitzer offered in answer to the second, third and fourth questions is relevant.

[25] Kraft submitted with respect to all four questions that Waitzer's opinion evidence will be restricted to factual matters relating to corporate governance, which is to be distinguished from securities law and corporate law. While there is an overlap between securities law and corporate governance, Kraft submitted that corporate governance is outside this panel's expertise and is regularly the subject of accepted expert testimony. In support, Kraft cited *Rowan (Re),*[9] where expert evidence was admitted about industry standards for brokerage compliance practices, *Paramount,* where evidence

3 [1994] 2 SCR 9 at p 20
4 RSO 1990 c S.22
5 2010 ABCA 405
6 *Workum* at para 82
7 *Paramount Equity Financial Corporation (Re)*, 2020 ONSEC 12 (***Paramount***) at para 5
8 2021 ONSEC 2 (***Solar Income Fund***) at para 55
9 2009 ONSEC 46

was admitted about standard practices in the mortgage lending industry, and *Cheng (Re),*[10] where evidence was admitted about trading practices.

[26] Kraft submitted that corporate governance is relevant as it comes into play with respect to Kraft's duties as a director and officer. The reasonable practices of a director and officer are questions of fact, not law.

[27] Staff submitted that the issue for the panel to determine is the proper interpretation of the NCOB exception to the prohibition against tipping in s. 76(2) of the Act. Staff submits that nothing in the statement of allegations raises issues related to corporate governance and practices. Staff further submitted that Kraft wants to argue that he acted in accordance with his duties as a director and consistent with corporate governance standards. However, the standard of care applicable to directors, and the alleged negligence of directors, are not issues for determination by the Tribunal. Therefore, the proposed expert opinion evidence is not relevant.

[28] Question #1 relates to how common a practice it is for the chair of a small-cap public company to be involved in the negotiation of transactions on behalf of the company. Although Kraft characterized Question #1 as relating to corporate governance, we do not agree with that characterization. Regardless of its characterization, having regard to Staff's allegations as well as the parties' opening submissions at the merits hearing, we concluded that Question #1 relates solely to a matter not in dispute and does not need to be resolved in this proceeding. We therefore find that this question is not relevant.

[29] Although Questions #2 and #3 are framed as corporate governance questions that are arguably not relevant to the allegations and the issues for determination by us, the approach taken by Waitzer in answering them focusses on the interpretation of s. 76(2) of the Act and the operation and application of the NCOB exception. As such, this evidence is relevant, but as explained below is not necessary and largely runs afoul of the exclusionary rule against opinion evidence on the interpretation of domestic law.

[30] We are satisfied that the parts of Waitzer's evidence in answer to Question #4 concerning the impacts or consequences or "chilling effect" that may flow should we conclude that the NCOB exception is determined on an "objective" basis is relevant to Kraft's conditional *Charter* argument because such evidence may have a bearing on the minimal impairment test under s. 1 of the *Charter.*

[31] We will next consider whether the second criteria cited in *Mohan* is met, that is, whether the evidence is necessary to assist the Tribunal to understand the significance of evidence that would otherwise be beyond the Tribunal's understanding.

2.1.4 Necessity

[32] We concluded that the Waitzer expert evidence in answer to Questions #2 and #3 is not necessary and largely runs afoul of the exclusionary rule against opinion evidence on domestic law and the ultimate legal issue. Regarding the parts of Waitzer's evidence in answer to Question #4 concerning the impacts or consequences or "chilling effect" of an objective test for the NCOB exception, we are satisfied that such evidence is necessary and does not offend an exclusionary rule.

[33] Kraft submitted that in considering whether the expert opinion evidence is necessary, it is enough if the evidence is helpful. Kraft cited *Bison Acquisition Corp (Re)*[11] and *Deeb (Re)*[12] to support this proposition. Kraft submitted that we can accept any relevant expert evidence and then decide how much weight to ascribe to it.

[34] We concur with Staff that it is preferable to determine admissibility rather than leaving the matter to weight as not doing so would unduly expand the scope of the merits hearing.

[35] Necessity is the primary safeguard against the risk of an expert usurping the role of the trier of fact.[13] Great care must be taken not to allow the expert's opinion to take over the adjudicative role of the court or tribunal receiving such evidence.

[36] Staff submitted that the proposed expert testimony runs afoul of the exclusionary rule against opinion evidence on the interpretation of domestic law. Opinion evidence going towards understanding domestic law and/or an ultimate legal issue is clearly inadmissible.[14] Staff went on to provide numerous examples within the proposed opinion report (including in answer to Questions #2, #3 and #4) where Waitzer provides his views on the interpretation and application of the NCOB exception under s.76(2) of the Act.

[37] We found that Waitzer's opinion evidence in response to Questions #2 and #3 goes to the interpretation of domestic law and the ultimate legal issue regarding the NCOB exception and its application in this case, and as such is not necessary.

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10 2019 ONSEC 8 (***Cheng***)
11 2021 ABASC at para 49
12 2012 IIROC 54 at para 18
13 *R v Singh*, 2014 ONCA 791 at para 40, citing *R v Sekhon*, 2014 SCC 15 at paras 75-76
14 *R v Comeau*, 2018 SCC 15 at para 40

Therefore the evidence is not admissible. We also found that certain portions of Waitzer's opinion evidence in response to Question #4 is not necessary or admissible for the same reason. The balance of Waitzer's evidence in response to Question #4 related to the effects of an objective test for the NCOB exception may very well be of assistance to us in considering and deciding the conditional *Charter* challenge and is therefore admissible.

2.1.5 Admissible opinion evidence relevant to the conditional *Charter* challenge

[38] We concluded that a portion of Waitzer's report (related to Question #4) is relevant to Kraft's conditional *Charter* challenge. Waitzer offers his opinion regarding the "chilling effect" that an NCOB exception based on an "objective" rather than "subjective/objective" test would have on directors and officers who would be subject to a second guessing of their motives in making selective disclosure of MNPI.

[39] Kraft submitted that such opinion evidence may be relevant to the question of whether s. 76(2) of the Act minimally impairs *Charter* rights. We accepted this submission, and it was on this basis that we decided to admit a portion of Waitzer's opinion evidence (and the corresponding portion of Halperin's responding opinion evidence).

2.2 Proposed bifurcation of the conditional *Charter* challenge

[40] We turn now to Staff's proposal that we bifurcate Kraft's conditional *Charter* challenge from the merits hearing. Staff submitted that it was procedurally preferable and more efficient that we first complete the merits hearing and issue our decision about Staff's allegations that Kraft and Stein breached s. 76 of the Act. Staff submitted that our decision on the merits might make it unnecessary for us ever to hear and decide Kraft's conditional *Charter* challenge.

[41] Staff acknowledged that the bifurcated procedure they proposed was not a requirement when dealing with a conditional *Charter* challenge and that we are entitled to hear and determine the conditional *Charter* challenge at the same time as the merits hearing, should we decide that was preferable. If we decided not to bifurcate the conditional *Charter* challenge, Staff urged us to nevertheless separate the two adjudicative exercises.

[42] Kraft submitted that in the interest of a fair and efficient adjudicative process with the minimal amount of interruption, delay and costs, including the additional costs of counsel and witnesses potentially having to prepare all over again to address the conditional *Charter* challenge, we ought not to bifurcate the hearing.

[43] We accepted Kraft's submission, particularly because Staff raised the issue of bifurcation for the first time after the merits hearing had already begun, the parties had already prepared to address the conditional *Charter* challenge within the merits hearing and hearing dates had already been reserved for the experts. In deciding not to bifurcate, we have taken heed of Staff's submission that the adjudicative exercises should be kept separate and distinct. We therefore first consider and decide the merits of Staff's allegations against Kraft and Stein. Our consideration of Kraft's conditional *Charter* challenge is dealt with separately, after our reasons for our decision on the merits.

[44] We now provide some background about WeedMD, its transaction with Perfect Pick (the **Perfect Pick Transaction**), its planned expansion of WeedMD's business at Perfect Pick's Strathroy location through the Perfect Pick Transaction, the respondents and the witnesses before turning to our analysis of the issues before us.

3. BACKGROUND

3.1 The Perfect Pick Transaction and its Announcement

[45] WeedMD, now named Entourage Health Corp., is a reporting issuer trading on the TSX-V including between October 23, 2017, and November 21, 2017 (the **Material Time**). WeedMD Rx Inc. (**WeedMD Rx**) was a wholly-owned subsidiary of WeedMD.

[46] On October 31, 2017, after going through several related phases and milestones, the board of directors of WeedMD, which included Kraft, received various documents relating to the Perfect Pick Transaction in advance of a November 2, 2017, board meeting to present and vote on WeedMD's expansion.

[47] The Perfect Pick Transaction composed of a lease of acreage in Perfect Pick's greenhouse space (the **Lease**), an option for WeedMD Rx to purchase Perfect Pick's property, greenhouse, and infrastructure (the **Option to Purchase**), and a letter agreement between Perfect Pick and WeedMD Rx whereby upon the closing of the purchase of the property if WeedMD Rx exercised the Option to Purchase, Perfect Pick agreed to leaseback the portion of the property on which WeedMD was not then licensed to grow cannabis (the **Leaseback Commitment**).

[48] The package of documents that was provided to the WeedMD board on October 31, 2017, included copies of the Lease, Option to Purchase and Leaseback Commitment. The documents were described as "Draft Final". On November 2, 2017, WeedMD's board authorized management to execute the agreements for the Perfect Pick Transaction. WeedMD initially

planned to issue a news release announcing the Perfect Pick Transaction on November 16, 2017. On November 11, 2017, the planned announcement was deferred to November 22, 2017.

[49] On November 22, 2017, WeedMD issued a news release (the **Announcement**) titled "WeedMD Launches Major Production Expansion with 610,000 Square Foot State-of-the Art Greenhouse" in which it announced a "transformational expansion" because of entering into the Lease and Option to Purchase with Perfect Pick. The Announcement noted that Perfect Pick's 98-acre property located in Strathroy, Ontario included 610,000 square feet (or 14 acres) of state-of-the art greenhouse facilities that were ready for rapid retrofit for cannabis cultivation. Prior to the Perfect Pick Transaction, WeedMD's cannabis growing operations were limited to an indoor facility in Aylmer, Ontario that was under 0.6 acres.

[50] In the Announcement, WeedMD stated that it would initially lease five acres of greenhouse from Perfect Pick, with an option to expand into the additional nine acres of greenhouse space at its discretion, in addition to an option for WeedMD to purchase the Perfect Pick property, greenhouse facilities and infrastructure. The retrofit of the initial five acres of greenhouse space had already begun, and was fully funded. The per square foot retrofit costs were among the lowest in the industry.

[51] The Announcement also stated that the WeedMD expansion at Perfect Pick's location was expected to initially lead to an increase in WeedMD's annual production of cannabis from 1,200 kg to more than 21,000 kg, to eventually more than 50,000 kg through exercise of the option to expand into the additional nine acres of greenhouse space. The Announcement included transaction details about the terms of the Lease and Option to Purchase.

3.2 The respondents

[52] Kraft is an entrepreneur who has been involved in co-founding a number of businesses. Kraft was a co-founder of WeedMD as well as the Chairman and a director of WeedMD from April 13, 2017, to December 23, 2019. In addition to his role with WeedMD, Kraft has been a director of a number of public issuers.

[53] Stein is a personal friend of Kraft, the two having known each other for over 40 years. Stein also had a business relationship with Kraft over the years. The two had looked at deals together and discussed various business opportunities, and became co-investors in transactions in different sectors. Kraft described Stein as his "go-to guy" for real estate and financial matters, in particular.

[54] Stein has been a banker and consultant for over 35 years and has been the president and director of his own consulting company for over 20 years, advising on matters related to acquisitions, divestitures, corporate financings, reorganizations and restructurings for both private and public companies.

[55] Stein became familiar with the cannabis industry and market for its stocks through his involvement with several different cannabis companies going public Stein also joined the board of a cannabis company in late 2017. Stein did not have any business, contractual or employment relationship with WeedMD during the Material Time, although he had a consulting agreement with WeedMD and its subsidiary, WMD Ventures Inc., from May to October, 2015.

3.3 Communications between Kraft and Stein

[56] Kraft and Stein were in regular contact. In October and November of 2017, including during the Material Time, Kraft had frequent communications with Stein, including by telephone, email, and text.

[57] On October 23, 2017, Kraft sent Stein an email (the **October Email**) attaching draft documents relating to the Perfect Pick Transaction. This is the first instance of selective disclosure of MNPI alleged by Staff.

[58] The October Email contained the re. line "Fw: PPF Final Agreements". Attached to the October Email were six draft documents for the Perfect Pick Transaction. These were:

a. a draft of the Lease for the Perfect Pick greenhouse acreage (the **Draft Lease**);

b. a document called "Option to Purchase – WMD x PPF – (20171013 – 2).docx" which was a draft of the Option to Purchase (the **Draft Option to Purchase**);

c. a document called "Perfect Pick Farms-Agreement re Leaseback (20171013).docx" which was the draft commitment letter regarding the agreement to leaseback (the **Draft Leaseback Commitment**);

d. a document called "PPF Warrant Certificate.docx" which was a draft warrant certificate granting Perfect Pick warrants in WeedMD exercisable only upon WeedMD exercising the Option to Purchase; and

e. two draft acknowledgments and directions ancillary to the Option to Purchase and authorizing the registration of notice of the Option to Purchase on title.

[59] The Draft Lease between Perfect Pick, as landlord, and WeedMD Rx, as tenant, described the leased premises as approximately one acre in the five-acre greenhouse on a specified parcel of land in Mount Brydges, Strathroy, Ontario, including all equipment supporting cultivation. The permitted use of the leased property was for the cultivation of medical cannabis and ancillary uses. The term of the Draft Lease was two years from commencement and WeedMD Rx had the right to extend the term of the lease for ten further periods of one year each. The annual rent for the first two years was $1.00, increasing to $500,000 in subsequent years.

[60] The Draft Lease also included an option to lease additional space in the greenhouse (the **Lease Expansion Option**) and provided that if WeedMD Rx exercised the option to lease the "initial five acre range" before the end of February 2018 there would be no option fee charged, whereas if WeedMD Rx did not exercise the option by the end of February 2018, WeedMD Rx would pay Perfect Pick $180,000 and any later exercise of the option also entailed an associated prescribed option fee. The annual rent for each additional acre leased was $180,000.

[61] The Draft Option to Purchase gave WeedMD Rx the option to purchase Perfect Pick's building, lands and property on a specified parcel of land in Mount Brydges, Strathroy, Ontario. The term of the option was 5 years, which term was extendable for a further 5 years at WeedMD Rx's option. The purchase price was $25.6 million, comprising a non-refundable $3 million deposit in the form of 3,000,000 common shares, and $7 million in milestone payments accruing to Perfect Pick over 36 months from the effective date of the agreement conditioned upon Perfect Pick meeting certain milestones including the provision of labour and consulting services and assistance with retrofit work, with the balance of the purchase price due upon closing of the purchase. The Draft Option to Purchase provided that upon closing of the purchase, Perfect Pick would enter into a leaseback agreement in accordance with the terms set out in the Leaseback Commitment.

[62] On October 25, 2017, Stein provided comments by email to Kraft and others at WeedMD (Keith Merker, Chief Financial Officer and Bruce Dawson-Scully, Chief Executive Officer) on the Draft Lease. Some of Stein's comments were incorporated into the final version of the Lease.

[63] Stein was not retained by WeedMD or Kraft to formally review the Draft Lease, nor was he compensated for conducting the review.

3.4 Stein's trading in WeedMD

[64] Prior to receiving the October Email from Kraft, Stein held 25,000 WeedMD shares. He sold 10,000 of those shares on November 13, 2017, and sold the remaining 15,000 shares on November 15, 2017.

[65] On November 21, 2017, the day before the Announcement, Stein purchased a total of 45,000 WeedMD shares for $68,525.

[66] Stein sold his WeedMD shares on November 22 and 23, 2017, after the Announcement for total proceeds of $97,870. Stein made a profit of $29,345, representing a return of approximately 43% on his investment.

3.5 Witnesses

[67] Staff called two witnesses at the merits hearing: Stuart Mills, a senior investigator in the Enforcement Branch of the Commission and Merker, who was the Chief Financial Officer of WeedMD during the Material Time.

[68] Mills conducted the investigation of Kraft and Stein and provided an affidavit which was marked as an exhibit at the merits hearing. Mills was cross-examined on the content of his affidavit and associated documents by the respondents.

[69] Merker testified about his roles at WeedMD, the management of WeedMD and its predecessor companies and subsidiaries, and the Perfect Pick Transaction.

[70] The respondents testified on their own behalf. We have addressed their testimony and our reliance upon it in the analysis of the issues before us.

[71] Stein also called Derek Pedro, a cannabis advocate and pioneer in the medical cannabis field. Beginning in January 2017, Pedro was a consultant at WeedMD and was responsible for cannabis operations. Pedro eventually became WeedMD's Chief Cannabis Officer in March 2019. Pedro testified about his experience in the medical cannabis field, how he came to work at WeedMD, and his involvement with the Perfect Pick Transaction and related expansion.

4. ISSUES AND ANALYSIS REGARDING ALLEGATIONS OF ILLEGAL TIPPING AND INSIDER TRADING

4.1 Introduction

[72] The issues before us with respect to the substance of Staff's allegations are as follows:

a. Did Kraft provide Stein with MNPI about the Perfect Pick Transaction and related expansion in breach of s. 76(2) of the Act?

b. Did Kraft provide MNPI to Stein by advising him about the date of the Announcement? and

c. Did Stein trade in WeedMD shares while in possession of MNPI in breach of s. 76(1) of the Act?

[73] Within each of these issues are multiple sub-issues, which we address in turn below.

[74] We start with a consideration of the applicable law about illegal tipping and insider trading. We then analyze whether Staff has made out its allegations that Kraft illegally tipped Stein, and that Stein in turn traded with the benefit of MNPI. In the course of our analysis we consider the availability of the NCOB exception.

4.2 Law on illegal tipping and insider trading

4.2.1 Illegal tipping

[75] The prohibition against tipping is set out in s. 76(2) of the Act. To prove that a respondent contravened s. 76(2) of the Act, Staff must establish the following on a balance of probabilities:

a. the tipper informed the other party of a material fact or material change about an issuer;

b. at the time the material information was communicated, the material fact or material change had not been generally disclosed; and

c. the tipper was in a special relationship with the issuer.

[76] Subsection 76(2) also requires that for there to be a contravention, the impugned communication must have been "other than in the necessary course of business". As we explain below, we conclude that if Staff proves the three elements listed above, the onus shifts to the respondent to show that the communication was in the necessary course of business. If the respondent does not succeed in proving that, the contravention is established.

4.2.2 Insider trading

[77] The prohibition against insider trading is set out in s. 76(1) of the Act which states "no person or company in a special relationship with an issuer shall purchase or sell securities of the issuer with the knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed."

[78] To prove that a respondent contravened s. 76(1) of the Act, Staff must establish the following on a balance of probabilities:

a. the respondent purchased or sold securities of an issuer;

b. at the time of the purchase or sale, the respondent had knowledge of a material fact or material change regarding the issuer;

c. the material fact or material change was not generally disclosed; and

d. at the time of the purchase or sale, the respondent was in a special relationship with the issuer.

[79] It is undisputed that WeedMD was an "issuer" in Ontario during the Material Time.[15] It is also undisputed that Kraft was in a special relationship with WeedMD during the Material Time. Below we address the following contentious issues:

a. did Kraft selectively disclose material information to Stein that had not been generally disclosed (and the related question of whether Stein had knowledge of material information that had not been generally disclosed at the time he traded in WeedMD shares)?

b. did Kraft communicate with Stein in the necessary course of business? and

c. was Stein in a special relationship with WeedMD?

4.3 Did Kraft selectively disclose material information to Stein?

[80] We now turn to Staff's allegations that Kraft informed Stein of a material fact or material change relating to the expansion on two occasions:

[15] Act, s. 76(5)

a. on October 23, 2017, by providing the draft agreements for the Perfect Pick Transaction to Stein; and

b. sometime between November 11 and 21, 2017, by informing Stein that WeedMD would make the Announcement on November 22, 2017 (the **Announcement Date**).

[81] Because the allegation that Stein had knowledge of a material fact or material change that was not generally disclosed is inter-related with the question of whether Kraft selectively disclosed material information to Stein, our considerations below also address that allegation.

4.3.1 Tip concerning the Perfect Pick Transaction and related expansion

4.3.1.a Introduction

[82] Staff submits that Kraft's selective disclosure to Stein about the expansion, by providing him with draft agreements in the October Email, constitutes a "material fact" under the Act. Neither Kraft nor Stein contests that Kraft sent Stein the October Email. Of the six documents attached to the October Email, Stein only admits to reading the Draft Lease. He provided comments on the Draft Lease in his e-mail to Kraft, Merker and Scully dated October 25, 2017.

[83] Staff urges us to reject Stein's evidence that he only reviewed the Draft Lease and did not review the Draft Option to Purchase or the other documents attached to the October Email. Staff submits that even if Stein reviewed only the Draft Lease, Staff has proved the communication of material information, because the Draft Lease itself was material.

[84] The Lease and the Option to Purchase were the principal documents for the Perfect Pick Transaction and the final executed Lease and Option to Purchase were not materially different than the drafts that Kraft provided to Stein. We conclude, for the reasons below, that the planned Perfect Pick Transaction, including the terms of the Draft Lease and Draft Option to Purchase, constituted a material fact that Kraft selectively disclosed to Stein and that had not been generally disclosed. We address whether Kraft's selective disclosure was made in the necessary course of business in section 4.4 below.

[85] We also conclude that even if Stein read only the Draft Lease and did not read the other documents (including the Draft Option to Purchase) attached to the October Email, he more likely than not was generally aware that the planned Perfect Pick Transaction included an Option to Purchase and he more likely than not had a general understanding of the planned expansion beyond the terms of the Draft Lease. In any event, we conclude, for the reasons below, that the fact of and terms of the Draft Lease, considered alone, constitute a material fact that Stein had knowledge of and that had not been generally disclosed at the time he traded.

4.3.1.b The parties' positions and principal submissions

[86] Staff submits that the October Email to Stein contained material facts because:

a. the Draft Lease was in all material respects identical to the final Lease that was the subject of the Announcement;

b. the Draft Option to Purchase was in all material respects identical to the final Option to Purchase that was the subject of the Announcement; and

c. the categories of terms contained in the Draft Lease and Draft Option to Purchase are what reasonable investors would consider in making investment decisions with respect to WeedMD in the circumstances.

[87] Kraft submits that the Draft Lease and the other documents attached to the October Email contained only limited information relating to the expansion and did not disclose any non-public material fact because:

a. WeedMD's expansion ambitions were widely disclosed and the information in the Draft Lease and other documents attached to the October Email was not incrementally material to the existing public information;

b. the Draft Option to Purchase attached to the October Email was neither relevant nor material;

c. the Perfect Pick Transaction was not final because there were outstanding issues; and

d. the market impact of the Announcement was driven by factors other than the facts in the Draft Lease and other documents attached to the October Email.

[88] With respect to the October Email, Kraft submits that the only information disclosed to Stein was that WeedMD was contemplating leasing one acre in the Perfect Pick greenhouse, with an option to lease up to five acres. Kraft submits that the October Email provided no information about whether the option to lease additional greenhouse space under the

Draft Lease would be exercised, whether the transaction in the already stale-dated Draft Lease would be completed, or about the costs of retrofitting the one, or optional five, acres of greenhouse space.

[89] Stein submits that through reading the October Email and reviewing the Draft Lease, he did not learn any material information related to WeedMD's expansion that was not already publicly disclosed.

[90] Further, Stein submits that a contingent transaction, such as the planned Perfect Pick Transaction, is not material where there is uncertainty and a lack of specificity. Stein also submits that he believed that the information he received from Kraft was not material.

[91] Before turning to a consideration of the question of materiality, we first set out the basis for our conclusion that in addition to the terms of the Draft Lease Stein was also aware that the planned Perfect Pick Transaction included an Option to Purchase and he had a general understanding of the expansion beyond the terms of the Draft Lease.

4.3.1.c Information known to Stein

[92] It is not disputed that Stein was aware of the contents of the Draft Lease. Stein testified that he was aware that the Draft Lease related to WeedMD's expansion plans. Stein also testified that he did not read or review the Draft Option to Purchase and did not receive any information about the Perfect Pick Transaction after he provided his comments on the Draft Lease on October 25, 2017.

[93] In embarking on our consideration and analysis, we are mindful that insider trading and tipping cases are usually established by a mosaic of circumstantial evidence which, when considered as a whole, leads to the inference that it is more likely than not that the trader or tipper possessed or communicated MNPI.[16]

[94] While we have not concluded that Stein read or reviewed the Draft Option to Purchase, we do conclude it was more likely than not that Stein was aware that the planned Perfect Pick Transaction included an Option to Purchase and also that Kraft provided Stein with additional context about the Draft Lease and the Perfect Pick Transaction in general in phone conversations the two had around the time of the October Email.

[95] Even if Stein did not read or review the Draft Option to Purchase, we note that it would have been virtually unavoidable for him to be aware that such a document was included in the attachments to the October Email. The name of the corresponding attachment was an unambiguous reference to an Option to Purchase: "Option to Purchase – WMD x PPF – (20171013 – 2).docx".

[96] Kraft called Stein at 8:00 AM on October 23, 2017. They spoke for 19 minutes. Shortly after this conversation, Kraft sent Stein the October Email with the attached Perfect Pick Transaction documents. Kraft called Stein again at 11:00 PM on October 24, 2017. The call lasted 18 minutes. Kraft called Stein again at 9:15 AM on October 25, 2017. The call lasted 28 minutes. Less than an hour after that call, Stein sent an e-mail to Kraft, copied to Merker and Scully, providing his comments on the Draft Lease.

[97] Neither Stein nor Kraft recalls what they discussed on these calls. Kraft testified that there were so many different conversation topics going on between them at the time he could not remember with any certainty what issues were discussed in any of the calls.

[98] In addition to the interactions referred to above, Kraft's chronology shows the following contacts between him and Stein from October 19 to October 25, 2017:

a. October 19 - Stein emailed Kraft a press release issued by the cannabis company where he served as a director;

b. October 20 - Kraft called Stein for 11 minutes;

c. October 22 - Kraft emailed Stein a sample term sheet for a business opportunity;

d. October 23 at 5:41PM - Kraft called Stein for 1 minute (indicated to be a voicemail/hang up);

e. October 23 at 5:45 PM - Kraft called Stein for 1 minute;

f. October 23 at 6:36 PM - Stein called Kraft for 4 minutes;

g. October 24 at 8:03 AM - Stein emailed Kraft a memorandum regarding a block chain deal, "as discussed";

[16] *Kitmitto (Re)*, 2022 ONCMT 12 (***Kitmitto***) at para 149

h. October 24 at 5:21 PM - Stein emailed Kraft about a convertible debenture financing for the cannabis company where he served as a director;

i. October 25 at 10:37 AM - Stein emailed Kraft, Merker and Scully with his comments on the Draft Lease.

[99] After Scully's email to Perfect Pick (copied to Kraft) on October 22 stating that the parties were ready to sign, Kraft and Stein spoke for a total of 70 minutes, between October 23 and October 25. The chronology indicates that they may also have spoken about a term sheet for a business opportunity, a block chain deal, and the convertible debenture financing for another cannabis company. While they may have discussed these and other topics, there was abundant time during the 70 minutes they spoke on calls that were in close proximity to the October Email and Stein's October 25 e-mail for them to have also discussed what was a significant, imminent transaction for WeedMD. Stein's October 25 e-mail with his comments on the Draft Lease states, "as discussed late yesterday". While neither Stein nor Kraft could remember what they discussed during these calls, Stein's October 25 e-mail indicates they did discuss the Draft Lease.

[100] Kraft and Stein both stated that they spoke regularly about business and personal matters. Their emails and oral evidence support the conclusion that they regularly discussed each other's, and potential joint, business.

[101] Inferences must be reasonably and logically drawn from a fact or group of facts established by the evidence, should be drawn from the combined weight of the evidence, and cannot be drawn from speculated facts.[17] For an inference to be validly drawn, it need not be the only possible inference; nor does it even need to be the most obvious or the most easily drawn.[18]

[102] Given the foregoing group of facts, we conclude it is more likely than not that over the course of those 70 minutes, Kraft gave Stein more context about WeedMD's pending strategic, compelling expansion reflected in the Draft Lease and the Draft Option to Purchase that Kraft provided to Stein in the October Email.

[103] We now turn to our consideration of the materiality of the information that Kraft disclosed to Stein and of which Stein was aware.

4.3.1.d Materiality Analysis: The planned Perfect Pick Transaction and related draft agreements (as well as the Draft Lease, considered alone) were material

4.3.1.d.i Materiality test and evidentiary burden

[104] A "material fact" is defined in the Act as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities"[19] and its determination is well established to be a question of mixed fact and law that falls within the specialized expertise of the Tribunal.[20]

[105] The term "material change" is defined in s. 1(1) of the Act as follows:

a. "a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer"; or

b. "a decision to implement a change referred to above made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable…".

[106] In determining whether the information would reasonably be expected to have a significant effect on the market price or value of a security, the Tribunal applies an objective "market impact test" and views materiality from the perspective of the trading markets, that is, the buying, selling, or holding of securities.[21]

[107] Materiality is assessed objectively from the perspective of a reasonable investor and prospectively through the lens of expected market impact.[22]

[108] Determinations of materiality must be based on evidence, except in cases where materiality can be derived from common sense inferences.[23] While shareholder evidence or expert evidence may be relevant or useful to a determination of materiality, it is not necessary.[24] A determination of materiality is not a science, but is a common-sense judgment, made

17 *Kitmitto* at para 147
18 *Hutchinson (Re)*, 2019 ONSEC 36 (***Hutchinson***) at para 62
19 s 1(1)
20 *Donald (Re),* 2012 ONSEC 26 (***Donald***) at paras 28-29
21 *Kitmitto* at para 164; *Donald* at para 201
22 *Cornish v Ontario Securities Commission*, 2013 ONSC 1310 (Div Ct) (***Cornish)*** at para 46, citing *Re YBM Magnex International Inc* (2003), 26 OSCB 5285 (***YBM***) at para 89
23 *Sharbern Holding Inc. v Vancouver Airport Centre,* 2011 SCC 23 at paras 52 and 61; *Cornish* at para 99
24 *Cornish* at para 99

based on the relevant facts in evidence and considering all the specific circumstances.[25] Materiality is highly contextual and there is no "bright line" test.[26]

[109] Generally, the concept of "materiality in the Act is considered to be a broad one that varies with the characteristics of the issuer and the particular circumstances involved.[27] National Policy 51-201 *Disclosure Standards* (**NP 51-201**)[28] identifies a number of factors that may be considered in making the common-sense judgment of materiality. Some of these factors are discussed in our consideration of materiality below.

[110] The parties agree that an assessment of materiality requires a consideration of the characteristics of the issuer and all the circumstances involved.[29] They disagree on whether Staff has provided sufficient evidence to support our determination of materiality in this instance.

[111] Kraft submits that Staff has failed to meet its evidentiary burden with respect to the materiality of the information in the Draft Lease and the other draft Perfect Pick Transaction documents attached to the October Email. He makes this submission based on the following assertions:

a. the Draft Lease, in particular, and the Draft Option to Purchase contained only limited information about the planned expansion and Staff failed entirely to offer any evidence as to why the Draft Lease was material when the market already knew that the company was looking to expand, which would require getting some additional space to expand.;

b. due to the lack of any evidence going to materiality, it would be inappropriate for us to determine materiality from common sense inferences as we would be speculating and inappropriately filling evidentiary gaps;

c. Staff's evidence was insufficient because it provided no market impact analysis to support the conclusion that the information in the Draft Lease, Draft Option to Purchase and other documents attached to the October Email was material and Staff's approach improperly conflates the significance of the Announcement itself with the significance of the information contained in the Draft Lease and other draft Perfect Pick Transaction documents; and

d. Stein's belief, as a "reasonable investor", that he was not in possession of material information is evidence that must be taken into account in assessing materiality.

[112] Kraft's first submission is that the Draft Lease (and other draft Perfect Pick Transaction documents) did not contain any information that had not already been generally disclosed by virtue of WeedMD's press releases indicating that it was pursuing an expansion. We do not accept this submission and for the reasons set out below in section 4.3.1.e, we have concluded that the planned Perfect Pick Transaction (and contents of the Draft Lease and other related documents) had not been generally disclosed.

[113] We also do not accept Kraft's second and related submission that there was no evidence before us on which to base a finding of materiality. Kraft argued that Staff should have led evidence of a witness (such as Merker, Pedro or Kraft) to identify or isolate a material fact in the Draft Lease and other draft Perfect Pick Transaction documents.

[114] There is no requirement that evidence in support of materiality be in any particular form.[30] In this case and as detailed below in section 4.3.1.d.iii there is evidence supporting a conclusion that the information contained in the Draft Lease and Draft Option to Purchase was material. The evidentiary framework on which we have based our finding of materiality is similar in nature (subject, of course, to factual and contextual differences) to the evidentiary framework that the Divisional Court determined to be appropriate and sufficient in *Cornish.*[31]

[115] Kraft third submission is that Staff's evidence is also deficient because Staff provided no market impact analysis. We disagree as explained below.

[116] According to Kraft, a market impact analysis from Staff should have taken into account prior disclosures, the liquidity of WeedMD shares at various times, the sensitivity of the trading price of the shares to other earlier announcements referencing WeedMD's intentions to expand, and the extent to which WeedMD's trading price was impacted by developments in the cannabis sector.

[117] In a related submission, Kraft also asserts that Staff has conflated the Draft Lease and Draft Option to Purchase with the Announcement and that Staff provided no detailed analysis to support a conclusion that on November 22, 2017, following

25 *Donald* at para 199; *YBM* at para 94
26 *Cornish* at para 53
27 *Biovail Corp (Re)*, 2010 ONSEC 21 (***Biovail***) at para 65
28 (2002) 25 OSCB 4492
29 *Biovail* at paras 65 and 69, National Policy 51-201, s. 4.2(1)
30 *Cornish* at para 99
31 *Cornish* at paras 84-85

the Announcement, the market was reacting to the details contained in those documents as opposed to additional details about the Expansion contained in the Announcement, such as the favourable cost to retrofit the Perfect Pick greenhouse and the ability to expand to 14 acres of greenhouse space.

[118] What is required instead, according to Kraft, is an assessment of materiality of the:

a. facts already publicly known as of October 23, 2017;

b. facts in the draft Perfect Pick Transaction documents; and

c. facts that were in the Announcement but not apparent from the draft Perfect Pick Transaction documents.

[119] Kraft submits that without a market impact analysis it is not possible to know whether the market reaction after the Announcement was driven by the terms of the Draft Lease and Draft Option to Purchase or the other details in the Announcement.

[120] In advancing these submissions, Kraft relies on *Biovail.* The issue before the panel in *Biovail* was whether statements made by the company and its officers were, in a material respect, misleading or untrue for the purposes of another section of the Act. Some of the statements in question were made simultaneously with other statements in question.

[121] Although the panel in *Biovail* did consider expert market impact analysis evidence, *Biovail* does not stand for the proposition that materiality cannot be determined without a market impact analysis or without evidence of actual market impact.

[122] The Divisional Court's decision in *Cornish* where the Court was considering the Tribunal's application of the market impact test makes it clear that evidence of actual price impact and volume fluctuations can assist the Tribunal in determining materiality, but the Tribunal does not always need evidence of the effect on market price to find materiality.[32] In this circumstance, we are satisfied that Staff's evidence was not deficient for not including a market impact analysis.

[123] We do accept Kraft's caution regarding conflating the Draft Lease and other draft Perfect Pick Transaction documents with the Announcement and the apparent market impact of the Announcement.

[124] In *Biovail*, the panel concluded that in circumstances where one press release included two negative facts and the value of Biovail's shares subsequently dropped, it was not possible to isolate the impact of each of those facts on the market price of Biovail's shares.[33] Similarly, in *Cornish*, the Tribunal concluded that where material information is disclosed by the issuer along with other information, the market reaction to the combined disclosure may not be a reliable indicator of the market impact of the disclosure of one particular piece of information in isolation.[34]

[125] In our view, these are exactly the circumstances with which we are dealing. The information about the Perfect Pick Transaction contained in the Draft Lease and Draft Option to Purchase was included in the Announcement, which also contained other information that may or may not have been material. After the Announcement, there was an increase in WeedMD's share price and the volume of shares traded.

[126] Because the Announcement contained more information than was in the Draft Lease and Draft Option to Purchase, the market reaction to the Announcement is not determinative of whether the information in the Draft Lease and Draft Option to Purchase was material. Therefore, we do not rely on the market reaction to the Announcement in concluding that the planned Perfect Pick Transaction and related documents (including the Draft Lease, considered alone) were material.

[127] We find there is ample other evidence before us to conclude that the details about the planned Perfect Pick Farm Transaction and related draft agreements (including the terms of the Draft Lease, considered alone) would reasonably be expected to have a significant effect on the price or value of WeedMD's shares.

[128] Our analysis of the evidence relevant to our conclusion of materiality follows below after we address Kraft's fourth submission that Staff has failed to meet its evidentiary burden because we must consider Stein as a proxy for a "reasonable investor" and Stein's related submission that he did not believe that the information he received from Kraft was material.

4.3.1.d.ii Stein's subjective appreciation of the materiality of the information that he received is not determinative

[129] Kraft submits that as it is settled law that the beliefs of a reasonable investor, together with other information, inform the market impact test, Stein should be considered a useful proxy for assessing materiality. Stein is a sophisticated investor with experience in the cannabis sector. Stein, Kraft submits, plainly did not believe that the information he learned from

32 *Cornish* at paras 56-57
33 *Biovail* at para 218
34 *Cornish* at para 59

Kraft was material because, rather than continuing to hold his existing position in WeedMD shares after he received the October Email, he sold his shares on November 13 and 15, 2017.

[130] Stein himself submits that he did not believe that Kraft provided material information to him.

[131] As noted above, the market impact test is assessed objectively from the perspective of a reasonable investor. It is not determined through the lens of any one investor, let alone a respondent. A respondent's subjective belief regarding materiality is not necessarily relevant to or determinative of the market impact test, nor is it relevant to a finding of a breach of the Act.

[132] Stein's own evidence suggests that he was actively following WeedMD's public announcements and investor communications about its interest in expanding. Combined with our earlier conclusion that it was more likely than not that Kraft communicated the context about the Draft Lease to Stein in their calls around the date of the October Email, this supports a conclusion that he, in fact, did appreciate that the planned Perfect Pick Transaction including the Draft Lease was material.

[133] Under cross-examination by Staff, Stein acknowledged that when he reviewed the WeedMD October 19, 2017 press release he suspected that the financing that was described as being "for working capital and production capacity expansion" related at least partly to the deal with Perfect Pick, which was the only deal he was aware of at that time.

[134] Stein further submits that he "waited a couple of weeks" after the October Email before selling his WeedMD shares on November 13 and 15 as he was not sure about the status of negotiations between WeedMD and Perfect Pick. He "just erred on the cautious side." In our view, Stein's caution in waiting to trade in WeedMD shares for a period of time after receiving the October Email is more likely than not an indication that reflects instead that he believed that the information he had received was material.

[135] We, therefore, do not consider Stein's sale of his WeedMD shares on November 13 and 15 before subsequently purchasing WeedMD shares on November 21 prior to the Announcement to be significant to our analysis of the materiality of the planned Perfect Pick Transaction and related documents, including the Draft Lease.

[136] We now turn to the evidence and our analysis of materiality.

4.3.1.d.iii Evidence supporting materiality

[137] The evidence that establishes that the planned Perfect Pick Transaction and related draft agreements attached to the October Email, (including the Draft Lease, considered alone) were material at the time of the October Email and also when Stein traded WeedMD shares falls into the following categories:

a. developments in the cannabis industry;

b. the size and nature of WeedMD's business and operations;

c. the details in the Draft Lease and Draft Option to Purchase; and

d. the likelihood of the Perfect Pick Transaction closing.

4.3.1.d.iv Developments in the cannabis industry

[138] During 2017, many companies in the cannabis industry in Canada were closely following developments regarding the Canadian government's proposal to permit the sale of cannabis products for adult recreational use.[35] Pedro a consultant at WeedMD with responsibility for cannabis operations, testified that in 2017 many, if not most, of the companies in the cannabis industry were looking to expand their capabilities and operations in response. He stated that "expansion was the name of the game".

[139] WeedMD's public statements in the months prior to October 2017 indicate that it also wanted to expand and was working on an expansion plan. In our view, these public statements did not constitute general disclosure about the Perfect Pick Transaction, including the Lease and Option to Purchase, nor did they constitute general disclosure about the expansion through the Perfect Pick Transaction. Our analysis on this point follows in section 4.3.1.e below.

4.3.1.d.v Size and nature of WeedMD's operations

[140] WeedMD was a niche player in the cannabis market in 2017, focused primarily on medical marijuana in the long-term care industry.

[35] Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts

[141] Prior to the Perfect Pick Transaction, WeedMD operated an approximately 0.6-acre indoor facility in Aylmer, Ontario on four acres of land and had an option to acquire four acres of neighboring land. In April 2017, WeedMD disclosed that the two parcels of land, if combined, could support the construction of approximately five additional acres of production space. In his evidence, Pedro stated that WeedMD had determined that five acres were necessary for it to get its fair share of the pending, expanded cannabis market.

[142] As of May 2017, it was publicly known that WeedMD was already operating at capacity at the Aylmer, Ontario facility.

[143] As of September 30, 2017, WeedMD had assets valued at $8.6 million, liabilities of just under $700,000 and net losses for the nine months ended September 30, 2017 of $6.5 million.

[144] On October 19, 2017, WeedMD announced that it had engaged Eight Capital to raise $15 million. The net proceeds from that offering would be used for "working capital and for production capacity expansion". The offering closed on November 2, 2017. The successful financing positioned WeedMD to execute its expansion strategy.

[145] WeedMD had approximately 61.7 million issued and outstanding common shares on September 30, 2017, approximately 62.5 million issued and outstanding common shares on November 1, 2017, and approximately 64.7 million issued and outstanding common shares on November 21, 2017. WeedMD's market capitalization (on a diluted basis) on November 21, 2017, was approximately $147 million.

[146] The foregoing information about the size and nature of WeedMD's operations, financial status and market capitalization is taken into account in our considerations below.

4.3.1.d.vi Details in the Draft Lease

[147] The key terms of the Draft Lease are outlined above in paras 59-60. As noted above, the final executed Lease between Perfect Pick and WeedMD Rx dated November 21, 2017, did not differ in any material way from the Draft Lease provided to Stein in the October Email. The only notable difference between the two versions was that the final Lease provided for rent to be paid monthly in arrears, a term that reflected one of Stein's comments about the Draft Lease.

[148] The addition of one acre of greenhouse space would almost triple WeedMD's pre-Perfect Pick Transaction acreage, while the option to add at least five acres of greenhouse space represented more than nine times WeedMD's pre-Perfect Pick Transaction acreage. We find that both the one-acre increase in greenhouse space under the Draft Lease as well as the available option to expand to at least five additional acres of greenhouse space under the Draft Lease represented a significant increase in WeedMD's operational capacity and therefore potential production for WeedMD and would place it strategically to take advantage of the adult recreational use market.

[149] Considered in the context of WeedMD's financial statements as discussed above, we also find that the annual rent payable under the Draft Lease, including for the exercise of the Lease Expansion Option and rental of additional acreage, represented a significant corporate expenditure.

[150] Considered in the context of WeedMD's pre-Perfect Pick Transaction scope of operations and WeedMD's determination that five acres were necessary for it to get its fair share of the pending, expanded cannabis market, the Draft Lease and its terms represented what would be a significant new contract and material development in relation to WeedMD's resources and capacity. We have concluded that the materiality of the Draft Lease did not depend upon a decision having already been made to exercise the Lease Expansion Option. The fact of the additional one acre combined with the Lease Expansion Option made the Draft Lease material.

[151] We note that WeedMD itself identified the Lease to be a material contract or document and filed it on SEDAR on November 27, 2017, as part of its Form 51-102F3 Material Change Report in accordance with National Instrument 51-102. WeedMD's acknowledgement of materiality is significant.

4.3.1.d.vii Details in the Draft Option to Purchase

[152] The key terms of the Draft Option to Purchase are outlined above in para 61. As noted above, the final executed Option to Purchase dated November 21, 2017, did not differ significantly from the Draft Option to Purchase that Kraft provided to Stein in the October Email. The only notable differences are that the final Option to Purchase included a larger deposit amount ($4.68 million versus $3 million, still paid through the issuance of 3 million common shares) and a corresponding slightly larger total purchase price ($27.28 million versus $25.6 million), the right for WeedMD Rx to negotiate the purchase of Perfect Pick's feed-in tariff (or **FIT**) contracts on market terms, and a right for Perfect Pick to receive up to $5 million of the $7 million in milestone payments in the form of common shares.

[153] Given the subject matter of the Draft Option to Purchase (namely the significant acquisition of property), its significance to WeedMD's previously stated intentions to expand its operations, and the amounts involved under the Draft Option to Purchase in comparison to WeedMD's assets and total market capitalization (as discussed above), including the scope

of WeedMD's obligations arising under the Draft Option to Purchase regardless of the exercise of the option, we conclude that the Draft Option to Purchase and its terms also represented what would be a significant new contract and material development for WeedMD.

[154] We note that WeedMD itself identified the Option to Purchase to be a material contract or document and filed it on SEDAR on November 27, 2017, as part of its Form 51-102F3 Material Change Report in accordance with National Instrument 51-102. WeedMD's acknowledgement of materiality is significant.

4.3.1.d.viii The likelihood of the Perfect Pick Transaction closing

[155] We conclude that by the time Kraft sent the October Email to Stein and Stein reviewed the Draft Lease, there was a significant likelihood that the Perfect Pick Transaction would proceed, and this significant likelihood had not decreased by the time Stein bought WeedMD shares on November 21, 2017. We deal in turn below with the respondents' submissions that there were details outstanding between Perfect Pick and WeedMD, the Perfect Pick Transaction was uncertain and contingent, and WeedMD was actively pursuing other expansion options, such that the information Kraft shared with Stein was not material.

a. **Alleged outstanding details**

[156] Kraft submits that certain details of the expansion remained outstanding and that, as a result, the deal was not near to being final. Those outstanding issues were:

a. whether WeedMD would lease one or five acres;

b. some potential cross-contamination issues associated with the products Perfect Pick grew at the site and related to the size of the greenhouse space WeedMD would occupy; and

c. whether the transaction would include some FIT contracts related to solar panels, which were not connected with the proposed cannabis production operation.

[157] Staff submits that any outstanding issues are irrelevant to the determination of materiality.

[158] We do not accept that there remained any real uncertainty about whether WeedMD would lease one or five acres. Pedro's evidence indicated that WeedMD had determined that five acres was necessary for it to get its fair share of the pending, expanded market. WeedMD's public statements about its expansion strategy prior to October 2017 indicate that its objective was to secure five acres for expansion. In August 2017, WeedMD advised Health Canada that its application for a license for the Perfect Pick property included the use of five acres of the property. The WeedMD board received materials for their November 2, 2017 meeting on October 31. The materials included a slide deck that stated that "WeedMD management is proposing that the company lease 5 acres from [Perfect Pick]".

[159] If there was an outstanding issue in October and November 2017 relating to the amount of space WeedMD would lease from Perfect Pick, we find it is more likely than not that it was just a matter of timing. The inclusion of the Lease Expansion Option in the Draft Lease to increase the leased premises to at least five acres, and the timing and cost of the option, are consistent with that conclusion. We also conclude that the potential cross-contamination issue factored into the timing considerations about how much space to lease initially. In any event and given our conclusion above that the materiality of the Draft Lease did not depend upon the prior exercise of the Lease Expansion Option, we do not accept Kraft's submission.

[160] As regards the potential for acquiring certain FIT contracts related to the solar panels, Kraft's evidence was that this was not connected to the cannabis business, but that selling solar into the grid would provide a separate source of revenue for WeedMD. We conclude that this potential for additional revenue was unrelated to the essential nature of the transaction between WeedMD and Perfect Pick, was not reflected in the Draft Lease (or final Lease) and is therefore outside of the mosaic of information on which we base our determination that the Draft Lease was material.

[161] Furthermore, we conclude that the evidence indicates that the Perfect Pick Transaction was essentially a done deal by no later than November 2, 2017, notwithstanding that the draft Option to Purchase did not yet include the provision giving WeedMD the option to negotiate to purchase the Perfect Pick FIT contracts. On October 31, 2017, Merker sent J. Zacharia at Perfect Pick an email with an attached draft Option to Purchase, stating "I think we are done!!!". On November 2, 2017, WeedMD's board authorized management to proceed with the execution of the agreements for the Perfect Pick Transaction.

b. **Alleged contingent nature of the planned Perfect Pick Transaction**

[162] Stein submits that the transaction between WeedMD and Perfect Pick was far from "ripe" and was full of uncertainties and contingencies. Kraft submits that there is nothing in the Draft Lease to indicate if the underlying transaction was to be completed at all, or if so, when, as the documents were already stale-dated. We disagree.

[163] Stein refers to the majority decision in *Kitmitto* for the proposition that a "potential strategic transaction" is not considered information that would reasonably be expected to have a material effect on the market price or value of securities, because there is "still uncertainty and a lack of specificity about the potential transaction."[36] In *Kitmitto,* the majority was referring to the fact that all that was known on a particular date was that there was a potential transaction. It wasn't until several days later that it was known that the company in question was considering a strategic transaction. It was in that context that the majority made the finding, specific to the facts in that case, that a potential strategic transaction could not be considered material.

[164] In *Kitmitto,* the majority set out a number of factors that supported their conclusion that, in that instance, the potential transaction in question was material. Stein points out that some of those factors, including a precise announcement date, are not present in this case. However, we note that "each case will undoubtedly have to depend upon its own circumstances and facts."[37]

[165] Our conclusion that the Perfect Pick Transaction was sufficiently likely or certain to occur to be material is based on our assessment of the facts when Kraft sent the October Email to Stein and when Stein bought WeedMD shares on November 21, 2017.

[166] With respect to when Kraft sent the October Email to Stein, those facts include:

a. WeedMD had been negotiating with Perfect Pick since February 2017 and the negotiations had progressed from exclusivity agreements to non-binding term sheets to draft definitive agreements, that Merker described in the email that Kraft forwarded to Stein, as "final";

b. in a June 4, 2017 e-mail to an unrelated party, Kraft had described the potential Perfect Pick Transaction as a "very compelling and massive greenhouse expansion plan which is a state of the art facility with 14 acres or 609,840 square feet under glass.", "the economics we negotiated are incredible and we will start phase I being 5 acres" and "we will be submitting to Health Canada for a satellite cultivation license in the next 30 days". Kraft instructed the third party not to trade on this information;

c. on June 17, 2017, the WeedMD board authorized J. Zakaria of Perfect Pick to sign an application to Health Canada by WeedMD as tenant, to become a licensed producer under Health Canada regulations at the Perfect Pick Strathroy property;

d. on July 6, 2017, WeedMD applied to Health Canada for a production licence for dried cannabis for the Perfect Pick facility in Strathroy, indicating that WeedMD had entered into a lease agreement for the property from the owner;

e. on August 14, 2017, in response to a question from Health Canada about the portion of the Perfect Pick property that WeedMD would be leasing, WeedMD indicated in its cover letter that it intended to take the entire 220,000 square feet (five acres) but was starting with an initial one acre;

f. WeedMD's communication strategy, circulated among WeedMD senior management and the board on August 31, 2017, includes a proposed announcement of WeedMD's strategic partnership with Perfect Pick on September 6, later revised to September 12, 2017;

g. a draft news release about the Perfect Pick Transaction was circulated on September 14, 2017;

h. on September 15, 2017, Health Canada provided confirmation of WeedMD's readiness for a licence for the Perfect Pick facility, which Merker described in an e-mail of the same date as "(w)e received approval from HC today. This is NOT the license. The license will come after security is complete";

i. on September 18, 2017, in an internal email Merker wrote the following in response to a question about when the Health Canada approval should be announced: "We will release the approval prior to license – timing is in our hands. At the latest, PR will be concurrent with signing definitive agreements with [Perfect Pick]. We are very close to this, but again, can control timing";

[36] *Kitmitto* at para 184
[37] *Donnini (Re)*, (2002) 25 OSCB 6225 (***Donnini)*** at para 17

j. a further revised draft news release about the Perfect Pick Transaction was circulated on September 21, 2017;

k. on October 11, 2017, Kurt Langille at WeedMD sent an e-mail within WeedMD introducing himself as the person responsible for coordinating the new Strathroy project and advising that a coordination meeting had been set for October 17, 2017, "for our quickly upcoming" Strathroy facility;

l. on October 18, 2017, Pedro sent an e-mail to an individual at a greenhouse supply company and copied Langille stating "we are ambitious to get going on the Strathroy facility that you came to visit and quote. We now have a better understanding of the actual space we will be using. Kurt will be the site super";

m. on October 19, 2017, WeedMD announced entry into a letter of engagement with Eight Capital with respect to an equity offering to raise $15 million for "working capital and for production capacity expansion";

n. in an e-mail to a Zakaria Produce email address used by J. Zakaria on October 23, 2017, on which Kraft was copied, Scully stated that "I understand that we are ready to sign – there are a couple of small issues that have not yet been discussed but Jerry said they are small issues. I am sure we can get through it tomorrow. Mike is coming to London tomorrow – could be a good time for us all to be together to sign";

o. the subject line of the October Email was "PPF final agreements". That subject line, in our view, indicates that the negotiations were well advanced and near completion; and

p. there was no evidence before us that there were any other properties that were viable, serious alternative contenders to the Perfect Pick Transaction that had progressed to any significant extent. Our consideration of whether WeedMD was actively pursuing other expansion alternatives is below.

[167] The majority in *Kitmitto* referred to the importance of considering the "indicia of interest" when assessing the materiality of a potential transaction.[38] All the facts and factors listed above, in our view, indicate significant indicia of interest by both WeedMD and Perfect Pick, which supports a conclusion that the planned Perfect Pick Transaction was sufficiently likely or certain to occur such that it (including the Draft Lease considered on its own) was material at the time Kraft sent the October Email to Stein.

[168] We conclude that nothing material happened between October 23, 2017, and the date of Stein's trades on November 21, 2017, to detract from the materiality of the planned Perfect Pick Transaction. Instead, events subsequent to October 23, 2017, if anything, simply heightened the certainty of the Perfect Pick Transaction closing.

[169] On October 27, 2017, Merker emailed "Final Docs" to J. Zakaria. The attached version of the Draft Lease was amended to have the rent payable monthly in arrears and to show the Commencement Date as a blank date in October. J. Zakaria subsequently, on October 30, 2017, asked for a minor change to the Draft Option to Purchase with respect to HST.

[170] The only other developments in this period support the conclusion that the Perfect Pick Transaction (including the Lease) closing was even more certain. The $15 million bought deal financing for working capital and expansion was announced on November 2, 2017. On that same day WeedMD's board authorized management to sign the Perfect Pick Transaction agreements (including the Lease and the Option to Purchase) for the greenhouse expansion project at Perfect Pick in Strathroy. As early as November 10, 2017, WeedMD planned to issue a news release about the Perfect Pick Transaction on November 16, 2017, which date was subsequently pushed out on November 11, 2017, to November 21, 2017.

[171] Stein submits that if the panel were to find that the Draft Lease was material when provided to him on October 23, 2017, the quality of materiality was nonetheless diminished and extinguished due to the time that elapsed between October 23 and when Stein purchased WeedMD shares on November 21, 2017.

[172] In support of this submission, Stein cites *Waheed (Re)*[39] and that decision's consideration of the probability/magnitude test. In *Waheed*, the Tribunal found that the material facts that had been shared with Waheed were contingent and that over an extended negotiation period the terms that had been shared ceased to be correct or relevant. Therefore, there was no probability that the originally contemplated transaction would occur, and the facts associated with it ceased to be material.

[173] Unlike in *Waheed*, the material terms in the Draft Lease that Kraft shared with Stein remained the same in the final Lease. The passage of time and events between the information being shared with Stein and the Announcement did not, in fact, result in the information that was shared with Stein ceasing to be material. Stein's expressed "viewpoint" that the probability of the Perfect Pick Transaction closing diminished substantially between October 25, 2017, and November 21, 2017, was not based on any particular facts or information (other than the passage of less than one month of time) and his subjective "viewpoint" in this regard is not relevant to or determinative of the question of materiality.

38 *Kitmitto* at para 187, citing *Agueci (Re),* 2015 ONSEC 2 (***Agueci***) at para 112
39 2014 ONSEC 23 (***Waheed***)

c. **Allegation that WeedMD was actively pursuing other alternatives to the Perfect Pick Transaction**

[174] As a further example that the planned Perfect Pick Transaction was contingent and uncertain, Kraft submits that WeedMD was simultaneously and actively considering other greenhouses and greenhouse options for its planned expansion at the same time it was negotiating with Perfect Pick.

[175] Merker testified that WeedMD was looking at several different expansion opportunities. WeedMD had, for example, purchased the property it initially rented in Aylmer and considered expanding on that property as one of its options. Merker also confirmed that he and his WeedMD colleagues toured several different properties looking for expansion opportunities, including in Ottawa. Merker did not provide a specific timeframe for when these other options were considered. His evidence was that he was not aware of any alternate expansion opportunities that WeedMD was pursuing between July 11 and November 22, 2017.

[176] Pedro testified that WeedMD had looked at properties, including greenhouses, in Ottawa, Niagara, Montreal and the Bruce peninsula. Pedro stated that WeedMD was looking at these other properties in August, 2017, to "keep our options open" and that WeedMD was "always looking". Pedro also stated that he had been to the Ottawa property in February 2017, and that it "needed substantial work". He went on to state that Ottawa was "truly a contender but, at the same time, I think this was just a very friendly conversation that was going on. So it was just more work to get Ottawa done in comparison to Perfect Pick". Pedro also stated that WeedMD's quality assurance team would have been looking at the Ottawa facility to consider issues such as water quality and pesticide use in October 2017.

[177] While we accept Pedro's evidence that WeedMD may have been continuing to look at the Ottawa facility during October 2017, there was no evidence to suggest that WeedMD's engagement regarding the Ottawa facility had progressed beyond the "friendly conversation" or in any way paralleled the extent of the highly advanced detailed negotiations and planning in connection with the Perfect Pick Transaction.

[178] Several of WeedMD's public statements referred to having building permits in hand and $6 million available, which may have suggested that expansion at the existing Aylmer facility was also an option. WeedMD did have an option to lease an additional four acres of land neighbouring its Aylmer facility. Exercising that option would have provided WeedMD with five acres. Pedro testified that WeedMD did not proceed with that option. There were no building permits for expansion of the Aylmer facility tendered in evidence. We conclude that expanding operations at the Aylmer site was also not seriously in contention as an expansion option during the Material Time.

[179] While WeedMD may have visited other potential sites and while there may have been multiple potential alternative properties that may have been suitable for WeedMD to expand its cannabis production, there is no evidence that WeedMD was pursuing any alternative properties to the same extent as they were the Perfect Pick Strathroy property at any point, including during the Material Time. Nor was there any evidence that any discussions about alternative opportunities had progressed to the same advanced point as the planned Perfect Pick Transaction.

[180] With respect to the Perfect Pick Transaction, the evidence before us includes term sheets, exclusivity agreements, draft agreements, draft communication plans including target announcement dates, a draft press release announcing the transaction, an application to Health Canada identifying the Perfect Pick location as the site for WeedMD's expanded cannabis production, documents identified as "final agreements", the CEO's understanding that the parties were ready to sign, the creation of a retrofit team with a project lead, and evidence that the team was meeting to discuss retrofitting the Perfect Pick facilities.

[181] Were these other potential expansion sites seriously being considered by WeedMD at any time, including during the Material Time, we would expect there to have been some evidence akin to that with respect to the planned Perfect Pick Transaction, demonstrating active negotiations or detailed assessments and evidence of more specific expansion plans for those sites. No such evidence was tendered. We therefore conclude that none of these other properties were in fact serious contenders for WeedMD's expansion during the Material Time.

[182] We now consider the respondents' submissions that the information Kraft shared with Stein and Stein learned from Kraft had been generally disclosed.

4.3.1.e The planned Perfect Pick Transaction (and terms of related draft agreements, including the Draft Lease) had not been generally disclosed

[183] In order to prove contraventions of ss. 76(1) and (2) of the Act, Staff must establish that the information Kraft provided to Stein and the information Stein learned from Kraft had not been generally disclosed or widely publicized at the time Kraft provided it to Stein as well as at the time Stein traded.[40] We find, for the reasons below, that the material facts about the Perfect Pick Transaction (including the terms contained in the Draft Lease and the Draft Option to Purchase) had not

[40] *Agueci* at para 113

been generally disclosed either at the time Kraft sent the October Email to Stein or at any time prior to Stein's trades on November 21, 2017.

[184] Staff submits that there is no evidence that the Perfect Pick Transaction and related expansion or any related details had been generally disclosed by October 23, 2017. Neither respondent identified a single instance of general disclosure, by WeedMD or any other party, of the Perfect Pick Transaction, related expansion or any related details prior to the Announcement. Merker's evidence was that the Announcement on November 22, 2017, was the first time WeedMD had announced the expansion. He also testified that he was unaware of any public announcement of the expansion prior to November 22, 2017.

[185] Staff also submits that had the Perfect Pick Transaction, related expansion and details been generally disclosed prior to the Announcement, there would not have been the significant market reaction to the Announcement on November 22, 2017.

[186] Kraft submits that WeedMD's growth strategy was widely disclosed in the market prior to the Announcement. Kraft clarified that he was not saying there was general disclosure of the Perfect Pick Transaction and related expansion. Rather, in assessing materiality, what is important is how incremental the information provided to Stein in the October Email was to what was already known in the marketplace.

[187] Kraft submits that it was generally known that WeedMD was seeking to expand to take advantage of the adult recreational use market, that it had spoken about an imminent expansion, and that it had raised $15 million to fund an expansion as well as to provide working capital.

[188] Kraft submits that the material information that moved the market after the Announcement was the cost of the expansion and the favourable costs to retrofit the Perfect Pick greenhouse, and not the details about the Perfect Pick Transaction and related expansion that can be gleaned from the Draft Lease. The materials provided to the WeedMD board at its November 2, 2017, meeting included a peer analysis of the costs of building a new greenhouse, for example at the existing Aylmer property, versus retrofitting an existing greenhouse. That analysis showed that while retrofitting was not necessarily less expensive, given the condition of the Perfect Pick greenhouse and other factors, the costs of retrofitting Perfect Pick's greenhouse were among the lowest.

[189] Stein submits that any facts conveyed to him by Kraft prior to his WeedMD trades, to the extent that they may have been material, had already been publicly disclosed. Stein submits that WeedMD had generally disclosed that it was engaged in what WeedMD described as a compelling expansion, as evidenced by the following:

a. public statements by Merker regarding WeedMD's exciting business opportunities compared to its competitors, including his statement in an interview on May 8, 2017, that WeedMD had been working on an expansion plan that included a license for a second site;

b. Merker's statements on May 24, 2017, during a Reddit "Ask Me Anything" event that WeedMD had plans to expand to 220,000 square feet (or approximately 5 acres) in its third quarter to meet the demands of the impending recreational market, and that WeedMD was exploring alternatives to accelerate growth plans as the company was expanding aggressively;

c. WeedMD's press releases in April, May, August, September and October 2017, that included the following statements:

   i. on April 27, 2017, WeedMD had the option to acquire 4 acres of land neighboring the Aylmer facility, which along with the existing 4 acres of land at that facility could support 220,000 square feet of new production space and with $6 million dollars in working capital and building permits approved, WeedMD was well positioned to deliver on its next phase of growth;

   ii. on May 1, 2017, WeedMD announced that it had secured a sales licence from Health Canada for the sale of dried cannabis products and stated that it would be expanding to 220,000 square feet, to be completed in early 2018, repeating that the company had $6 million dollars in working capital and building permits in hand;

   iii. on August 30, 2017, WeedMD announced its second quarter results and stated that it was "working on a very compelling expansion opportunity to position the company strategically ahead of the future adult-use market";

   iv. on September 26, 2017, WeedMD announced entering into exclusive cannabis supply contracts with three long-term care and retirement homes and stated that the company "is advancing a very compelling expansion plan to position itself strategically for the future adult-use market which it expects to unveil in the coming weeks."; and

v. on October 19, 2017, WeedMD announced the completion of a $15 million convertible debenture bond deal and stated that the use of proceeds would be for working capital and production capacity expansion.

[190] The Act does not define the term "generally disclosed". Previous Tribunal decisions have determined that information was generally disclosed if:

a. the information has been disseminated in a manner calculated to effectively reach the marketplace; and

b. the public investors have been given a reasonable amount of time to analyze the information.[41]

[191] NP 51-201 provides guidance on how companies may satisfy general disclosure, namely by:

a. news releases distributed through a widely circulated news or wire service; and

b. announcements made through press releases or conference calls that interested members of the public may attend or listen to either in person, or by telephone, or by other electronic transmission (including the Internet).[42]

[192] In our view, none of these public statements or press releases amounted to public disclosure of the planned Perfect Pick Transaction or related draft agreements, including the Draft Lease. The various statements and announcements listed above were aspirational, whereas the Perfect Pick Transaction was concrete. At most, the various statements and announcements demonstrate that WeedMD management was aware that, as Pedro testified, "expansion was the name of the game" and they wanted to assure their shareholders that they were pursuing a strategy to take advantage of the potential adult recreational use market. We consider the WeedMD prior public statements that it was "working on" and "advancing" a compelling expansion opportunity or plan to be substantively and materially different than the fact of the planned Perfect Pick Transaction and terms of the related draft agreements, including the Draft Lease.

[193] While the relative cost of retrofitting the Perfect Pick facility may have been a factor in the market impact of the Announcement, it was not part of the information provided to Stein in the October Email. Therefore, we do not include it in our analysis of whether the information Kraft provided to Stein and Stein learned from Kraft constituted material facts. We addressed the issue of whether Staff has met its evidentiary burden on the issue of market impact in section 4.3.1.d.i above.

[194] We also conclude that there is no evidence that the planned Perfect Pick Transaction and terms of the related draft agreements, including the Draft Lease, had been generally disclosed between the October Email and Stein's trades in WeedMD shares on November 21, 2017.

[195] Between the October Email and the Announcement, WeedMD made only one public statement. On November 2, 2017, WeedMD announced the closing of its bought deal financing. That press release stated the net proceeds from the financing would be used "for working capital and for production capacity expansion." No details of the planned Perfect Pick Transaction or related expansion were included in that press release.

4.3.1.f Conclusion regarding the tip about the Perfect Pick Transaction and related expansion

[196] For all of the foregoing reasons we have concluded that the planned Perfect Pick Transaction, including the terms of the Draft Lease and Draft Option to Purchase, constituted a material fact that Kraft selectively disclosed to Stein and that had not been generally disclosed. We also conclude that the fact of and terms of the Draft Lease, considered alone, constituted a material fact that Stein had knowledge of and that had not been generally disclosed at the time he traded.

[197] We now turn to our analysis of whether the Announcement Date was a material fact or material change and whether Kraft tipped Stein about the Announcement Date.

4.3.2 Alleged tip concerning the Announcement Date

4.3.2.a The Announcement Date was a material fact and a material change

[198] We have found the planned Perfect Pick Transaction (and related Draft Lease and Draft Option to Purchase) to be material facts. Therefore, it naturally and logically follows that the Announcement Date of the Perfect Pick Transaction is also a material fact. In addition, the Announcement Date was a material change as evidenced by execution of the definitive agreements and WeedMD's filing of a Material Change Report. That report was filed on the basis that the Expansion and the Announcement on November 22, 2017, constituted a "material change".

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41 *Cheng* at para 50, *Green v Charterhouse Group Can Ltd*, (1976), 12 OR (2d) 280, *In the Matter of Harold P Connor* (1976) Volume II OSCB 149 at paras 174-177

42 NP 51-201, s.3.5(4)

4.3.2.b Did Kraft tip Stein about the Announcement Date?

[199] There is no direct evidence of a second tip about the Announcement Date. Any conclusion that such a tip occurred must be based on circumstantial evidence.

[200] We considered the following factors:

a. Stein's explanation for trading on November 21;

b. Stein's opportunities to learn of the Announcement Date; and

c. the characteristics of Stein's trading on November 21-23;

before concluding that on a balance of probabilities, a second tip from Kraft to Stein about the Announcement Date did not occur.

4.3.2.c Stein's explanation for trading on November 21

[201] Stein and Kraft both deny that Kraft tipped Stein about the Announcement Date. Stein submits that when he purchased WeedMD shares on November 21, 2017, he had no knowledge that a transaction had been agreed upon, nor that the Announcement would take place the following day.

[202] Rather, Stein testified that he purchased WeedMD shares on November 21 because of further progress on Bill C-45 which would permit adult-use recreational markets for cannabis.

[203] Stein submits that a number of events occurred on November 21. There was the passage of a motion allocating time for a third and final reading of Bill C-45 before the House of Commons and a press release by Health Canada announcing consultation on the proposed regulation for cannabis. WeedMD's Q3 interim financials were also expected to be disclosed on or before November 30.

[204] Stein also testified that he liked WeedMD as an investment because it was a niche player in the market, he was familiar with the company and he respected its leaders.

[205] Staff submits that Stein's testimony explaining the timing of his November 21 share purchases is not credible given that he did not purchase WeedMD shares as Bill C-45 progressed through each stage in the House of Commons or the Senate. For example, Stein did not purchase WeedMD shares after the first or second reading of Bill C-45 in the House of Commons. Nor did Stein purchase later in November when the Bill passed its third and final reading in the House of Commons. Similarly, Stein did not purchase any shares as the Bill progressed through the Senate and was finally passed in June 2018.

[206] We find Stein's evidence about his rationale for purchasing WeedMD shares on November 21 to be unsatisfactory. Stein only purchased WeedMD shares and no shares of other major cannabis producers that presumably would have also been impacted by the Bill C-45 news. In addition, purchasing WeedMD shares on November 21 after selling his entire WeedMD position less than a week earlier suggests that Stein's outlook on WeedMD as an investment had changed.

[207] While we question the timing and rationale for Stein's purchase of WeedMD shares, we are not convinced on a balance of probabilities that the trades resulted from Stein being tipped by Kraft about the Announcement Date.

4.3.2.d Opportunities to learn the Announcement Date

[208] It is clear that Kraft and Stein were in regular contact. They were long-time friends, discussed personal matters and discussed business matters unrelated to WeedMD. However, with respect to opportunities for Kraft to communicate the Announcement Date to Stein, we take note that they had four brief calls between November 11 when the Announcement Date was set and November 16.

[209] We accept their joint submission that they had fewer opportunities to communicate between November 16 and November 22 due to Kraft's travel schedule. The cell phone records bear this out. There were no documented phone calls between them between November 16 and November 22 other than one call from Stein to Kraft which appears to have not connected. While it is true that they may have communicated via landline or text messages, we do not find that the frequency of communication was unusually high during this period. In *Rosborough (Re)*,[43] it was found that the existence of communication opportunities, by itself, was a neutral factor in determining whether or not the respondent acquired knowledge via tipping.

[43] 2022 ONCMT 11 (***Rosborough***) at paras 45-50

[210] We attach little weight to the fact that Stein had opportunities to learn of the Announcement Date from Kraft. Stein and Kraft may have communicated during the time period but we cannot conclude that any such communication was about the Announcement Date.

4.3.2.e Characteristics of Stein's trading on November 21-23

[211] The Tribunal has identified certain factors that may suggest that trading is suspicious – specifically, "well-timed, highly uncharacteristic, risky, and highly profitable purchases," that are a "fundamental shift in the nature of [the respondents'] trading."[44]

[212] Stein repeatedly stated that he reviews his portfolio on a weekly or bi-weekly basis. He further testified that he generally puts in day orders, and if a day order is not filled by the end of the day, his broker calls and they extend the order accordingly.

[213] On November 21 at 2:30 pm Stein entered a day limit order to purchase 45,000 shares of WeedMD. Stein submits that the size of the trade was not significant in the overall context of his portfolio. On November 22 Stein sold 20,000 of the shares and on November 23 he sold the remaining 25,000 shares resulting in a profit of $29,345 and a 43% return on his investment.

[214] Staff submits that Stein's trading was uncharacteristic. Staff submits that it was unusual that Stein entered day limit orders for WeedMD shares on November 21 compared to Stein's prior purchases of WeedMD shares in September, where the trade orders remained open for a week. Staff also submits that the November 21 share purchases reflected a shift in Stein's trading pattern from reviewing his portfolio on a weekly or bi-weekly basis and, depending on other opportunities or cash requirements, buying, selling or reinvesting shares, to a trading strategy that is more akin to that of a day trader.

[215] We conclude that entering day limit orders, and extending them if required, was likely Stein's usual method of trading. While it is true that Stein sold his WeedMD shares on November 22 and November 23, only two days after purchasing them, we attribute those sales to the opportunity to take the profit resulting from the Announcement.

[216] When asked why he sold his WeedMD shares on November 22, Stein was evasive. There had been no change in the status of Bill C-45 to prompt a sale if it was the Bill that was motivating Stein's purchase and sales of WeedMD. In our view, Stein had no reason to be evasive, yet he was so insistent in denying advance knowledge of the WeedMD press release announcing the Perfect Pick Transaction and related expansion, that he continued to deny knowing about it once it was publicly released. The WeedMD press release would have been the logical explanation for Stein selling his shares of WeedMD on November 22 and 23.

[217] While there are certainly facially suspicious circumstances surrounding Stein's trading in WeedMD shares in late November – notably the near-perfect timing of the trades and his evasive explanation for the sale of the shares immediately following the Announcement – we nevertheless cannot conclude that it was more probable than not that Stein bought WeedMD shares on November 21 with knowledge received as a result of a second tip from Kraft to Stein about the Announcement Date. The evidence about opportunity for Kraft and Stein to communicate is a neutral factor and Stein's trading pattern was not out of the ordinary.

[218] We now turn to our consideration of Kraft's submission that his selective disclosure of the Perfect Pick Transaction documents to Stein was made in the necessary course of business.

4.4 Did Kraft communicate with Stein in the necessary course of business?

4.4.1 Introduction

[219] Kraft asserts that he sought Stein's advice on the Draft Lease contained in the October Email in the "necessary course of business". Kraft further asserts that, in the event that we find that the October Email contained MNPI, the "necessary course of business" language in the prohibition against tipping in s. 76(2) of the Act operates in the circumstances to preclude any finding of a breach of this section by Kraft.

[220] The "necessary course of business" language is embedded as a part of the prohibition against tipping under the Act. Section 76(2) of the Act provides:

> **(2) Tipping** –No issuer and no person or company in a special relationship with an issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed. *[emphasis added]*

[44] *Suman (Re)*, 2012 ONSEC 7 (***Suman***) at para 342

[221] We have determined that Kraft's communication of the October Email to Stein was not in the "necessary course of business" within the meaning of s. 76(2) of the Act. Our reasons are set out below.

[222] Before considering the substance of Kraft's submission, we address two preliminary issues:

a. who bears the onus of establishing whether a communication was (or was not) made in the necessary course of business?; and

b. the applicable test for establishing that a communication was made in the necessary course of business.

[223] We note that Staff and Kraft agreed that there do not appear to be any prior decisions directly considering or applying the "necessary course of business" provision in s. 76(2) of the Act. As such, much of what follows is being considered for the first time by this Tribunal.

4.4.2 Who bears the onus of establishing whether a communication was (or was not) made in the necessary course of business?

[224] Staff and Kraft fundamentally disagree about who bears the onus of establishing whether a communication was (or was not) made in the "necessary course of business".

[225] Staff submits that Kraft bears the burden of establishing that the communication between Kraft and Stein was in the "necessary course of business", citing Tribunal decisions, including *Lydia Diamond Exploration of Canada Ltd (Re)*[45], showing that respondents in enforcement proceedings bear the burden of establishing exemptions upon which they seek to rely.[46]

[226] Staff submits that this is consistent with the approach taken in the large number of past decisions of this Tribunal involving allegations of illegal tipping under s. 76(2) of the Act where specific findings regarding the necessity of the selective disclosure by respondents are notably absent.[47]

[227] Staff also submits that a conclusion that Kraft bears the burden is consistent with the requirement under s. 47(3) of the *Provincial Offences Act*[48] (**POA**) that governs any quasi-criminal proceedings brought in Provincial Court for breaches of the Act (including for breaches of s. 76(2)). Section 47(3) of the POA unambiguously confirms that in quasi-criminal proceedings brought to Provincial Court under the Act:

> "(t)he burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant."

[228] Kraft submits that Staff bears the burden. He relies on two recent insider tipping and trading decisions of the Tribunal, *Rosborough* and *Kitmitto* as well as policy considerations that he says support his position. Relying upon criminal law authority,[49] he also submits that the "necessary course of business" language in s. 76(2) is to be construed as an element of the offence or charging provision that must be considered in every case, as distinct from an affirmative defence that is only available in particular circumstances, thus requiring Staff to prove that the communication was not made "in the necessary course of business" in every case.

[229] Pared down to the essence of their respective submissions, the disagreement between Staff and Kraft is that Kraft says that the "necessary course of business" language in s. 76(2) is to be construed as an element of the breach (or offence) to be proved by Staff, whereas Staff says that such language is to be construed as an exception to the prohibited act of tipping, the availability of which is for a respondent to prove.

[230] The three decisions that Staff relies upon for the principle that respondents in enforcement proceedings bear the burden of establishing exceptions upon which they seek to rely[50] deal exclusively with breaches of s. 25(1) and s. 53(1) of the Act (trading without being registered and distributing a security without a prospectus, respectively). Both of these provisions of the Act are subject to multiple exemptions that are specifically described as "exemptions" under Ontario securities laws.

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45 (2003), 26 OSCB 2511 at paras 83-84 (***Lydia Diamond***)

46 See *Black Panther Trading Corp (Re),* 2017 ONSEC 1 (***Black Panther***) at para 95, citing *Lydia Diamond* at para 83; *Meharchand (Re),* 2018 ONSEC 51 (***Meharchand***) at para 95, citing *Lydia Diamond* at para 83

47 *MCJC Holdings Inc (Re)*, (2003) 26 OSC 8206; *George (Re)*, 1999 CarswellOnt 236 (***George***); *Waheed; Azeff; Suman*; *Donnini*; *MI Developments Inc (Re)*, 2009 ONSEC 47; *Kitmitto*; *Rosborough*

48 RSO 1990, c P.33

49 *R. v Keegstra*, 1994 ABCA 293 at para 16, rev'd on other grounds [1996] 1 SCR 458

50 See *Black Panther* at para 95, citing *Lydia Diamond* at para 83 and *Meharchand* at para 95, citing *Lydia Diamond* at para 83

[231] While Staff provided a number of other decisions of this Tribunal[51] where the burden was placed on a respondent to establish the availability of an exemption in proceedings for breach of s. 25(1) and s. 53(1) of the Act, we were not provided with any other Tribunal decisions considering the applicability of the principle adopted in these decisions (*i.e.,* a respondent bears the burden of proving the availability of an exemption or exception) to breaches of other sections of the Act.

[232] Despite the absence of Tribunal authority, we accept that the principle adopted in the Tribunal decisions Staff cited should extend to other sections of the Act where, properly construed, a breach of the Act is made subject to an exemption or exception. Additionally, extending this principle to other sections of the Act is entirely consistent with s. 47(3) of the POA quoted above.

[233] To not find that the principle extends to breaches of other sections of the Act could result in a nonsensical difference in how exceptions or exemptions are treated depending on whether Staff elects to pursue a breach of the Act in an administrative enforcement proceeding before this Tribunal or alternatively elects to proceed by way of a quasi-criminal proceeding in Provincial Court. The former choice would require Staff to establish that an exception or exemption does not apply. The latter choice would result in the burden of establishing the availability of the same exception or exemption falling to the respondent.

[234] Kraft submits that the principle in *Lydia Diamond* and the other cases cited by Staff does not extend to the "necessary course of business" language in s. 76(2) of the Act because:

a. the registration and prospectus exemptions to the requirements in s. 25(1) and s. 53(1) of the Act are set out in separate provisions of the Act and are clearly identified as exemptions, whereas, in contrast, the "necessary course of business" language is contained in the same provision of the Act that contains the tipping prohibition and does not refer to an exception or exemption;

b. the exemptions to the requirements in ss. 25(1) and 53(1) are detailed, prescriptive and leave no, or little, room for doubt, in contrast to the "necessary course of business" language;

c. the registration and prospectus exemptions do not arise in the context of real-time decision making and therefore can be the subject of an application for exemptive relief in cases of doubt; and

d. the availability of a registration or prospectus exemption is not a question that arises in every circumstance where ss. 25(1) and 53(1) apply.

[235] In our view, s. 76(2) of the Act is properly construed as a broad prohibition against selective disclosure of MNPI by an issuer or person or company in a special relationship with an issuer, subject to the stated narrow exception, proviso or carve-out for communications "in the necessary course of business".

[236] In arriving at this conclusion, we have taken into account the purposes of the Act, the principles and rationale that apply equally to the prohibition against insider trading and tipping under the Act as well as the specific language of s. 76(2) and related provisions of the Act, including s. 76(3).

[237] The purposes of the Act that are particularly relevant to our consideration of s. 76(2) are:

a. to provide protection to investors from unfair, improper or fraudulent practices; and

b. to foster fair, efficient and competitive capital markets and confidence in capital markets.[52]

[238] The prohibition against insider trading (as well as the prohibition against tipping, given that it is an enabler of insider trading) exists for three principal reasons:

a. fairness requires that all investors have access to information about an issuer that would likely affect the market value of the issuer's securities;

b. insider trading may undermine investor confidence in the capital markets; and

c. capital markets operate efficiently on the basis of timely and full disclosure of all material information.[53]

[239] We do not accept Kraft's submission that because the "necessary course of business language" is contained in s. 76(2) itself rather than in a separate provision, it cannot properly be construed as an exception to the tipping prohibition in the

[51] *Limelight Entertainment Inc (Re),* 2008 ONSEC 4 at paras 142 and 144; *Mega-C Power Corp (Re),* 2010 ONSEC 19 at para 248; *Paramount* at para 61; and *York Rio Resources Inc (Re),* 2013 ONSEC 10 at para 99

[52] Act, s 1.1

[53] *Kitmitto* at para 155; *Suman* at para 22

Act. Kraft's submission in this regard is inconsistent with the fact that s. 25(1) itself, which is a prohibition recognized to be subject to an exception or exemption that must be established by a respondent, refers to the exemption in the very same provision that creates the prohibition. Section 25(1) provides:

> Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in of hold himself, herself or itself as engaging in the business of trading in securities […][*emphasis added*]

[240] We also do not accept Kraft's submission that because the "necessary course of business" language in s. 76(2) is not expressly identified as an "exception" in that section, it does not operate as an exception.

[241] In our view, the language "other than" that precedes "in the necessary course of business" in s. 76(2) clearly signals an exception and operates as a synonym to "except". Further, in concluding that the "in the necessary course of business" language in s. 76(2) should be construed as an exception to the prohibition against selective disclosure of MNPI, we have not construed s. 76(2) in isolation[54] but have also taken into account the language in the related s. 76(3) that prohibits selective disclosure of MNPI specifically in the context of take-over bids and significant business transactions, where communications "in the necessary course of business" are clearly stated to be an exception to the prohibition. Section 76(3) of the Act provides:

> **Same --**No person or company that is considering or evaluating whether, or that proposes,
>
> (a) to make a take-over bid, as defined in Part XX, for the securities of an issuer;
>
> (b) to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with an issuer; or
>
> (c) to acquire a substantial portion of the property of an issuer,
>
> shall inform another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed except where the information is given in the necessary course of business relating to the take-over bid, business combination or acquisition. ***[emphasis added]***

[242] We also do not accept Kraft's additional submissions. Kraft's submissions that the "in the necessary course of business" language is not sufficiently specific to be an exception to the prohibition in s. 76(2) and his other attempts to draw factual distinctions between the operation of the registration and prospectus exemptions and the "in the necessary course of business" exception are not persuasive. Furthermore, because the burden of proving whether selective disclosure of MNPI was made (or not made) "in the necessary course of business" was not in dispute in either *Rosborough* or *Kitmitto* we do not find Kraft's submissions that those decisions confirm that Staff is required to prove that a selective disclosure was made "other than in the necessary course of business" to be persuasive.

[243] Given our conclusion that the "necessary course of business" language is an exception to the tipping prohibition in s. 76(2) that Kraft bears the burden of establishing, we use the shorthand **"NCOB exception"** to refer to that language.

4.4.3 The test for establishing the NCOB exception

4.4.3.a Is the NCOB exception established on an objective or subjective/objective standard?

[244] Staff submits that the NCOB exception can be established only where the selective disclosure of MNPI is made in the "necessary course of business" on a purely objective basis. The subjective belief of the tipper that selective disclosure was necessary, even if reasonably held, is insufficient to establish the NCOB exception where the selective disclosure is found not to be objectively necessary.

[245] Kraft submits that the NCOB exception is established on a subjective standard (with an objective element), that is as a subjective/objective test. Specifically, Kraft submits that whether selective disclosure is "in the necessary course of business" must be assessed having regard to the subjective beliefs of the alleged tipper. Under the subjective test propounded by Kraft, the Tribunal would also determine on an objective basis, applying a reasonability standard that:

a. the disclosure was made in good faith; and

b. the disclosure was made in a context that distinguishes it from "normal" or "ordinary" course of business communications.

[54] *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at para 76

[246] In other submissions, Kraft articulated the subjective/objective test somewhat differently – namely, as one requiring a subjective belief in the necessity of the disclosure, which subjective belief is objectively reasonable.

[247] We have considered these submissions and have concluded that the NCOB exception is to be established on an objective basis. Our reasons for so concluding are set out below.

[248] The Supreme Court of Canada's leading authority on statutory interpretation is *Rizzo v Rizzo Shoes Ltd* (***Rizzo***).[55] In interpreting s. 76(2) and the NCOB exception, we are required to apply a contextual and purposive approach and read the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the objectives of the Act, and the intention of the Legislature.

[249] We are also mindful of the interpretive framework in the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*[56] which is consistent with *Rizzo* and also recognizes that the specialized expertise of administrative decision makers may sometimes lead them to rely, in interpreting a statutory provision, on considerations that a court may not have thought to employ.

[250] We have concluded that reading the words of s. 76(2) in their grammatical and ordinary sense, there is nothing in the language or the articulation of the NCOB exception that suggests or indicates that the NCOB exception rests on the subjective belief of a tipper or is subject to anything other than an objective test.

[251] Kraft submits that the absence of the term "reasonably" or "reasonable" as a modifier of the NCOB exception language in s. 76(2) indicates that a subjective standard applies to establish the NCOB exception, unless an objective standard is otherwise apparent from the context. In support of this submission, Kraft cites *Connolly v Canada (National Revenue)*[57] where the Federal Court of Appeal concludes that the term "reasonable" when modifying "error" and "steps" in s. 204.1(4) of the *Income Tax Act*[58] (as in, "reasonable error" and "reasonable steps") denotes how an objective observer, with full knowledge of the pertinent facts, would view the particular action taken. Also in support of this submission, Kraft cites *Hutchinson*[59] which confirms that what is a "material fact" under the Act, defined as "a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities"[60] is to be determined objectively. While we do not take issue with the point that the inclusion of a "reasonableness" modifier in a statutory provision generally imports some element of objectivity, we reject Kraft's proposition that the absence of a "reasonableness" modifier means that a subjective standard necessarily applies (except perhaps where there is an absence of a reasonableness modifier for words that in and of themselves inherently import subjectivity, such as "belief"). Neither of the cases cited by Kraft stands for the proposition that he advances.

[252] Kraft also submits that the term "necessary" in the NCOB exception language means that the NCOB exception must be determined on a subjective basis because whether something is "necessary" is always assessed with reference to the state of mind of the actor involved in the activity in issue. In support of this submission, Kraft cites a single decision of the Ontario District Court in *R. v Staples*[61] that considered the circumstances in which a peace officer may require a breath test under s. 234.1 of the *Criminal Code.*[62] In the circumstances of that case, the Court determined that if the words "where necessary" in s. 234.1 of the *Criminal Code* are to be given any logical meaning they "have to refer to some extent to the subjective state of mind of the officer".[63]

[253] We find this case to be of limited assistance to us and do not accept it as standing for the sweeping proposition for which it is advanced by Kraft. The Court's decision that "necessary" in the context of s. 234.1 of the *Criminal Code* invokes the subjective state of mind of the officer is readily explained by the fact that the *Criminal Code* provision (now repealed) expressly provided that necessity is to be assessed from the perspective of the peace officer. There is no similar language in s. 76(2) that invokes the subjective state of mind of the tipper. Section 234.1 of the *Criminal Code* provided:

> Where a peace officer reasonably suspects that a person who is driving a motor vehicle or who has the care or control of a motor vehicle, whether it is in motion or not, has alcohol in his body, he may, by demand made to that person, require him to provide forthwith such a sample of his breath as in the opinion of the peace officer is necessary to enable a proper analysis of his breath to be made by a means of an approved road-side screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of his breath to be taken. ***[emphasis added]***

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55 [1998] 1 SCR 27 (SCC) at para 21
56 2019 SCC 65 at paras 117-120
57 2019 FCA 161 at para 64
58 *Income Tax Act,* RSC 1985, c 1 (5th Supp)
59 *Hutchinson* at para 119
60 Act, s 1(1), "material fact"
61 1986 Carswell Ont 37 (***Staples***)
62 *Criminal Code*, R.S.C. 1970, c. C-34, s. 234.1(1). This provision was repealed by s. 36 of the *Criminal Law Amendment Act, 1985*, S.C. 1985, c.19. See *R v Thomsen*, [1988] 1 SCR 640 at para 7
63 *Staples* at paras 7 and 10-11

[254] Our conclusion that the plain meaning of the words of s. 76(2) indicates that an objective standard applies to the NCOB exception and the exception does not rest on any subjective belief of the tipper is further confirmed by other provisions of the Act that provide two defences to the tipping prohibition in s. 76(2) and that expressly refer to the tipper's belief, as well as clause 134(2)(d) in Part XXIII of the Act that provides a defence to civil liability for tipping where the person or company in question "reasonably believed that the material fact or material change had been generally disclosed" *[emphasis added]*.

[255] These other provisions make it clear that when the Legislature intends to invoke a subjective standard or a modified subjective standard that is subject to objective reasonableness, it has done so. The two provisions of the Act that provide defences to the tipping prohibition are:

a. subsection 76(4) of the Act:

> **Defence --**No person or company shall be found to have contravened subsection (1), (2), (3) or (3.1) if the person or company proves that the person or company reasonably believed that the material fact or material change had been generally disclosed. [*emphasis added*]; and

b. subsection 175(5) of the General Regulation under the Act:[64]

> A person or company is exempt from subsection 76 (1), (2) and (3) of the Act where the person or company proves that such person or company reasonably believed that,
>
> (a) the other party to a purchase or sale of securities; or
>
> (b) the person or company informed of the material fact or material change,
>
> as the case may be, had knowledge of the material fact or material change. [*emphasis added*]

[256] Kraft made a number of additional submissions attempting to persuade us that the NCOB exception is (or, more specifically, "ought to be") based on a subjective, not objective, standard. We considered these submissions and do not find them persuasive or relevant to our statutory interpretation of the applicable standard for establishing the NCOB exception. In large part, Kraft's submissions were policy-based. Kraft's additional submissions are addressed below.

[257] Kraft submits that a subjective standard for establishing the NCOB exception is consistent with the purposes of both the Act and of s. 76(2) because corporate officials, provided that they are acting in good faith, are best placed to determine what is "necessary" in the context of the business and affairs of the issuer. Kraft submits that a subjective standard for establishing the NCOB exception will empower issuers and their representatives to achieve the best possible outcomes for their shareholders in significant transactions and that this is even more important than maintaining control over the disclosure of MNPI.

[258] Kraft also submits that an objective standard for establishing the NCOB exception will have a "chilling effect" on corporate officers and directors and would have an adverse effect on corporate governance practices, including by discouraging the seeking of advice from outside advisors.

[259] We find that with these submissions Kraft is asking us to second guess the Legislature's deliberate, clear and unambiguous choice to make the NCOB exception subject to an objective standard (which, we note, is a choice that is entirely consistent with the Legislature's related decision to also make the question of whether information is a "material fact" or "material change" subject to an objective, rather than subjective, test). These two choices to legislate an objective test reflect the importance placed by the Legislature on ensuring that any selective disclosure of MNPI occurs only in the narrowest of circumstances, consistent with the related purposes of the Act noted above.

[260] Kraft also submits[65] that if we conclude that the language of the NCOB exception is ambiguous, meaning its proper interpretation might bear two equally plausible meanings (both a subjective and an objective standard), we must apply the NCOB exception in a manner that accords with s. 2(b) (freedom of expression) and s. 2(d) (freedom of association) of the Charter and apply a subjective standard. As we have concluded that the language of s. 76(2) is not ambiguous, we reject this submission.

[261] Kraft further submits, relying upon *Taylor-Baptiste v Ontario Public Service Employees Union* (***Taylor-Baptiste***)[66] and *R v Plastic Technology Engine Corp.*[67] that even if we conclude that s. 76(2) is not ambiguous, it nevertheless remains available to us, "guided by the Charter's guarantee of free expression and free association" to find that a contravention of s. 76(2) is only established where a selective disclosure of MNPI is made in the absence of an honest and *bona fide*

64 RRO 1990, Reg 1015: General, s 175(5)
65 2015 ONCA 495
66 *Taylor-Baptiste* at paras 50-51, citing *Doré v Barreau du Québec,* 2012 SCC 12 (***Doré***)
67 (1994), 88 CCC (3d) 287 (Ont Gen Div) at paras 38, 66, 69 and 81-84

belief in the necessity of the disclosure. Kraft acknowledges that this propounded test for applying s. 76(2) is not explicit in the express words of s 76(2). He nevertheless urges us to adopt it.

[262] We reject Kraft's submission, and instead accept the position of Staff. We agree with Staff that the essence of Kraft's submission is that in the context of a decision made by an administrative tribunal, Charter values are not just relevant to resolving ambiguity in the interpretation of a statute, but they should also inform the tribunal's interpretation of the statute itself, even where the statutory provision is not ambiguous.

[263] As noted by Staff, *Taylor-Baptiste* addressed the line of cases based on *Doré* and *Loyola High School v Québec (Attorney General).*[68] We agree with Staff that *Taylor-Baptiste* did not involve an issue of statutory interpretation, but instead involved the application of a statute to a particular set of facts, and does not re-write the normal rules governing how administrative tribunals interpret statutes.[69] Where legislation or regulations are clear and unambiguous, it is not up to an administrative tribunal to rewrite them on the pretext of ensuring conformity with *Charter* values.[70]

[264] Having concluded that the NCOB exception is subject to an objective standard, we now turn to considering the factors and considerations that are relevant to establishing the NCOB exception.

4.4.3.b The factors and considerations relevant to establishing the NCOB exception

[265] The Act does not provide a definition of the phrase "in the necessary course of business". Nor does it offer any specific guidance regarding the factors that are or may be relevant to establishing the NCOB exception.

[266] As a starting premise, we reiterate our observation that s. 76(2) of the Act is properly construed as a broad prohibition against selective disclosure of MNPI by an issuer or person or company in a special relationship with an issuer, subject to the narrowly stated NCOB exception.

[267] In interpreting and applying the NCOB exception we must have regard to the reasons for the prohibition against tipping, namely, to ensure that everyone in the market has equal access to and opportunity to act upon material information. In our view, the NCOB exception to the prohibition against tipping must be interpreted and applied reasonably narrowly to ensure that the purposes of the Act and the overarching rationale for the tipping prohibition are not undermined.

[268] The phrase "in the necessary course of business" as contained in s. 76(2) of the Act clearly requires that there must be a business rationale for any selective disclosure of an issuer's MNPI and that the selective disclosure must be tied to a business and business purpose. The word "business" in the phrase "in the necessary course of business" is not qualified by the phrase "the issuer's". Staff submits that the language of the NCOB exception in s. 76(2), properly construed, requires that the selective disclosure be in the necessary course of the issuer's business. Staff submits that to conclude otherwise could lead to an ever-shifting standard.

[269] In the circumstances of this case, where the MNPI was received by Kraft in his capacity as a Chairman and director of the issuer, we accept that the NCOB exception is to be applied with reference to the "issuer's business". Kraft does not disagree. In so finding we should not be taken to conclude that in all factual situations the NCOB exception is limited to a consideration of what may be in the necessary course of the issuer's business.

[270] In our view, the inclusion of "necessary" in the language of the NCOB exception elevates the requirement beyond a mere business purpose or business rationale. As noted in commentary in *George*, what may be in the "ordinary" course of business does not necessarily equate to the "necessary" course of business.[71]

[271] Although neither Staff nor Kraft provided us with specific submissions regarding a definition or meaning of "necessary" or of the phrase "necessary course of business", we note that Staff's submissions spoke in terms of "absolute necessity". Having regard to the legislative purpose of s. 76(2) as well as our understanding of the ordinary meaning of the word, we find that the inclusion of the word "necessary" (as opposed to "ordinary") in the language of the NCOB exception imports a level of importance, including that something is "essential", "indispensable", or "requisite". We find that the purpose of the selective disclosure must be sufficiently important or necessary to the business to warrant an exception to the blanket prohibition against selective disclosure.

[272] The parties have not suggested that we should identify an exhaustive list of factors or circumstances that are or may be relevant to establishing whether selective disclosure of MNPI is in the "necessary course of business". We note that Staff did provide us with a non-exhaustive list of factors that may be relevant to a consideration of whether selective disclosure satisfies the NCOB exception, which includes:

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68 2015 SCC 12

69 *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62 makes it clear that "to the extent this Court has recognized a *Charter* values interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity".

70 *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 62-63

71 *George* at para 68

a. the business of the issuer;

b. the relationship between the tipper and the issuer;

c. the relationship between the tipper and the tippee;

d. the nature of the MNPI that was disclosed;

e. the relevance of the MNPI to the relationship between the tippee and the issuer (that is, whether the nature of the relationship between the tippee and the issuer necessitates the disclosure of the MNPI in question);

f. the tipper's reason for making selective disclosure to the tippee; and

g. the credibility of the tipper seeking to establish the NCOB exception.

[273] We agree that in appropriate circumstances all or some of these factors may be important considerations. That said, we agree with Staff that it would not be appropriate for us to seek to identify a comprehensive set of factors relevant to establishing the NCOB exception in all cases.

[274] As the question of whether the NCOB exception has been made out in any particular case is a question of mixed fact and law, we would expect that the particular facts and circumstances of each situation will inform such a determination. Both parties pointed us to NP 51-201 which addresses the statutory prohibitions against selective disclosure including the NCOB exception and related considerations. We accept that it is settled law that policy statements such as NP 51-201 are not legislative instruments and offer non-binding guidance.[72]

[275] However, both Staff and Kraft submit, and we agree, that NP 51-201 may provide a non-exhaustive guide to considering the *categories* or *types* of communications that may be viewed as being made in the necessary course of business and/or the types of recipients of selective disclosure who might presumptively qualify as receiving MNPI in the necessary course of business.

[276] Section 3.3(2) of NP 51-201 contains the following list of recipients of selective disclosure described in the National Policy as a list of recipients with whom the NCOB exception would generally cover communications:

a. vendors, suppliers, or strategic partners on issues such as research and development, sales and marketing, and supply contracts;

b. employees, officers, and board members;

c. lenders, legal counsel, auditors, underwriters, and financial and other professional advisors to the company;

d. parties to negotiations;

e. labour unions and industry associations;

f. governmental agencies and non-governmental regulators; and

g. credit rating agencies (provided that the information is disclosed for the purpose of assisting the agency to formulate a credit rating and the agency's ratings generally are or will be publicly available).

[277] Although we find that NP 51-201 is helpful in providing some guidance, we note that the NCOB exception must nevertheless be established on the relevant facts. Establishing that selective disclosure was made to a recipient falling within the non-exhaustive list of recipients set out in s. 3.3(2) of NP 51-201 is not the end of the relevant enquiry.

[278] We turn now to consider whether Kraft's communication of the October Email to Stein was in the "necessary course of business" within the meaning of s. 76(2) of the Act.

4.4.4 Kraft's communication was not in the necessary course of business

4.4.4.a Overview of conclusions

[279] We conclude that Kraft did not provide the Draft Lease (and the other documents attached to the October Email, including the draft Option to Purchase) to Stein "in the necessary course of business" and therefore the NCOB exception to s. 76(2) of the Act is not available to him in the circumstances.

[72] *Cornish* at para 53

[280] We have concluded that although Kraft's decision to make selective disclosure to Stein was made for a business reason – namely, his personal desire to have the benefit of his long-time friend and business colleague providing thoughts and input as a second set of eyes – that personal business reason was not equivalent to selective disclosure made in the necessary course of WeedMD's business.

[281] Furthermore, and despite Kraft's testimony, we find that Kraft did not actually turn his mind to whether his selective disclosure to Stein was made in the necessary course of WeedMD's business prior to making the selective disclosure.

[282] We acknowledge that in a small start-up company such as WeedMD there may not be stringent processes and that individuals will wear many hats and take on responsibilities where needed. However, we do not accept that the circumstances here meet the NCOB exception. Kraft hastily forwarded an email containing MNPI, with little instruction, to a personal friend reflexively and out of habit and for his own personal reasons. He did so without any prior discussion with management or the board of WeedMD about his intention to make the disclosure or the considerations necessitating that he do so. Such action was careless.

[283] Our reasons for arriving at these conclusions are set out below.

4.4.4.b Key background, circumstances and facts relevant to the consideration of the NCOB exception

4.4.4.b.i WeedMD and Kraft's relationship and role with WeedMD

[284] At the relevant time, Kraft was the Chairman of the board and a director of WeedMD. Kraft was also a significant shareholder of WeedMD and one of its co-founders. WeedMD was a small start-up company and as a result Kraft rolled up his sleeves and took on responsibilities on an as-needed basis that were not necessarily limited to the role and responsibilities of a chairman.

[285] Despite not being a member of WeedMD's management, he had some management-like responsibilities. He also assumed responsibility for keeping the independent members of WeedMD's board abreast of important developments and securing their support for transactions. Kraft was not very involved with WeedMD's day to day business.

[286] Kraft worked part-time and on an as-needed basis, spending between 30% to 60% of his working hours on WeedMD matters.

[287] Kraft had significant experience sitting on boards of private and public companies. He was instrumental in assisting in WeedMD's transition from a start-up company to a public company. He introduced key consultants as well as some of WeedMD's directors to the company.

[288] In addition to Kraft, WeedMD's board comprised seven other persons, including Scully (Chief Executive Officer), Merker (Chief Financial Officer) and Rick Moscone, a lawyer and corporate partner with the firm Fogler Rubnioff LLP (**Fogler**), that provided legal services to WeedMD, including in connection with the Perfect Pick Transaction and the Draft Lease and other transaction documents.

[289] No member of WeedMD's core management team, and no director, had commercial real estate experience.

4.4.4.b.ii Stein's relationship with Kraft and WeedMD

[290] We discuss Kraft and Stein's relationship as friends and business collaborators in section 3.2 above.

[291] Kraft described Stein as a personal, trusted and "go-to advisor". In his testimony, Kraft described his professional relationship with Stein as follows:

> Michael had provided advice, input, feedback for me on whether it be items that were – transactions that were personal or my management company or advice, and then he also worked certain files that I mentioned, that I provided services for companies like WeedMD, companies like Lingo Media. Wherever I had a need for some expertise that was beyond me, I would usually go to Michael, and he fit the role and was able to deliver a different set of eyes and a different set of expertise, and somebody who I'd always want in my court in terms of somebody who had a financial acumen and ability to look at a balance sheet far superior to myself or even people like Khurram Qureshi, who was the accountant who I used.

[292] Stein's company, Michael Stein & Associates Inc., entered into a consulting services agreement dated May 27, 2015, to act as a non-exclusive consultant to the board of directors of WeedMD Rx and its subsidiary. The consulting services agreement contained a confidentiality provision. The consulting services agreement was not extended beyond its initial term which ended on October 31, 2015, and was not in place at the time Kraft made the selective disclosure of the Draft Lease (and other documents attached to the October Email) to Stein.

[293] Despite the fact that the consulting services agreement with Stein's company expired on October 31, 2015, Kraft testified that he continued to view Stein as a consultant and advisor generally available to him.

[294] In 2017, including during the Material Time, Stein had no business, contractual, or employment relationship with WeedMD or WeedMD Rx. Stein was not hired by WeedMD or WeedMD Rx to review the Draft Lease. Kraft did not ask Stein to act as an advisor or consultant to WeedMD or WeedMD Rx. Stein reviewed the Draft Lease as a favour to Kraft and was not compensated for his review.

[295] In the course of responding to inquiries made by Staff during Staff's investigation in connection with this matter, WeedMD's counsel did not include Stein or his company in the list of third parties whose services WeedMD used in connection with its engagement with Perfect Pick prior to the Announcement.

4.4.4.b.iii Kraft's role in the Perfect Pick Transaction

[296] Although Merker was the lead person at WeedMD with respect to the Perfect Pick Transaction, we find that both Kraft and Scully were important to bringing the Perfect Pick Transaction to fruition. Merker acknowledged that Kraft played an important role in the negotiation of the Perfect Pick Transaction. In connection with the Draft Lease, Merker oversaw outside legal counsel who were primarily responsible for preparing the Draft Lease and other documents. Merker, along with Scully and Kraft, reviewed drafts of the Lease.

[297] Merker and Kraft both testified that Kraft was an important bridge between WeedMD's senior management and its board of directors. Merker confirmed that the board counted on Kraft to make a recommendation about whether to proceed with the Perfect Pick Transaction. Kraft testified that he was not prepared to recommend the Perfect Pick Transaction to the board until he was completely satisfied with the advice WeedMD received and that he would not have been completely satisfied without having received Stein's input.

4.4.4.b.iv The circumstances in which selective disclosure was made to Stein

[298] Stein was not asked by either Merker or Scully to review any of the draft documents for the Perfect Pick Transaction, including the Draft Lease.

[299] Kraft did not tell WeedMD management, including Merker or Scully, that he wanted to get another opinion on any of the draft documents for the planned Perfect Pick Transaction, including the Draft Lease. Kraft also did not tell the WeedMD board of directors that he wanted to get another opinion.

[300] It is not controversial that the decision to make the selective disclosure to Stein was Kraft's decision alone, made without notice to, or approval by, anyone else at WeedMD.

[301] Kraft made the selective disclosure to Stein in the October Email. His email note to Stein said simply "Please review and would greatly appreciate any and all comments you could provide". Kraft's evidence at the merits hearing was that despite the lack of specificity in his email note and despite the fact that the October Email attached all of the draft Perfect Pick Transaction documents, and not just the Draft Lease, he only wanted and was only seeking Stein's input on the Draft Lease.

[302] Kraft testified that he sent all six draft Perfect Pick Transaction documents to Stein because in sending the October Email to Stein he simply "flipped" (or forwarded) the underlying October 16, 2017 internal WeedMD e-mail from Merker to Kraft and Scully attaching the six documents and did not change the original e-mail re line of "PPF Final Agreements" that appeared on the October 16 e-mail from Merker. He conceded in cross-examination that because he was only looking for Stein's comments on the Draft Lease, in retrospect, it was not necessary for him to send all of the documents to Stein. He explained that as he was on his way to London, he sent the email to Stein "on the fly". He disputed the suggestion that he was being sloppy—asserting instead that he was being "reactive" and repeating again that he sent the email "on the fly".

[303] Kraft did not ask Stein to enter into any agreements with respect to his review and he did not ask Stein in advance of making the selective disclosure to him to keep the information provided confidential or to agree on what use Stein could make of the information. However, Kraft testified that he had every expectation that Stein would keep the information confidential.

[304] When Stein provided comments to Kraft on the Draft Lease he did so by email dated October 25, 2017, copying both Merker and Scully. Merker forwarded Stein's comments to Fogler. Some of Stein's comments were implemented by Fogler.

4.4.4.c Consideration of the parties' arguments and submissions on the availability of the NCOB exception

[305] Kraft submits that the reasons he made selective disclosure to Stein were because:

a. Stein has commercial real estate expertise that both Kraft and WeedMD's management lacked;

b. Kraft was not fully satisfied with leaving commercial real estate issues related to the Draft Lease to WeedMD's external counsel; and

c. Kraft required Stein's comments on the Draft Lease in order to satisfy himself that WeedMD was negotiating the best terms possible.

[306] Implicit in Kraft's submission that he held a subjectively reasonable belief that the selective disclosure to Stein was made in the necessary course of WeedMD's business is the related position of Kraft that he actually turned his mind to whether the selective disclosure to Stein was made in the necessary course of WeedMD's business, prior to making the selective disclosure.

[307] Having reviewed and considered the parties' submissions and the evidence, we are satisfied on a balance of probabilities that, notwithstanding the justification Kraft now offers for making selective disclosure to Stein, Kraft's reason for reaching out to Stein on October 23, 2017, and unilaterally deciding to selectively disclose the Draft Lease and other draft Perfect Pick Transaction documents to Stein was a personal decision, rather than a WeedMD decision.

[308] We also find that Kraft's selective disclosure to Stein arose out of his own self-described habit and preference of regularly personally consulting with Stein on business matters and was not made in the necessary course of WeedMD's business or to address any particular business requirement of WeedMD. This is made clear in Kraft's own words at the merits hearing:

> "Wherever I had a need for some expertise that was beyond me, I would usually go to Michael [Stein], and he fit the role and was able to deliver a different set of eyes and a different set of expertise, and somebody who I'd always want in my court…".

[309] We also find that Kraft's selective disclosure to Stein was done hastily, on the fly and was careless. We conclude that the circumstances surrounding Kraft's selective disclosure indicate that more likely than not he did not actually turn his mind to the question of whether such disclosure was in the necessary course of WeedMD's business before he made the disclosure.

[310] Staff submits that Kraft provided inconsistent evidence at the hearing regarding his reasons for making selective disclosure to Stein, not all of which aligns with the justification Kraft now offers for making the selective disclosure. In addition to testifying that he was seeking Stein's expertise specifically from a commercial real estate perspective, in his testimony he also provided the following additional explanations for making selective disclosure to Stein:

i. he wanted Stein to look at the transaction through the lens of an investor or an external audience; and

ii. he wanted Stein to look at the draft agreements from "any perspective".

[311] Staff also submits that Kraft's prior testimony during his compelled interview with Staff in April 2021 was that he wanted Stein to look at all of the draft documents (and not just the Draft Lease) attached to the October Email. Staff submits that this prior testimony is inconsistent with Kraft's principal submission and position before us that he reached out to Stein specifically for commercial real estate expertise related to the Draft Lease that WeedMD was allegedly lacking.

[312] We give no weight to these submissions and give Kraft the benefit of the doubt regarding any imprecise language describing his reasoning for making the selective disclosure and also give Kraft the benefit of the doubt considering that he had not had an opportunity to review all relevant documents to refresh his memory at the time of his compelled interview. In our view, Kraft's testimony is revealing in that it reinforces that he personally wanted another perspective and the benefit of a review by another set of eyes.

[313] In addition to Kraft's own testimony about his self-described habit of regularly consulting with Stein, we find that the matrix of the surrounding circumstances in which the selective disclosure was made by Kraft supports a finding that the selective disclosure to Stein was made for Kraft's personal reasons, and not because the selective disclosure was in the necessary course of WeedMD's business. These circumstances are addressed below.

[314] Kraft, by virtue of his role with WeedMD, may have had the authority to retain advisors or communicate information to advisors where appropriate. Although there may not have been any requirement that Kraft do so, the fact that he did not provide notice to or obtain approval by others at WeedMD of his intention to make the selective disclosure to Stein tends to show that he reached out to Stein for personal reasons.

[315] We accept Staff's submissions that in the circumstances we should place significant weight on the nature of the relationship between Stein (the recipient of the selective disclosure) and WeedMD (the issuer) as detailed in section 4.4.4.b.ii above.

[316] In our view, the relationship of the issuer and the recipient of the selective disclosure sheds light on the nature and purpose of the selective disclosure. Although not necessarily sufficient or determinative on their own, we have taken into account the facts detailed in section 4.4.4.b.ii in reaching our conclusion that Kraft's selective disclosure was not in the necessary course of WeedMD's business.

[317] Staff submits that the fact that Kraft failed, contrary to "conventional wisdom", to ask Stein to keep the information confidential and agree on what use Stein could make of the information in the Draft Lease, prior to making selective disclosure to Stein, is a factor that weighs against a finding that Kraft's selective disclosure to Stein was in the necessary course of business. We agree with Kraft that entering into a confidentiality agreement in connection with making selective disclosure is neither necessary nor a precondition to being able to establish the NCOB exception and that NP 51-201 guidance about entering into such an agreement is non-binding. That said, entering into such an agreement is advisable as a best practice and is certainly potentially relevant to the question of whether the selective disclosure is being made in the necessary course of business.

[318] We also conclude that Kraft was not seeking any necessary or otherwise unavailable commercial real estate experience for WeedMD.

[319] The generic and barebones instructions that Kraft provided to Stein were not specific to a review of only the Draft Lease and also not specific to commercial real estate expertise. Indeed Stein's own evidence was that when he received the October Email he did not have any context beyond Kraft's cover note.

[320] Furthermore, well before Kraft's October Email to Stein, WeedMD entered into multiple term sheets with Perfect Pick setting out the material terms of the Perfect Pick Transaction, and by the time of Kraft's email to Stein agreements described as "final" had been prepared with the assistance of WeedMD's external counsel.

[321] At no point did Kraft suggest or advise WeedMD management to retain an external consultant to provide commercial real estate advice, nor did Kraft take steps to enquire or ensure that WeedMD's external counsel team had counsel sufficiently experienced in commercial real estate matters.

[322] Given these circumstances, we find Kraft's assertion that he did not identify that WeedMD had a need to retain someone to provide commercial real estate advice until around the time he sent the draft documents to Stein to be neither convincing or compelling.

[323] We have considered Kraft's submission that Merker confirmed in cross-examination that, in his view, the selective disclosure made by Kraft to Stein was "necessary" because the Perfect Pick Transaction would not be approved unless and until Kraft was satisfied that the company was negotiating the best terms possible. In this regard, we note the following exchange between Kraft's counsel and Merker during Merker's cross-examination:

> Q. And I take it that in terms of his activities on behalf of WeedMD, you have no reason to doubt that Mr. Kraft acted in good faith in seeking Mr. Stein's comments on those documents, correct?
>
> A. That would be correct.
>
> Q. And if Mr. Kraft were to testify that he thought that that was important and necessary that he get those comments on those lease documents, that's not something you would deny, correct?
>
> A. Correct.
>
> Q. And from the perspective of the company, it was important and necessary that Mr. Kraft be comfortable with the transaction so it be approved, correct?
>
> A. Correct.

[324] While we find that Merker's evidence cited above confirms the practical importance to having Kraft supportive of the Perfect Pick Transaction, we do not agree that this testimony amounts to Merker expressing a view that Kraft's selective disclosure to Stein was in the necessary course of WeedMD's business.

[325] The proposition agreed to by Merker—namely that "it was important and necessary that Kraft be comfortable with the transaction"—is very high level and general. It is not evidence of Merker's agreement that Kraft's selective disclosure was in the necessary course of WeedMD's business. That proposition was not put to Merker. The thrust of Kraft's submission—namely that anything Kraft might characterize after the fact as important to him to allow him to get personally comfortable with the transaction equates to something in the necessary course of WeedMD's business—is also a construct that we do not accept.

[326] In any event, although the subjective perspective of relevant persons is a matter to be taken into account in considering whether the NCOB exception has been established, given all of the evidence and considerations noted above, Merker's evidence does not displace our conclusion that the selective disclosure to Stein was not made in the necessary course of WeedMD's business.

[327] In arriving at our conclusion, there are certain arguments advanced by Staff that we have not accepted or that we consider not relevant to our analysis. These include: (i) Staff's submission that Stein did not have commercial real estate expertise; and (ii) Staff's submission that Stein's comments were not all adopted and in any event did not require particular expertise. We also do not consider Kraft's submission that that there is no evidence that Kraft acted in bad faith to have any bearing on the question of whether the NCOB exception is available to him in the circumstances.

[328] Establishing that one has turned one's mind in advance to the question of whether the purpose of making selective disclosure is in the necessary course of business is not a precondition to availing oneself of the NCOB exception. However, we note that evidence that one has considered the issues up front may certainly be helpful to establishing after the fact the purpose for which the selective disclosure was made, and also establishing that such purpose was in the necessary course of business.

[329] Without intending to provide an exhaustive list, such evidence might include evidence of discussions at the board or management level considering the advisability or need for the selective disclosure, documents (for example retainer agreements, minutes, memos or other communications) specifying the purpose for making selective disclosure, and confidentiality agreements with or confidentiality instructions to the intended recipient of the selective disclosure or instructions to the intended recipient of the selective disclosure. No evidence of this nature was present in this case.

4.4.4.d Conclusion about the NCOB exception

[330] For the foregoing reasons, we find that the NCOB exception is not available to Kraft to excuse his selective disclosure to Stein in breach of s. 76(2) of the Act.

4.5 Was Stein in a special relationship with WeedMD?

[331] The definition of special relationship in s. 76(5) of the Act, referenced above, includes:

> "(e) a person or company that learns of a material fact or material change with respect to an issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship"

[332] We have concluded above that Kraft was in a special relationship with WeedMD during the Material Time by virtue of being the Chairman and a director of WeedMD.

[333] We note that Stein confirmed during cross-examination that when he received the October Email (including the Draft Lease) from Kraft, he knew that Kraft was the Chairman of WeedMD's board. Consequently, pursuant to the above definition, Stein was also a person in a special relationship with WeedMD.

[334] Accordingly, we find that Stein was also in a special relationship with WeedMD at the time he received the October Email from Kraft and also when he purchased WeedMD shares on November 22, 2017.

4.6 Conclusions regarding allegations of illegal tipping and insider trading

[335] For the foregoing reasons, we find that:

a. by providing Stein with draft documents for the Perfect Pick Transaction on October 23, 2017, Kraft provided Stein with MNPI on one occasion in breach of s. 76(2) of the Act; and

b. Stein traded shares of WeedMD while in possession of MNPI in breach of s. 76(1) of the Act.

4.7 Alleged conduct contrary to the public interest

[336] Staff alleges that, in addition to breaching Ontario securities law, Kraft's and Stein's conduct was contrary to the public interest. Staff did not provide any particulars in the Statement of Allegations or in written and oral submissions to support this allegation. The Tribunal has previously determined that where it has found a respondent's conduct to have breached Ontario securities law, it will not also conclude that the conduct was contrary to the public interest without there being additional facts and submissions to support that allegation.[73] In the absence of any evidence and submissions by Staff

[73] See *Solar Income Fund* at paras 70-76; *Kitmitto* at paras 174-180

to support this allegation we decline to conclude that either Kraft or Stein engaged in conduct contrary to the public intertest in addition to breaching Ontario securities law.

5. KRAFT'S CONDITIONAL CONSTITUTIONAL CHALLENGE

5.1 Introduction

[337] Kraft served on the Attorney General of Canada and on the Attorney General of Ontario, and filed with the Tribunal, a Notice of Constitutional Question dated July 29, 2022, challenging the constitutionality of s.76(2) of the Act.

[338] The Notice of Constitutional Question asserts that, in the event the NCOB exception is to be established on an objective basis, rather than a subjective/objective basis, Kraft's rights to engage in free expression and free association under ss. 2(b) and 2(d) of the *Charter* are infringed. In essence, Kraft's position is that if we determine (as we have above) that s. 76(2) prescribes an objective test for the NCOB exception, then there is an infringement of Kraft's *Charter* rights.

[339] Although duly served, neither the Attorney General of Canada nor the Attorney General of Ontario appeared, participated in the hearing before us or took any position in connection with Kraft's conditional constitutional argument.

[340] Although Kraft's Notice of Constitutional Question was brought in reference to both ss. 2(b) and 2(d) of the *Charter*, in oral submissions Kraft's counsel advised that we need only consider s. 2(b) (freedom of expression). All of his oral submissions were framed in this context.

5.2 The conditional nature of Kraft's constitutional challenge and whether it need be decided

[341] Staff submits that the *Charter* argument raised by Kraft should be decided by us only if it has the potential to impact the case that is alleged against Kraft. Staff further submits that a consideration of Kraft's *Charter* argument should arise for determination only if we have already first decided that:

a. the NCOB exception is established on an objective standard, and not a subjective/objective standard;

b. Kraft made selective disclosure of MNPI to Stein and has failed to establish that the NCOB exception justifies the selective disclosure; and

c. Kraft subjectively believed that the selective disclosure was made in the necessary course of WeedMD's business and that subjective belief was objectively reasonable—that is, Kraft has established that he would meet the NCOB exception on the alternative "subjective/objective" standard he advocates.

[342] We understand the essence of Staff's submission to be based on the limitations of our authority and jurisdiction as an administrative tribunal to grant a remedy under the *Charter.* The Tribunal, unlike a superior court, does not have the ability to strike a statutory provision, provide an alternative interpretation of the statute that would be constitutionally acceptable, or read down, read in or read up a particular statutory provision. As such, Staff submits, we therefore should not consider the constitutionality of a particular statutory provision "in the air".

[343] Staff submits that because the Tribunal's authority is limited to examining the operation of a statute if it determines that *in a particular case* the statute would operate to have the effect of violating a *Charter* right, we could only grant Kraft a constitutional remedy under s. 24(1) of the *Charter* (in this case, by declining to enforce s. 76(2) of the Act against him) if we are satisfied both that:

a. an objective test for the NCOB exception infringes s. 2(b) of the *Charter* and cannot be upheld under s. 1 of the *Charter*, and

b. Kraft actually meets the alternative subjective/objective test for establishing the NCOB exception that Kraft says would be upheld under s. 1 of the *Charter*.

[344] Staff further submits that if there is no potential for a constitutional remedy in the circumstances, then there is no need for us to engage in the relatively complicated process of assessing the constitutionality of s. 76(2). Staff submits that this argues in favour of us first deciding the issue of whether Kraft has established that he would meet the NCOB exception on the alternative "subjective/objective" standard that he argues for, before considering the *Charter* issues, as our determination of this issue may obviate entirely the need to consider the *Charter* issues.

[345] While Kraft agrees with Staff that the Tribunal is limited in its authority to grant a remedy under the *Charter* and that the only remedy for a finding of a *Charter* violation in this case would be for this panel to simply not enforce s. 76(2) of the Act as against Kraft, he submits that such remedy is not conditioned on a factual finding that Kraft actually meets the alternative subjective/objective test for establishing the NCOB exception that Kraft says would be upheld under s. 1 of the *Charter*.

[346] Staff cites only two cases in support of its submissions, *British Columbia (Securities Commission) v Clozza*[74] (***Clozza***) and *Zang v Alberta Securities Comm* (***Zang***).[75] Kraft cites no cases in support of his submission.

[347] While we understand that the *Clozza* decision was cited by Staff as support for the general proposition that a court (or tribunal) should not decide unnecessary constitutional questions particularly where there is an inadequate factual basis or there have not been full submissions, we do not understand *Clozza* to provide support for Staff's more specific submission that a constitutional remedy in this case is contingent on us first finding that Kraft would meet the NCOB exception if it were applied on a subjective/objective basis.

[348] Similarly, we find *Zang* to be of little assistance to us. In *Zang* the Alberta Court of King's Bench found that it was premature for Zang to bring a constitutional challenge regarding the actions of the Alberta Securities Commission where the challenge was hypothetical and speculative and the Alberta Securities Commission had not yet found him to be in contravention of the *Securities Act* (Alberta).

[349] In the circumstances, although we do find Staff's submissions to be logical and compelling, given the lack of jurisprudence offered in support, we have opted to decide the constitutional question.

5.3 The *Charter* analysis

[350] Kraft submits that in prescribing an objective test (as opposed to a subjective/objective test) for the NCOB exception, s. 76(2) of the Act infringes his s.2(b) freedom of expression under the *Charter* and that the limitation cannot be justified under s. 1 of the *Charter*.

[351] Staff submits that s. 76(2), considered along with the anti-tipping provisions of the Act and the operation of Part XVIII (Continuous Disclosure) of the Act as a whole, is not inconsistent with s. 2(b) of the *Charter* and does not infringe s. 2(b) of the *Charter.* To the extent that we find that s. 76(2) infringes the s. 2(b) freedom, Staff submits that the infringement is justified under s. 1 of the *Charter*.

5.3.1 Does s. 76(2) of the Act infringe s. 2(b) of the *Charter?*

[352] Kraft submits that the expression at issue here was a communication by him to Stein made for the ostensible purpose of advancing WeedMD's business and that it clearly meets the established test for determining whether an expressive activity is protected under s. 2(b) of the *Charter*. The test requires the following three questions to be answered:

a. Does the activity in question have expressive content, thereby bringing it *prima facie*, within the scope of s. 2(b) protection?

b. Is the activity excluded from that protection as a result of either the location or the method of expression?

c. If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? [76]

[353] Kraft submits that the scope of protected expression should be given a broad and generous interpretation. He submits that there is nothing about the location or method of Kraft's expression that should take it outside protected expression. He further submits that there is no doubt that both the purpose and effect of s. 76(2) are to curtail the right of a person in a special relationship with an issuer from engaging in expressive activity and that this is clear from the language of s. 76(2) itself that imposes an explicit prohibition on the communication: "no person shall inform".

[354] Staff submits that although the language of s. 76(2), examined in isolation, might suggest that it amounts to a facial violation of freedom of expression, the suggestion of a facial violation becomes less clear if s. 76(2) is considered as part of the general scheme under Part XVIII of the Act which is directed at ensuring the sharing of an issuer's material information in a timely and even-handed way, thereby fostering fair and efficient capital markets, as well as confidence in the integrity of the capital markets.

[355] Staff argues that because s. 76(2) does not impose a general prohibition on communicating information, but instead only prohibits selective disclosure of material information, and also because nothing would have prevented Kraft (or any other insider) from any form of expression or communication, provided that the material information was contemporaneously generally disclosed to the market, s. 76(2) does not infringe Kraft's or anyone's freedom of expression. Staff referred us to various passages in the Québec Court of Appeal's decision in *Procureur général du Québec c. Gallant* (***Gallant***)[77] as ostensibly offering some comfort in justification of Staff's submission.

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74 2017 BCSC 419 at paras 118-122
75 2019 CarswellAlta 2233 (QB) at paras 71-74
76 *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 38
77 2021 QCCA 1701, 2021 CarswellQue 22970 at paras 262-263 and 265

[356] Having considered Kraft's and Staff's submissions, we are satisfied that s. 76(2) of the Act, including the NCOB exception within s.76(2), infringes s. 2(b) of the *Charter* because its purpose is to control attempts to convey a message by directly restricting the content of expression.

[357] We did not find Staff's submissions based on *Gallant* to be persuasive to this issue because the passages to which we were referred were focussed principally on the burden of establishing the *effect* of restricting free expression in circumstances where the purpose of the government action was *not* to control or restrict attempts to convey meaning—a different situation altogether.

[358] Furthermore, we do not accept Staff's submission that s. 76(2) does not infringe Kraft's freedom of expression because there is no prohibition in the Act against Kraft disclosing WeedMD's material information once that material information has been generally disclosed. While that argument may be superficially appealing – it does not address the fact that s. 76(2) purports to control and restrict the timing and the conditions under which a message can be conveyed. We conclude that this amounts to a purpose of controlling attempts to convey a message and restricting the content of expression.

5.3.2 Is the infringement of s. 2(b) justified under s. 1 of the *Charter?*

[359] Legislation infringing a fundamental constitutional right or freedom may be found to be valid and enforceable as a reasonable limit under s. 1 of the *Charter* if the limit is prescribed by law and "can be demonstrably justified in a free and democratic society."[78]

[360] The structure of the s. 1 analysis is well settled. In order to be justified under s. 1 of the *Charter*, the limitation must:

a. be prescribed by law;

b. address a pressing and substantial governmental objective; and

c. be proportional to that objective.[79]

[361] The proportionality test itself comprises three elements:

a. the limitation must be rationally connected to the legislative objective;

b. the limitation must infringe the subject *Charter* right no more than reasonably necessary (also referred to as "minimal impairment"); and

c. the salutary effects of the legislation must not exceed the deleterious effects on the protected right.[80]

5.3.2.a The nature of the expression and nature, scope and context of the infringement

[362] Staff submits that the nature of the expression at issue should be taken into account in the s. 1 analysis and also submits that it is important to clearly delineate the nature, scope and context of the infringement. We agree. We also note that not all expression is equally worthy of protection, nor are all infringements of free expression equally serious.[81]

[363] Staff submits that the speech in issue is best characterized as "economic speech" (as distinguished from "commercial speech" that typically references advertising).

[364] Staff submits that the economic speech in issue here is at the outer edges of any constitutional protection as it does not involve artistic, political or religious expression and falls short of advancing the principles and values that underlie freedom of expression, namely the pursuit of truth, participation in the community or individual self-fulfillment and human flourishing.[82] Staff also contends that the infringement itself is not serious, given both the nature of the expression involved and the fact that the infringement on expression is narrowly limited.

[365] Kraft takes issue with Staff's submission that the type of expression in issue here is deserving of limited constitutional protection. Kraft argues that the expression in issue here is required to advance another important objective, namely the objective of ensuring that corporations are able to be governed effectively by boards of directors in a way that advances the interests of shareholders and all other stakeholders and in a way that fosters capital formation, which is a recognized purpose of the Act.

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78 *Charter*, s. 1

79 *Carter v Canada (Attorney General)*, 2015 SCC 5 (***Carter***) at paras 94-96; *R v N.S.*, 2022 ONCA 160 (***N.S.***) at para 159

80 *Carter* at paras 94-96; *N.S.* at para 159

81 *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 (SCC) (***Rocket***) at paras 30-32

82 *Rocket* at paras 30-32; *Gallant* at para 163 citing *Irwin Toy Ltd. v Québec (Attorney General*), [1989] 1 SCR 927 at 976-977 and citing *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 187

[366] We agree with Staff that the infringement involves economic speech that is at the outer edges of constitutional protection and also that the infringement in question is not serious. The prohibition on expression is only partial and the impacted expression involves the selective disclosure to a single or few persons of only a narrow category of business information (MNPI) in circumstances where such disclosure is not in the necessary course of business.

[367] In the circumstances, we accept that the infringement on expression under s. 76(2) of the Act is easier to justify under s. 1 than other infringements of s. 2(b). In our view, Kraft's submissions about the links between the expression in issue and corporate governance and capital formation are more appropriately considered below under the second and third elements of the proportionality test.

5.3.2.b Prescribed by law

[368] Both Kraft and Staff agree that the limitation on freedom of expression in s. 76(2) is prescribed by law.[83] We agree. In short, we agree that objective necessity in the NCOB exception provides an intelligible standard and thus is not vague.

5.3.2.c Pressing and substantial governmental objective

[369] Both Kraft and Staff agree that the limitation on freedom of expression in s. 76(2) addresses a pressing and substantial governmental objective. However, they characterize the governmental objective slightly differently.

[370] Staff submits that the objectives of s. 76(2) have to be considered within the overall scheme of Part XVIII of the Act and its goal of fostering confidence in Ontario's capital markets. Staff articulates the pressing and substantial objectives of s. 76(2) to be the protection of the investing public and the preservation of the integrity of Ontario's capital markets, along with the fostering of confidence in Ontario's capital markets.

[371] In support, Staff cites the Ontario Court of Appeal's decision in *Finkelstein v Ontario Securities Commission* that confirms:

a. the important premise of securities law that all investors and prospective investors ought to be given access to material information about securities so that they can make informed investment decisions;

b. the risk that insider trading will undermine investor confidence in the capital markets; and

c. the principle of Canadian securities regulation that markets operate efficiently on the basis of timely and full disclosure of all material information and that prohibitions against both insider trading and tipping support this principle.[84]

[372] Kraft describes the pressing and substantial legislative objective to be the prevention of insider trading and tipping and acknowledges that this objective is tied to ensuring public confidence in the capital markets.

[373] We do not find Staff's and Kraft's characterization of the pressing and substantial governmental objective to be at odds, but prefer Staff's articulation as being consistent with our understanding of the legislative goals of s. 76(2) within the overall framework of Part XVIII of the Act. These legislative goals are reflected in the stated purposes of the Act, including providing protection to investors from unfair, improper or fraudulent practices and fostering fair, efficient and competitive markets and confidence in the capital markets.[85]

5.3.2.d Is the limitation proportional to the legislative objective?

5.3.2.d.i Rational connection to legislative objective

[374] Kraft contends that s. 76(2) is arguably not rationally connected to its legislative objective to the extent of its overbreadth. He submits that the provision is overbroad to the extent that it prohibits the selective disclosure of MNPI in circumstances where such disclosure is objectively unnecessary despite the fact that the person making the selective disclosure honestly and reasonably believed that the selective disclosure was necessary to advance the issuer's business interests. He argues that there is no rational connection between maintaining investor confidence in the integrity and fairness of the capital markets and penalizing corporate insiders who honestly misjudge the necessity of selective disclosure.

[375] We note that Kraft ultimately conceded in oral submissions that this overbreadth argument is more appropriately addressed at the minimal impairment stage of the s. 1 analysis. That said, we are swayed by Staff's submission that Kraft's overbreadth argument would have merit only if the objectives of s. 76(2) and Part XVIII of the Act are limited to preventing intentional or morally culpable tipping activity. In our view, the legislative purpose of providing protection to investors, fostering fair, efficient and competitive markets and public confidence through the creation and enforcement

83 We note that Kraft confirmed this in oral submissions.
84 2018 ONCA 61 at paras 23-25
85 Act, ss. 1.1(a) and 1.1(b); *Rosborough* at para 12; *Rankin (Re)*, 2008 ONSEC 6 at para 27-29, citing ***Report of the Attorney General's Committee on Securities Legislation in Ontario***, March 1965, Brief of Studies/Reports and *R v Plastic Engine Technology Corp,* [1994] 4 CCLS 1

of a level informational playing field for all market participants is rationally connected to a prohibition against selective disclosure that is based on an objective standard that does not depend on moral culpability.

[376] We agree that the limitation on freedom of expression in s. 76(2) addresses a pressing and substantial legislative objective and is rationally connected to that objective.

5.3.2.d.ii Minimal Impairment

[377] Kraft and Staff disagree fundamentally on the second element of the proportionality test, namely whether the s. 76(2) limitation infringes the s. 2(b) freedom no more than reasonably necessary, or minimally impairs the s. 2(b) freedom.

[378] The vast majority of their respective constitutional submissions and evidence were focussed on this stage of the analysis. Kraft and Staff each called experts (Waitzer and Halperin, respectively) to provide opinion evidence.

[379] Waitzer expressed the opinion that introducing a precedent where a securities regulator retrospectively determines the objective necessity of selective disclosures between corporate directors and officers and their professional advisors "would risk" a chilling effect on the ability of corporate officers and directors to discharge their duties which requires them to properly inform themselves through consultation with consultants and experts, "could" discourage informed decision making and "could" discourage qualified candidates from agreeing to serve as directors of public issuers.

[380] In response, Halperin expressed the opinion that he does not believe that there are significant practical implications from a corporate governance perspective of a retrospective assessment of objective necessity and that Waitzer overstates the potential chilling effect of that scenario. Halperin pointed out that there are well recognized and longstanding conflicts between corporate and securities law with which corporate directors and their advisors have to deal. Halperin also expressed the view that given the generous regulatory safe harbour within which disclosures in the necessary course of business can be properly made, Waitzer overstates the likelihood that a strict interpretation of or retrospective regulatory assessment of reliance on the NCOB exception could discourage qualified candidates from agreeing to serve as directors of public issuers.

[381] The minimal impairment stage of the s. 1 analysis has been articulated by the Supreme Court of Canada as follows:

> "At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal". The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner". The analysis at this stage is meant to ensure that the deprivation of the *Charter* rights is confined to what is reasonably necessary to achieve the state's object."[86]

[382] Kraft submits that the minimal impairment test is not met in the circumstances. Kraft submits that s. 76(2) does not infringe freedom of expression "as little as possible" and an NCOB exception established on an honest and reasonable belief (subjective/objective standard) would equally achieve the legislative objective.

[383] Kraft further submits that the fact that certain defences to the prohibition against selective disclosure of MNPI are available under the Act demonstrates that it is not necessary to impose a strictly objective standard for the NCOB exception in order to achieve the legislation's purposes. In this regard Kraft points to the available defences under s. 76(4) of the Act and s. 175(5) of the General Regulation in circumstances where the person making the disclosure mistakenly (but honestly and reasonably) believes that the information has been generally disclosed to the market or was already known by the recipient of the information.

[384] Along the same lines, Kraft refers to multiple instances in other legislation where a reasonable and honest belief standard is applied to actions that are permitted if "necessary" and prohibited if "unnecessary". These other instances include:

a. the defence of self-defence under the *Criminal Code*;

b. the authority of peace officers to use necessary force under the *Criminal Code*;

c. the common law power to conduct warrantless searches; and

d. various provisions in a wide range of other Ontario statutes and regulations.

[385] In addition, Kraft submits that corporate insiders, including directors and officers, responsible for making business decisions cannot effectively conduct the business of the corporation if consultations that they honestly and reasonably believe to be necessary at the time they were undertaken might ultimately be found to be unnecessary in contravention of s. 76(2) of the Act.

[86] *Carter* at para 102

[386] Kraft argues, relying on the opinion evidence of Waitzer, that this will have a chilling effect and corporate insiders including directors and officers will be discouraged from seeking guidance and advice from persons outside the corporation for fear of contravening s. 76(2). In a related argument, Kraft submits that because a determination of whether a disclosure is "necessary" for the issuer's business is a determination that is inherently difficult to make, this also creates an unjustified chilling effect on free expression.

[387] Kraft also contends, relying on the opinion evidence of Waitzer, that an objective NCOB exception under s. 76(2) makes the Act and the Ontario *Business Corporations Act* (**OBCA**) inconsistent and also causes them to operate at cross-purposes. In particular, Kraft argues that an objective test for "necessity" under s. 76(2) is inconsistent with the business judgment rule under the OBCA that calls for the application of a subjective/objective standard to evaluate the conduct of directors and officers.

[388] Kraft takes this argument a step further and also contends that the chilling effect of the objective standard for the NCOB exception under s. 76(2) will discourage a director or officer from seeking out the information or advice that they honestly believe is required and that would be required to demonstrate that their decisions are reasonably informed in order to claim the benefits of the business judgment rule. Kraft also contends, relying on the opinion evidence of Waitzer, that the chilling effect of an objective test could discourage qualified and informed candidates from agreeing to serve as directors of public issuers.

[389] Staff submits that in considering the minimal impairment stage of the s. 1 analysis, we must be mindful that the infringement involves economic speech that, in the circumstances, including the partial restriction placed on a narrow class of speech, is easier to justify.[87] Staff submits that a broader "margin of appreciation" should be accorded to the Legislature in the circumstances. In other words, the Legislature need not be held to a standard of "perfection" at the minimal impairment stage of the analysis.[88]

[390] Staff also submits that the choice to voluntarily participate in the capital markets that are highly regulated, is relevant to our analysis. Although choosing to participate in the capital markets does not require individuals to abandon their *Charter* rights, Staff submits that it is significant that participation in the capital markets is a privilege, and not a right,[89] and market participants voluntarily choose to assume certain obligations, including the obligations to safeguard the MNPI of reporting issuers.

[391] Staff further submits that we have to look no further than the facts of this case for a clear demonstration of why the objective standard for the NCOB exception was chosen by the Legislature. Staff says that the Legislature did so to provide real protection to the market and that the wisdom of that choice is borne out by Kraft's own evidence, which reveals the mindset that the objective standard for the NCOB exception seeks to address:

> Q. I put it to you, Mr. Kraft, that you did not believe it was necessary to seek advice from Mr. Stein in relation to the Perfect Pick Farms deal?
>
> A. You can –with all due respect, sir, you can put anything you want, you're not in my head. No two people think the same way. And **nobody tells me what's necessary, I made my own decisions and I make my own judgments**. So that may be, you know, five years later, easy for you to basically to make assumptions, but if you're not in the transaction and you're not there and you're not accountable to a leadership team, a board, shareholders and yourself, if I don't have the power to decide what I want to do or to make recommendations and to pursue certain initiatives, and you're going to tell me five years later what's necessary and what isn't, that wasn't my understanding of how I can operate and what I can and can't do, so." *[emphasis added]*

[392] Staff submits that the objective standard to establish the NCOB exception is a feature of the legislation intended to ensure that individuals are cautious before they make selective disclosure of MNPI and that the Legislature was deliberate about this for good reason.

[393] Staff also submits that Kraft's submissions and Waitzer's opinions about the alleged chilling effect of the objective standard on the behaviour of corporate insiders, including directors and officers, are overstated. Kraft's and Waitzer's comments about the alleged chilling effect of s. 76(2) are premised on the notion that there is uncertainty and unpredictability in the application of the NCOB exception and that such uncertainty and the related risk of regulatory proceedings may be too much for some persons. Staff submits that we should prefer Halperin's opinions to Waitzer's including his opinion that there is significant authoritative guidance in the form of NP 51-201 to provide comfort.

[394] Having considered the parties' submissions and the evidence, including the opinion evidence of Waitzer and Halperin, we find that it was open to the Legislature, operating within the margin of appreciation available to it under s. 1 of the *Charter*, to select an objective standard for the NCOB exception under s. 76(2) of the Act.

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87 *Rocket* at para 30; *R v Lucas*, [1998] 1 SCR 439 at para 34; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 91

88 *Gallant* at para 267

89 *Erikson v Ontario (Securities Commission)*, (2003), 26 OSCB 1622 (ONSC) at para 55; *Doulis (Re)*, 2014 ONSEC 31 at para 180

[395] We agree with Staff that a broader margin of appreciation is applicable in the circumstances. We do not accept Kraft's submission that an NCOB exception established on an honest and reasonable belief (subjective/objective standard) would equally achieve the legislative objective. We find instead that the facts of this case serve to highlight the importance of impressing caution on corporate insiders.

[396] We prefer Halperin's opinion evidence to that of Waitzer, find it to be more in keeping with common sense, and believe Waitzer's expressed concerns about a potential chilling effect of an objective test of necessity to be overstated.

[397] As we note above, NP 51-201 offers helpful guidance to market participants regarding the availability of the NCOB exception and there are numerous reasonable steps available to corporate insiders to position themselves to establish the availability of the NCOB exception. Furthermore, we note that there was no evidence before us that s. 76(2) is actually having or has actually had a chilling effect on corporate insiders' willingness to seek external advice or willingness to serve as directors. Properly construed, s. 76(2) has always provided for the potential of an objective retrospective consideration of the availability of the NCOB exception.

5.3.2.d.iii Proportionality

[398] The requirement that a limit be proportional requires us to examine the nature of the infringement, when balanced against the pressing and substantial objective achieved by s. 76(2) of the Act.

[399] Kraft submits that the deleterious effect of the law (namely, the chilling effect on consultations by directors and officers with outside advisors) is not proportional to the benefits to the legislative objectives achieved through an objective (as opposed to a subjective/objective) NCOB exception.

[400] Given our conclusions above, we find that what is accomplished by s. 76(2) is more than proportional to the minimal intrusion.

5.4 Conclusion regarding Kraft's conditional *Charter* challenge

[401] For the foregoing reasons, we dismiss Kraft's conditional *Charter* challenge. Although we find that s. 76(2) of the Act, including the NCOB exception within s.76(2), infringes s. 2(b) of the *Charter*, we have concluded that such infringement is justified under s. 1 of the *Charter*.

6. CONCLUSION

[402] For the above reasons, we conclude that:

a. By providing Stein with draft documents for the Perfect Pick Transaction on October 23, 2017, Kraft provided Stein with MNPI contrary to s.76(2) of the Act; and

b. Stein traded shares of WeedMD while in possession of MNPI contrary to s.76(1) of the Act.

[403] In dismissing Kraft's conditional constitutional argument, we also conclude that while s. 76(2) of the Act infringes s. 2(b) of the *Charter*, that infringement is justified under s. 1 of the *Charter*.

[404] The parties shall contact the Registrar by 4:30 p.m. on November 3, 2023, to arrange an attendance in respect of a hearing regarding sanctions and costs. The attendance is to take place on a date that is mutually convenient, that is fixed by the Governance & Tribunal Secretariat, and that is no later than December 1, 2023.

[405] If the parties are unable to present a mutually convenient date to the Registrar, then each party may submit to the Registrar, for consideration by a panel of the Tribunal, one-page written submissions regarding a date for the attendance. Any such submissions shall be submitted by 4:30 p.m. on November 3, 2023.

Dated at Toronto this 20th day of October, 2023

"Andrea Burke"

"M. Cecilia Williams"

"Sandra Blake"

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B. Ontario Securities Commission

B.1
Notices

B.1.1 OSC Staff Notice 11-737 (Revised) – Securities Advisory Committee – Vacancies

OSC STAFF NOTICE 11-737 (Revised)

SECURITIES ADVISORY COMMITTEE – VACANCIES

The Securities Advisory Committee ("SAC") is a committee of industry experts established by the Commission to advise it and its staff on a variety of matters including policy initiatives and capital markets trends. The Commission seeks four prospective candidates to serve on SAC beginning in January 2024 for a three-year term ending December 2026. There is typically a one-third turnover of SAC membership each calendar year.

SAC members generally meet every month and provide advice on a variety of matters, including legal and regulatory initiatives, as well as market implications of Commission rules, policies, operations, and administration. SAC members are also invited to provide their perspectives on emerging trends in the marketplace. Those who make a commitment to serve on SAC must be in a position to devote the time necessary to attend meetings and be an active participant at those meetings.

SAC members are expected to have excellent technical abilities and a strong interest in the development of securities regulatory policy. This includes having in-depth knowledge of the legislation, rules and policies for which the Commission is responsible, as well as a significant practice and experience in the securities field. Expertise in an area of special interest to the Commission at the time of an appointment will also be a factor in selection. Diversification of membership on SAC continues to be a Commission priority in order to promote a broad perspective on the development of securities regulatory policy. In addition to candidates engaged in private practice, we continue to welcome the submission of applications from in-house counsel practicing in the securities area at an exchange, institutional investor or dealer.

The OSC encourages applications from all qualified candidates who represent the full diversity of communities across Ontario.

Qualified individuals who have the support of their firms/employers for the commitment required to effectively participate on SAC, are invited to apply in writing for membership on SAC to the General Counsel's Office of the Commission, indicating areas of practice and relevant experience. Prospective candidates are encouraged to review OSC Policy 11-601 for further information about SAC.

SAC members whose terms continue past December 2023 are:

- David A. Seville — Torys LLP
- Jeff Hershenfield — Stikeman Elliott LLP
- Nancy Mehrad — Registrant Law Professional Corporation
- Manoj Pundit — Borden Ladner Gervais LLP
- Heidi Reinhart — Norton Rose Fulbright LLP
- Sandra Zhao — McMillan LLP
- Robert Seager — Voorheis & Co. LLP
- Rosalind Hunter — Osler, Hoskin & Harcourt LLP

The Commission wishes to thank the following members whose terms will expire at the end of December 2023:

- Bradley Freelan — Fasken LLP
- Chris Sunstrum — Goodmans LLP
- Chris Birkett — Toronto Stock Exchange
- Margaret Chow — TD Bank Group

The Commission is very grateful to outgoing members for their able assistance and valuable input.

Applications for SAC membership will be considered if received on or before **November 30, 2023**. Applications should be submitted by email to:

Naizam Kanji
General Counsel
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario, M5H 3S8
Email: nkanji@osc.gov.on.ca

The OSC is committed to diversity, and it is our priority to provide an inclusive workplace, including on our advisory committees, where all individuals feel safe, valued, respected, and empowered.

We are committed to ensuring an inclusive, barrier-free, accessible recruitment process so that all individuals with disabilities, who are interested in pursuing and who apply for employment with the OSC, are made aware of the accommodation measures available to them throughout the recruitment and hiring process.

If you require an accommodation, please contact Naizam Kanji and we will work with you to meet your needs. For further information, please refer to **accessibility at the OSC**.

The OSC is a proud partner with the following organizations: ***BlackNorth Initiative***, ***Canadian Centre for Diversity and Inclusion***, and ***Pride at Work Canada***, and is committed to our Accessibility and Reconciliation Action Plans.

B.2
Orders

B.2.1 EasTower Wireless Inc.

Headnote

National Policy 11-207 Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions – Section 144 of the Securities Act (Ontario) – application for a partial revocation of a cease trade order – issuer cease traded due to failure to file audited annual financial statements – issuer has applied for a partial revocation of the cease trade order to permit the issuer to proceed with a private placement under prospectus exemptions – issuer will use proceeds from private placement to prepare and file continuous disclosure documents and pay related fees – partial revocation granted subject to conditions.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 144.

Citation: 2023 BCSECCOM 410

PARTIAL REVOCATION ORDER

EASTOWER WIRELESS INC.

UNDER THE SECURITIES LEGISLATION OF
BRITISH COLUMBIA
AND
ONTARIO
(**the Legislation**)

Background

1 EasTower Wireless Inc. (the Issuer) is subject to a failure-to-file cease trade order (the FFCTO) issued by the regulator or securities regulatory authority in each of British Columbia (the Principal Regulator) and Ontario (each a Decision Maker) respectively on May 8, 2023.

2 The Issuer has applied to each of the Decision Makers for a partial revocation order of the FFCTO.

3 This order is the order of the Principal Regulator and evidences the decision of the Decision Maker in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* or in National Policy 11-207 *Failure-to-File Cease Trade Orders and Revocations in Multiple Jurisdictions* have the same meaning if used in this order, unless otherwise defined.

Representations

4 This decision is based on the following facts represented by the Issuer:

(a) The Issuer was incorporated under the *Canada Business Corporations Act* (CBCA) on November 30, 2016. On March 11, 2022, the Issuer completed its qualifying transaction (the Qualifying Transaction) pursuant to the policies of the TSX Venture Exchange (the TSXV), resulting in a reverse takeover of the Issuer by EasTower Group Inc., a corporation incorporated in the State of Florida. In connection with the Qualifying Transaction, the Issuer continued from being a corporation governed by the CBCA to the *Business Corporations Act* (British Columbia). On March 29, 2022, the Issuer's common shares (the Common Shares) commenced trading on the TSXV under the symbol "ESTW", and as a result of ceasing business operations, as of April 28, 2023, the Issuer's Common Shares were transferred to the NEX Board of the TSXV and the Issuer's trading symbol changed from "ESTW" to "ESTW.H". The Common Shares are also quoted on the OTCQX International Exchange under the symbol "ETWLF". The Issuer's securities are not listed or quoted on any other exchange or marketplace in Canada or elsewhere.

(b) The Issuer's head office is located in Boynton Beach, Florida.

(c) The Issuer is a reporting issuer in each of the provinces of British Columbia, Alberta, and Ontario.

(d) The authorized capital of the Issuer consists of an unlimited number of Common Shares, of which 104,754,309 Common Shares are issued and outstanding. In addition, the Issuer has warrants outstanding which are exercisable into 15,810,422 Common Shares of the Issuer, and stock options which are exercisable into 1,925,000 Common Shares of the Issuer.

(e) The Issuer does not currently hold any assets of value and is not carrying on any active business.

(f) The FFCTO was issued by the Decision Makers due to the failure of the Issuer to file its audited annual financial statements, annual management's discussion and analysis, and the certification of the annual filing for the year ended December 31, 2022 (collectively, the Unfiled Documents).

(g) The Issuer's failure to file the Unfiled Documents was a result of financial distress, namely, insufficient funds to pay the auditors to audit the financial statements for the year ended December 31, 2022.

(h) Other than the failure to file the Unfiled Documents, and the Issuer's interim financial statements, interim management's discussion and analysis, and certifications of the interim filing for the three months ended March 31, 2023, the Issuer is not in default of any of the requirements of the Legislation. The Issuer's SEDAR+ and SEDI profiles are up to date.

(i) The Issuer is seeking a partial revocation of the FFCTO in order to complete a debt financing of $60,000 (the Proposed Financing) in the province of Ontario through the issuance of on demand unsecured promissory notes accruing interest at 8.5% per annum. The Issuer has ceased operations and has no available cash and has historically relied upon debt and equity financings to fund its expenditures. The purpose of the Proposed Financing is to raise funds to prepare and file all outstanding financial statements and continuous disclosure records, pay for certain accounts payable and ongoing general and administrative expenses, and obtain sufficient working capital to ensure the continuity of the Issuer during the period that the FFCTO remains in effect, in each case until the Issuer is in a position to raise capital from other sources upon the issuance of a full revocation order in respect of the FFCTO.

(j) It is anticipated that the Proposed Financing will be conducted on a prospectus exempt basis to one or more investors who are accredited investors (as defined in National Instrument 45-106 *Prospectus Exemptions*).

(k) The Issuer intends to use the proceeds of the Proposed Financing to allow the Issuer to accomplish the items as follows:

Description	**Estimated Amount**
Audit, legal fees and other professional fees related to the preparation and completion of the Unfiled Documents	$35,000
Legal, transfer agent and TSXV fees related to the Proposed Financing	$2,250
Filing fees and penalties to securities regulators	$12,750
Unallocated working capital	$10,000
Total	**$60,000**

(l) The Issuer reasonably believes that the proceeds from the Proposed Financing will be sufficient to bring its continuous disclosure obligations up to date, pay all related outstanding fees, and provide it with sufficient working capital to continue its business.

(m) The Proposed Financing would involve a trade of securities of the Issuer and acts in furtherance of trades in securities of the Issuer, and as such, neither can be completed without a partial revocation of the FFCTO.

(n) Within a reasonable time following the completion of the Proposed Financing, the Issuer intends to apply for and obtain a full revocation of the FFCTO.

(o) While the Issuer intends to commence a process of identifying and evaluating businesses or assets with a view of completion a Change of Business or Reverse Takeover (as such terms are defined by the TSXV), no such agreement or understanding in respect of a Change of Business or Reverse Takeover has been identified or consummated.

(p) Since the issuance of the FFCTO, there have been no material changes in the business, operations or affairs of the Issuer which have not been disclosed by news release and/or material change report and filed on the Issuer's SEDAR+ profile.

(q) Upon issuance of a Partial Revocation Order, the Issuer will issue a press release announcing the Partial Revocation Order and the intention to complete the Proposed Financing. Upon completion of the Proposed Financing, the Issuer will issue a press release and file a material change report. As other material events transpire, the Issuer will issue appropriate press releases and material change reports as applicable.

Order

5 Each of the Decision Makers is satisfied that a partial revocation order of the FFCTO meets the test set out in the Legislation for the Decision Maker to make the decision.

6 The decision of the Decision Makers under the Legislation is that the FFCTO is partially revoked as it applies to the Issuer solely to permit the Proposed Financing, provided that

(a) prior to completion of the Proposed Financing, the Issuer will

(i) provide each investor in the Proposed Financing a copy of the FFCTO and a copy of this Partial Revocation Order; and

(ii) obtain a signed and dated acknowledgement from each investor in the Proposed Financing which clearly states that all of the Issuer's securities will remain subject to the FFCTO until such orders are revoked and that the issuance of the partial revocation order does not guarantee the issuance of a full revocation in the future; and

(b) the Issuer undertakes to make available a copy of the written acknowledgement to staff of the Decision Makers on request.

7 August 25, 2023

"Michael Moretto"
CPA, CA, CPA (Illinois)
Deputy Director, Corporate Disclosure

B.2.2 Home Capital Group Inc.

Headnote

National Policy 11-206 Process for Cease to be a Reporting Issuer Applications – The issuer ceased to be a reporting issuer under securities legislation.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10)(a)(ii).

October 19, 2023

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR CEASE TO BE
A REPORTING ISSUER APPLICATIONS

AND

IN THE MATTER OF
HOME CAPITAL GROUP INC.
(the Filer)

ORDER

Background

The principal regulator in the Jurisdiction has received an application from the Filer for an order under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) that the Filer has ceased to be a reporting issuer in all jurisdictions of Canada in which it is a reporting issuer (the **Order Sought**).

Under the Process for Cease to be a Reporting Issuer Applications (for a passport application):

1. the Ontario Securities Commission is the principal regulator for this application, and

2. the Filer has provided notice that subsection 4C.5(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in all provinces and territories of Canada.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this order, unless otherwise defined.

Representations

This order is based on the following facts represented by the Filer:

1. the Filer is not an OTC reporting issuer under Multilateral Instrument 51-105 *Issuers Quoted in the U.S. Over-the-Counter Markets*;

2. the outstanding securities of the Filer, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

3. no securities of the Filer, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

4. the Filer is applying for an order that the Filer has ceased to be a reporting issuer in all of the jurisdictions of Canada in which it is a reporting issuer; and

5. the Filer is not in default of securities legislation in any jurisdiction.

Order

The principal regulator is satisfied that the order meets the test set out in the Legislation for the principal regulator to make the order.

The decision of the principal regulator under the Legislation is that the Order Sought is granted.

"Lina Creta"
Manager, Corporate Finance
Ontario Securities Commission

OSC File #: 2023/0407

B.2.3 Copper Mountain Mining ULC

Headnote

Multilateral Instrument 11-102 Passport System – National Policy 11-206 Process for Cease to be a Reporting Issuer Applications – Securities Act, s. 88 – Cease to be a reporting issuer in BC – The issuer's securities are traded only on a market or exchange outside of Canada – The only publicly held securities of the issuer are debt securities traded on a foreign exchange; the issuer is not able to accurately determine beneficial ownership of the debt securities; the debt securities were not marketed to Canadians; the filer provided alternative evidence to support that Canadian residents hold a de minimis number of the filer's securities and represent a de minimis number of the total number of debt holders; the issuer has no present intention of conducting a public offering of its securities to Canadian residents; the issuer is subject to a financial reporting requirement under the constating document of the securities.

Applicable Legislative Provisions

Securities Act, R.S.B.C. 1996, c. 418, s. 88.

Citation: 2023 BCSECCOM 486

October 11, 2023

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
BRITISH COLUMBIA
AND
ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR CEASE TO BE
A REPORTING ISSUER APPLICATIONS

AND

IN THE MATTER OF
COPPER MOUNTAIN MINING ULC
(the Filer)

ORDER

Background

¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer for an order under the securities legislation of the Jurisdictions (the Legislation) that the Filer has ceased to be a reporting issuer in all jurisdictions of Canada in which it is a reporting issuer (the Order Sought).

Under the Process for Cease to be a Reporting Issuer Applications (for a dual application):

(a) British Columbia is the principal regulator for this application;

(b) the Filer has provided notice that subsection 4C.5(1) of Multilateral Instrument 11-102 -*Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Northwest Territories, Yukon and Nunavut; and

(c) this order is the order of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

¶ 2 Terms defined in National Instrument 14-101 – *Definitions* have the same meaning if used in this decision, unless otherwise defined.

Representations

¶ 3 This decision is based on the following facts represented by the Filer:

1. the Filer was incorporated under, and is governed by, the *Business Corporations Act* (British Columbia);

2. the Filer's registered office and head office are located at 1600 - 925 West Georgia Street Vancouver, BC V6C 3L2;

3. the Filer is a reporting issuer under the laws of each of the Jurisdictions;

4. on June 20, 2023, Hudbay Minerals Inc. (Hudbay) completed a previously announced acquisition of all of the issued and outstanding common shares of the Filer (the Common Shares) pursuant to an arrangement agreement between Hudbay and the Filer and by way of a court approved plan of arrangement under the *Business Corporations Act* (British Columbia) (the Arrangement);

5. pursuant to the Arrangement, except the Common Shares and the Nordic Bonds (as defined below), all other securities of the Filer were either settled or cancelled;

6. the Common Shares were de-listed from the Toronto Stock Exchange (TSX) on June 21, 2023;

7. the trading of Filer's CHESS Depositary Instruments on the Australian Securities Exchange was suspended on June 15, 2023 and the Filer's CHESS Depositary Instruments were cancelled on June 20, 2023;

8. Hudbay is a reporting issuer in all jurisdictions of Canada, and its common shares are listed for trading on the TSX and the New York Stock Exchange;

9. the Filer issued US$250 million of senior secured bonds (the Nordic Bonds) pursuant to bond terms dated April 8, 2021, as amended and restated on December 8, 2022 (the Bond Terms);

10. as of the date hereof, approximately US$59 million of Nordic Bonds remain outstanding;

11. the Nordic Bonds trade on the Nordic Alternative Bonds Market, an unregulated market based in Norway;

12. none of the Nordic Bonds have ever been listed or traded on an exchange or marketplace in Canada;

13. the Nordic Bonds do not constitute voting or equity securities in the capital of the Filer, and are not convertible into any securities of the Filer;

14. the Nordic Bonds were never marketed in Canada, and to the best of the Filer's knowledge, the Nordic Bonds were distributed exclusively to non-Canadian institutional investors;

15. the Filer conducted diligent inquiries with its Norwegian counsel, the bond trustee for the Nordic Bonds and the Nordic Alternative Bonds Market;

16. due to the market structure of the Nordic Alternative Bonds Market, the Filer is not able to make unqualified representations that there are no Canadian beneficial securityholders of the Nordic Bonds;

17. as the Filer's Common Shares were publicly traded on the TSX prior to the Arrangement, the Filer believes that it is unlikely that any Canadian investors would have purchased any Nordic Bonds through a European intermediary with an account at the Nordic Alternative Bonds Market;

18. the Filer engaged Broadridge Investor Communication Solutions, Inc. (Broadridge) to prepare a geographical analysis report (the Broadridge Report) to determine if there are any Canadian beneficial securityholders of the Nordic Bonds as of August 30, 2023 (the Record Date) that are held by Canadian intermediaries;

19. according to the Broadridge Report, as of the Record Date, there are no Canadian beneficial securityholders who hold any Nordic Bonds through a Canadian intermediary;

20. the Bond Terms do not require the Filer to remain a reporting issuer in any jurisdiction of Canada;

21. the Bond Terms provide that the Filer must prepare audited consolidated annual financial statements and unaudited consolidated quarterly financial statements prepared in accordance with Canadian GAAP, and Hudbay will make these financial statements available on a section of its website called "Copper Mountain Financial Statements";

22. the Filer must deliver a compliance certificate in respect of such financial statements duly signed by the Filer's chief executive officer or chief financial officer;

23. the Filer has previously disclosed in certain SEDAR filings that it intended to apply for exemptive relief to cease to be a reporting issuer in all jurisdictions of Canada (the ERA);

24. as of the date hereof, no securityholder of the Filer has contacted the Filer regarding the ERA;

25. the Filer is applying for a decision that the Filer has ceased to be a reporting issuer in all of the jurisdictions of Canada in which it is a reporting issuer;

26. the Filer has no current intention to seek public financing by way of an offering of its securities;

27. the Filer is not in default of securities legislation in any jurisdiction other than its obligations to file on or before August 29, 2023 its interim financial statements and related management's discussion and analysis for the interim period ended June 30, 2023, as required under National Instrument 51-102 *Continuous Disclosure Obligations* and the related certificates as required under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (collectively, the Filings);

28. the requirements to file the Filings did not arise until after completion of the Arrangement;

29. the Filer is not eligible to use the simplified procedure under National Policy 11-206 *Process for Cease to be a Reporting Issuer Applications* (NP 11-206) as it is in default for failure to file the Filings;

30. the Filer is not eligible to use the modified procedure under NP 11-206, because even though it believes that it is unlikely to have any Canadian beneficial securityholders of its Nordic Bonds, it is not able to make an unqualified representation that it falls under the required beneficial securityholder threshold due to the market structure of the Nordic Alternative Bonds Market; and

31. upon granting of the Order Sought, the Filer will cease to be a reporting issuer in all jurisdictions in Canada.

Order

¶ 4 Each of the Decision Makers is satisfied that the order meets the test set out in the Legislation for the Decision Maker to make the order.

The decision of the Decision Makers under the Legislation is that the Order Sought is granted.

"John Hinze"
Director, Corporate Finance
British Columbia Securities Commission

OSC File #: 2023/0288

B.2.4 Home Capital Group Inc. – s. 1(6) of the OBCA

Headnote

Applicant deemed to have ceased to be offering its securities to the public under the Business Corporations Act (Ontario).

Applicable Legislative Provisions

Business Corporations Act, R.S.O. 1990, c. B.16 as am., s. 1(6).

IN THE MATTER OF
THE BUSINESS CORPORATIONS ACT,
R.S.O. 1990, c. B.16,
AS AMENDED
(the "OBCA")

AND

IN THE MATTER OF
HOME CAPITAL GROUP INC.
(the "Filer")

ORDER
(Subsection 1(6) of the OBCA)

UPON the application of the Filer to the Ontario Securities Commission (the "**Commission**") for an order pursuant to subsection 1(6) of the OBCA to be deemed to have ceased to be offering its securities to the public;

AND UPON the Filer representing to the Commission that:

1. The Filer is an "offering corporation" as defined in subsection 1(1) of the OBCA;

2. The head office of the Filer is located at Suite 2300, 145 King Street West, Toronto, Ontario M5H 1J8;

3. The Filer has no intention to seek public financing by way of an offering of securities;

4. On October 19, 2023, the Filer was granted an order (the "**Reporting Issuer Order**") pursuant to subclause 1(10)(a)(ii) of the *Securities Act* (Ontario) that it is not a reporting issuer in Ontario and is not a reporting issuer or equivalent in any other jurisdiction in Canada in accordance with the simplified procedure set out in National Policy 11-206 – *Process for Cease to be a Reporting Issuer Applications*; and

5. The representations set out in the Reporting Issuer Order continue to be true.

AND UPON the Commission being satisfied that to grant this order would not be prejudicial to the public interest;

IT IS HEREBY ORDERED pursuant to subsection 1(6) of the OBCA that the Filer be deemed to have ceased to be offering its securities to the public.

DATED at Toronto on this 20th day of October, 2023.

"Michael Balter"
Manager Corporate Finance
Ontario Securities Commission

OSC File #: 2023/0408

B.2.5 The Canadian Depository for Securities Limited and CDS Clearing and Depository Services Inc. – s. 147

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5,
AS AMENDED
("Act")

AND

IN THE MATTER OF
THE CANADIAN DEPOSITORY FOR SECURITIES LIMITED

AND

CDS CLEARING AND DEPOSITORY SERVICES INC.

EXEMPTION ORDER
(147 of the Act)

WHEREAS the Ontario Securities Commission (**Commission**) issued an order dated June 15, 2023 recognizing each of The Canadian Depository for Securities Limited (**CDS Ltd.**) and CDS Clearing and Depository Services Inc. (**CDS Clearing**; together with CDS Ltd., **CDS**) as clearing agencies pursuant to section 21.2 of the Act (the **CDS Recognition Order**);

AND WHEREAS section 4.3(b) of Part II of the CDS Recognition Order requires CDS to ensure that at least 33% of its board of directors are representatives of Participants, as defined in the CDS Recognition Order (the **Industry Representation Requirement**);

AND WHEREAS CDS has applied to the Commission for an exemption pursuant to section 147 of the Act (the **Application**) from the Industry Representation Requirement for a period of two years (the **Relief**);

AND WHEREAS based on the Application and the representations that CDS has made to the Commission, in the Commission's opinion it is not prejudicial to the public interest to grant a temporary exemption to CDS from complying with the Industry Representation Requirement:

IT IS HEREBY ORDERED that, pursuant to section 147 of the Act, CDS is exempted from the Industry Representation Requirement for the period ending on the earlier of (i) the date of the annual general meeting of CDS shareholders in 2025 or (ii) October 26, 2025.

DATED at Toronto this 19th day of October, 2023.

"Susan Greenglass"
Director, Market Regulation

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B.3
Reasons and Decisions

B.3.1 Planet 13 Holdings Inc.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – exemption from the prospectus requirement for certain marketing activities not expressly permitted by National Instrument 71-101 – The Multijurisdictional Disclosure System so that investment dealers acting as underwriters or selling group members of an issuer are permitted to use standard term sheets and marketing materials and conduct road shows (each as defined under National Instrument 41-101 General Prospectus Requirements) in connection with future offerings under an MJDS base shelf prospectus – NI 71-101 does not contain equivalent provisions to Part 9A of National Instrument 44-102 Shelf Distributions – relief granted, provided that any road shows, standard term sheets and marketing materials would comply with the approval, content, use and other conditions and requirements of Part 9A of NI 44-102, as applicable.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 53 and 74(1)2.
National Instrument 71-101 The Multijurisdictional Disclosure System, s. 11.3.

October 18, 2023

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE
RELIEF APPLICATIONS
IN MULTIPLE JURSIDICITONS

AND

IN THE MATTER OF
PLANET 13 HOLDINGS INC.
(the Filer)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction (the **Legislation**), pursuant to paragraph 74(1)2 of the *Securities Act* (Ontario), for an exemption from the prospectus requirement for certain marketing activities not expressly permitted by National Instrument 71-101 *The Multijurisdictional Disclosure System* (NI 71-101) so that investment dealers acting as underwriters (as defined in the Legislation) or selling group members of the Filer are permitted to (i) use Standard Term Sheets (as defined below) and Marketing Materials (as defined below), and (ii) conduct Road Shows (as defined below) in connection with future offerings under a Final Canadian MJDS Shelf Prospectus (as defined below) together with applicable supplements to be filed by the Filer in each of the provinces and territories of Canada (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in each of British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut (together with the Jurisdiction, the **Jurisdictions**).

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation incorporated under the laws of the State of Nevada. The Filer's head office is located at 2548 West Desert Inn Road, Las Vegas, Nevada, 89109, and its registered office is located at 4675 W. Teco Avenue, Suite 250, Las Vegas, Nevada 89109.

2. As of the date hereof, the Filer is a reporting issuer in each of the Provinces of Canada and is not in default of its obligations as a reporting issuer under securities legislation of any such jurisdiction.

3. As of the date hereof, the Filer is an "SEC foreign issuer" (as such term is defined in National

Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*).

4. The Filer has filed a registration statement on Form S-3 with the Securities and Exchange Commission, which contains, among other things, a shelf prospectus (the **U.S. Shelf Prospectus**) and may register for sale in the United States, from time to time, in one or more offerings and pursuant to one or more prospectus supplements, any combination of shares of common stock, shares of preferred stock, warrants, subscription rights and units (collectively, the **Securities**).

5. The Filer also filed a final MJDS prospectus in the Jurisdictions pursuant to NI 71-101, which includes the U.S. Shelf Prospectus (the final MJDS prospectus is referred to in this decision as the Final Canadian MJDS Shelf Prospectus) and will qualify the distribution in each Jurisdiction, from time to time, in one or more offerings and pursuant to one or more prospectus supplements, of any combination of Securities.

6. National Instrument 44-102 *Shelf Distributions* (NI 44-102) sets out the requirements for a distribution under a (non-MJDS) shelf prospectus in Canada, including requirements with respect to advertising and marketing activities; in particular, Part 9A of NI 44-102 entitled *Marketing In Connection with Shelf Distributions* (Part 9A) permits the conduct of "Road Shows" and the use of "Standard Term Sheets" and "Marketing Materials" (as such terms are defined in National Instrument 41-101 *General Prospectus Requirements* (NI 41-101)) following the issuance of a receipt for a final base shelf prospectus provided that the approval, content, use and other applicable conditions and requirements of Part 9A are complied with. NI 71-101 does not contain provisions equivalent to those of Part 9A of NI 44-102.

7. In connection with marketing an offering in Canada under the Final Canadian MJDS Shelf Prospectus, investment dealers acting as underwriters or selling group members of the Filer may wish to conduct **Road Shows** and utilize one or more **Standard Term Sheets** and **Marketing Materials**, as such terms are defined in NI 41-101. Any such Road Shows, Standard Term Sheets and Marketing Materials would comply with the approval, content, use and other conditions and requirements of Part 9A of NI 44-102, as applicable.

8. Canadian purchasers, if any, of Securities offered under the Final Canadian MJDS Shelf Prospectus will only be able to purchase those Securities through an investment dealer registered in the Jurisdiction of residence of the purchaser.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator is that the Exemption Sought is granted, provided that the conditions and requirements set out in Part 9A of NI 44-102 for Standard Term Sheets, Marketing Materials and Road Shows are complied with for any future offering under the Final Canadian MJDS Shelf Prospectus in the manner in which those conditions and requirements would apply if the Final Canadian MJDS Shelf Prospectus were a final base shelf prospectus under NI 44-102.

"Michael Balter"
Manager, Corporate Finance
Ontario Securities Commission

OSC File #: 2023/0453

B.4
Cease Trading Orders

B.4.1 Temporary, Permanent & Rescinding Issuer Cease Trading Orders

Company Name	Date of Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Revoke
THERE IS NOTHING TO REPORT THIS WEEK.				

Failure to File Cease Trade Orders

Company Name	Date of Order	Date of Revocation
THERE IS NOTHING TO REPORT THIS WEEK.		

B.4.2 Temporary, Permanent & Rescinding Management Cease Trading Orders

Company Name	Date of Order	Date of Lapse
THERE IS NOTHING TO REPORT THIS WEEK.		

B.4.3 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Expire	Date of Issuer Temporary Order
Performance Sports Group Ltd.	19 October 2016	31 October 2016	31 October 2016		

Company Name	Date of Order	Date of Lapse
Agrios Global Holdings Ltd.	September 17, 2020	
Sproutly Canada, Inc.	June 30, 2022	
iMining Technologies Inc.	September 30, 2022	
Alkaline Fuel Cell Power Corp.	April 4, 2023	
mCloud Technologies Corp.	April 5, 2023	
Element Nutritional Sciences Inc.	May 2, 2023	
CareSpan Health, Inc.	May 5, 2023	
Canada Silver Cobalt Works Inc.	May 5, 2023	
FenixOro Gold Corp.	July 5, 2023	
HAVN Life Sciences Inc.	August 30, 2023	

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B.7
Insider Reporting

This chapter is available in the print version of the OSC Bulletin, as well as in Thomson Reuters Canada's internet service SecuritiesSource (see www.westlawnextcanada.com).

This chapter contains a weekly summary of insider transactions of Ontario reporting issuers in the System for Electronic Disclosure by Insiders (SEDI). The weekly summary contains insider transactions reported during the seven days ending Sunday at 11:59 pm.

To obtain Insider Reporting information, please visit the SEDI website (www.sedi.ca).

B.9
IPOs, New Issues and Secondary Financings

INVESTMENT FUNDS

Issuer Name:
Educators Sustainable Bond Fund
Educators Sustainable Global Equity Fund
Principal Regulator – Ontario
Type and Date:
Preliminary Simplified Prospectus dated Oct 16, 2023
NP 11-202 Preliminary Receipt dated Oct 17, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Filing #06033600

Issuer Name:
Black Diamond Global Enhanced Income Fund
Black Diamond Global Equity Fund
MLD Core Fund
PK Core Fund
Purpose Active Balanced Fund
Purpose Active Conservative Fund
Purpose Active Growth Fund
Purpose Canadian Financial Income Fund
Purpose Conservative Income Fund
Purpose Emerging Markets Dividend Fund
Purpose Enhanced Dividend Fund
Purpose Global Bond Fund
Purpose Global Flexible Credit Fund (formerly Purpose Floating Rate Income Fund)
Purpose Gold Bullion Fund
Purpose High Interest Savings Fund (formerly, Purpose High Interest Savings ETF)
Purpose International Dividend Fund
Purpose International Tactical Hedged Equity Fund
Purpose Premium Money Market Fund
Purpose Premium Yield Fund
Purpose Tactical Thematic Fund
Purpose U.S. Preferred Share Fund
Purpose US Cash Fund
StoneCastle Global Tactical Asset Allocation Fund
Principal Regulator – Ontario
Type and Date:
Final Simplified Prospectus dated Oct 13, 2023
NP 11-202 Final Receipt dated Oct 18, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Filing #06026774

Issuer Name:
Next Edge Biotech and Life Sciences Opportunities Fund
Next Edge Strategic Metals and Commodities Fund (formerly Next Edge Strategic Metals and Opportunities Fund)
Veritas Next Edge Premium Yield Fund
Principal Regulator – Ontario
Type and Date:
Final Simplified Prospectus dated Oct 20, 2023
NP 11-202 Final Receipt dated Oct 23, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Filing #06025943

Issuer Name:
Dynamic Alpha Performance II Fund
Dynamic Credit Absolute Return II Fund
Dynamic Liquid Alternatives Private Pool
Dynamic Premium Yield PLUS Fund
Dynamic Real Estate & Infrastructure Income II Fund
Dynamic Short Term Credit PLUS Fund
Principal Regulator – Ontario
Type and Date:
Final Simplified Prospectus dated Oct 16, 2023
NP 11-202 Final Receipt dated Oct 17, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Filing #06023826

Issuer Name:
Dynamic Credit Opportunities Fund
Principal Regulator – Ontario
Type and Date:
Amendment #1 to Final Simplified Prospectus dated October 20, 2023
NP 11-202 Final Receipt dated Oct 23, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Filing #06009418

Issuer Name:
Life & Banc Split Corp.
Principal Regulator – Ontario
Type and Date:
Amendment #1 to Final Shelf Prospectus dated October 16, 2023
NP 11-202 Final Receipt dated Oct 17, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Filing #03313623

_____

Issuer Name:
3iQ Ether Staking ETF
Principal Regulator – Ontario
Type and Date:
Amendment #1 to Final Long Form Prospectus dated October 13, 2023
NP 11-202 Final Receipt dated Oct 18, 2023
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Filing #03504453

_____

NON-INVESTMENT FUNDS

Issuer Name:
Criterium Energy Ltd. (formerly Softrock Minerals Ltd.)
Principal Regulator – Alberta
Type and Date:
Final Short Form Prospectus dated Oct 19, 2023
NP 11-202 Final Receipt dated Oct 20, 2023
Offering Price and Description:
$6,700,100.00
60,910,000 Subscription Receipts
Price per Security: 0.11 per Subscription Receipt
Filing # 06028843

Issuer Name:
Elemental Altus Royalties Corp. (formerly Elemental Royalties Corp.)
Principal Regulator – British Columbia
Type and Date:
Preliminary Short Form Base Shelf Prospectus dated Oct 13, 2023
NP 11-202 Preliminary Receipt dated Oct 16, 2023
Offering Price and Description:
US $200,000,000.00
Common Shares, Subscription Receipts, Warrants, Debt Securities, Units
Filing # 06035736

Issuer Name:
MetalMark Resources Corp. (Formerly Golden Mountain Technologies Inc.).
Principal Regulator – British Columbia
Type and Date:
Preliminary Long Form Prospectus dated Oct 16, 2023
NP 11-202 Preliminary Receipt dated Oct 18, 2023
Offering Price and Description:
$700,000.00
3,500,000 Units
Price per Security: $0.20 per Unit
Filing # 06036318

Issuer Name:
Planet 13 Holdings Inc.
Principal Regulator – Ontario
Type and Date:
Final MJDS Prospectus dated Oct 17, 2023
NP 11-202 Final Receipt dated Oct 18, 2023
Offering Price and Description:
$100,000,000.00
Common Stock, Preferred Stock, Warrants, Subscription Rights, Units
Filing # 06032308

Issuer Name:
Yubba Capital Corp.
Principal Regulator – Ontario
Type and Date:
Final Long Form Prospectus dated Oct 16, 2023
NP 11-202 Final Receipt dated Oct 18, 2023
Offering Price and Description:
No securities are being offered pursuant to this prospectus
Filing # 03520709

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B.10
Registrations

B.10.1 Registrants

Type	Company	Category of Registration	Effective Date
Voluntary Surrender	OneSixtyTwo Capital Ltd.	Exempt Market Dealer, Portfolio Manager, Investment Fund Manager	October 20, 2023
New Registration	42KM Investment Partners Ltd.	Portfolio Manager	October 23, 2023

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B.11
CIRO, Marketplaces, Clearing Agencies and Trade Repositories

B.11.1 CIRO

B.11.1.1 Canadian Investment Regulatory Organization (CIRO) – Housekeeping Amendments to Mutual Fund Dealer Form 1 – Notice of Commission Deemed Approval

NOTICE OF COMMISSION DEEMED APPROVAL

CANADIAN INVESTMENT REGULATORY ORGANIZATION (CIRO)

HOUSEKEEPING AMENDMENTS TO MUTUAL FUND DEALER FORM 1

The Ontario Securities Commission did not object to CIRO's proposed housekeeping amendments to Part II – Report on compliance for insurance and segregation of cash and securities and other audit reports in the Mutual Fund Dealer Form 1 (**Housekeeping Amendments**). The objectives of the Housekeeping Amendments are to ensure compliance with CSRS 4400 auditing standards and to conform to audit reports with the current legal names of the self-regulatory organization and investor protection fund. As a result, the Housekeeping Amendments were deemed approved or non-objected to.

The Housekeeping Amendments will be effective immediately, on October 26, 2023.

In addition, the Alberta Securities Commission; the Autorité des marchés financiers; the British Columbia Securities Commission; the Financial and Consumer Affairs Authority of Saskatchewan; the Financial and Consumer Services Commission of New Brunswick; the Manitoba Securities Commission; the Northwest Territories Office of the Superintendent of Securities; the Nova Scotia Securities Commission; the Nunavut Office of the Superintendent of Securities; the Office of the Superintendent of Securities, Digital Government and Services, Newfoundland and Labrador; the Office of the Yukon Superintendent of Securities; and the Prince Edward Island Office of the Superintendent of Securities (together with the Ontario Securities Commission, the **Recognizing Regulators**) did not object to the classification of the Housekeeping Amendments and therefore the Housekeeping Amendments were deemed approved or non-objected to.

A copy of the CIRO Notice of Approval/Implementation, including the text of the approved Housekeeping Amendments, is also published on our website at www.osc.ca.

B.11.1.2 Canadian Investment Regulatory Organization (CIRO) – Amendments to UMIR and IDPC Rules to Facilitate the Investment Industry's Move to T+1 Settlement – Notice of Commission Approval

NOTICE OF COMMISSION APPROVAL

CANADIAN INVESTMENT REGULATORY ORGANIZATION (CIRO)

AMENDMENTS TO UMIR AND IDPC RULES TO FACILITATE THE INVESTMENT INDUSTRY'S MOVE TO T+1 SETTLEMENT

The Ontario Securities Commission has approved CIRO's proposed amendments to the Universal Market Integrity Rules (UMIR) and Investment Dealer and Partially Consolidated Rules (IDPC) (collectively, the **Amendments**) to facilitate the investment industry's move from a trade date plus two business days (T+2) settlement cycle to a trade date plus one business day (T+1) settlement cycle.

CIRO published the Amendments for comment on April 20, 2023. One comment letter was received, however, the commenter did not provide any specific comments on the proposal. No other comments were received.

A copy of the CIRO Notice of Approval/Implementation, including text of the Amendments, can be found at www.osc.ca.

The Amendments will be effective on May 27, 2024. In the event there is a delay in the industry's implementation of T+1 settlement, CIRO will also delay implementation of the Amendments accordingly.

In addition, the Alberta Securities Commission; the Autorité des marchés financiers; the British Columbia Securities Commission; the Financial and Consumer Affairs Authority of Saskatchewan; the Financial and Consumer Services Commission of New Brunswick; the Manitoba Securities Commission; the Northwest Territories Office of the Superintendent of Securities; the Nova Scotia Securities Commission; the Nunavut Office of the Superintendent of Securities; the Office of the Superintendent of Securities, Digital Government and Services, Newfoundland and Labrador; the Office of the Yukon Superintendent of Securities; and the Prince Edward Island Office of the Superintendent of Securities have either not objected to or have approved the Amendments.

B.11.1.3 Canadian Investment Regulatory Organization (CIRO) – Rule Consolidation Project – Phase 1 – Request for Comment

REQUEST FOR COMMENT

CANADIAN INVESTMENT REGULATORY ORGANIZATION (CIRO)

RULE CONSOLIDATION PROJECT – PHASE 1

CIRO is publishing for comment certain rule proposals as Phase 1 of its Rule Consolidation Project (**Phase 1 Proposed DC Rules**). This project will bring together the two member regulation rule sets, currently applicable to investment dealers and to mutual fund dealers, into one set of member regulation rules applicable to both categories of CIRO Dealer Members. The consolidated member regulation rules will be known as the CIRO Dealer and Consolidated Rules (**DC Rules**).

The objective of the Phase 1 Proposed DC Rules is to establish a framework for the development of the DC Rules. The Phase 1 Proposed DC Rules also establish the DC Rules structure, which involves the adoption of:

- rule interpretation provisions,
- definitions of common application throughout the rules,
- rule exemption provisions, and
- general standards of conduct applicable to all activities of the dealer and their employees and Approved Persons.

A copy of the CIRO Bulletin, including the text of the Phase 1 Proposed DC Rules, is also available on our website at www.osc.ca. The comment period ends on December 19, 2023.

B.11.2 Marketplaces

B.11.2.1 SpectrAxe, LLC – Application for Exemption from Recognition as an Exchange – Notice and Request for Comment

NOTICE AND REQUEST FOR COMMENT

APPLICATION BY
SPECTRAXE, LLC
FOR EXEMPTION FROM RECOGNITION AS AN EXCHANGE

A. Background

SpectrAxe, LLC (**SpectrAxe**) has applied to the Commission for an exemption from the requirement to be recognized as an exchange pursuant to subsection 21(1) of the Securities Act (Ontario) (**OSA**).

SpectrAxe is a marketplace for trading derivatives that are regulated as swaps by the United States Commodity Futures Trading Commission (**CFTC**). SpectrAxe offers trading of uncleared bilateral options in various currencies, which are regulated as swaps by the CFTC.

SpectrAxe will enable clients to access its platform to enter transactions. In addition, SpectrAxe intends to provide access to trading on its marketplace to participants located in Ontario and therefore is considered to be carrying on business in Ontario.

As SpectrAxe will be carrying on business in Ontario, it is required to be recognized as an exchange under the OSA or apply for an exemption from this requirement. SpectrAxe has applied for an exemption from the recognition requirements on the basis that it is already subject to regulatory oversight by the CFTC.

B. Application and Draft Exemption Order

In the application, SpectrAxe has outlined how it meets the criteria for exemption from recognition. The specific criteria can be found in Appendix 1 to Schedule "A" of the draft exemption order. Subject to comments received, Staff intends to recommend that the Commission grant an exemption order with terms and conditions based on the draft exemption order. The application and draft exemption order are available on our website at www.osc.ca.

C. Comment Process

The Commission is publishing for public comment the SpectrAxe application and the draft exemption order. We are seeking comment on all aspects of the application and draft exemption order.

Please provide your comments in writing, via e-mail, on or before November 27, 2023, to the attention of:

Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
Email: comments@osc.gov.on.ca

The confidentiality of submissions cannot be maintained as the comment letters and a summary of written comments received during the comment period will be published.

Questions on may be referred to:

Alex Petro
Trading Specialist, Market Regulation
Email: apetro@osc.gov.on.ca

Mark Delloro
Senior Accountant, Market Regulation
Email: mdelloro@osc.gov.on.ca

Tim Reibetanz
Senior Legal Counsel, Derivatives
Email: treibetanz@osc.gov.on.ca

September 6, 2023

Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
Fax: (416) 593-2318

Attention: Secretary

Dear Sirs/Mesdames:

Re: SpectrAxe, LLC – Application for Exemption from Recognition as an Exchange

SpectrAxe, LLC, a limited liability company organized under the laws of Delaware (the "**Applicant**" or "**SpectrAxe**"), is requesting an order for the following relief (collectively, the "**Requested Relief**") relating to the operation by SpectrAxe of a marketplace (the "**SEF Platform**") for trading swaps that is regulated by the United States Commodity Futures Trading Commission ("**CFTC**") under the terms of the U.S. Commodity Exchange Act ("**CEA**"), in the Province of Ontario:

a) exempting the Applicant from the requirement to be recognized as an exchange under subsection 21(1) of the *Securities Act* (Ontario) (the "**OSA**") pursuant to section 147 of the OSA; and

b) exempting the Applicant from the requirements in National Instrument 21-101 *Marketplace Operation* ("**NI 21-101**") pursuant to section 15.1(1) of NI 21-101, the requirements of National Instrument 23-101 *Trading Rules* ("**NI 23-101**") pursuant to section 12.1 of NI 23-101 and the requirements of National Instrument 23-103 *Electronic Trading and Direct Electronic Access to Marketplaces* ("**NI 23-103**") pursuant to section 10 of NI 23-103.

SpectrAxe offers trading of uncleared bilateral swap transactions involving various underlying currencies (each a "**SEF Contract**"), which SEF Contracts are regulated as swaps by the CFTC.

SpectrAxe will enable sophisticated persons, each of which must be an "eligible contract participant" ("**ECP**") as defined in the CEA (each a "**Participant**"), to access the SEF Platform. Each Participant is further required to execute all transactions through a prime broker (each a "**Participating Financial Institution**" or "**PFI**"), whether the Participant is trading for its own account or on behalf of a client account ("**Client Account**"). The Applicant does not offer access to retail clients.

SpectrAxe intends to provide access to trading on its SEF Platform to Participants located in Ontario, including such entities with their headquarters or legal address in Ontario (*e.g.*, as indicated by their Legal Entity Identifier (LEI)), and all traders conducting transactions on behalf of a Participant, regardless of the traders' physical location (inclusive of non-Ontario branches of Ontario legal entities), as well as any trader physically located in Ontario who conducts transactions on behalf of any other entity ("**Ontario Users**").

The Applicant has no physical presence and does not otherwise intend to carry on business in Ontario except as described herein.

The Applicant seeks the Requested Relief on the basis that it is already subject to regulatory oversight by the CFTC.

This application is divided into the following Parts I to V, Part III of which describes how the Applicant satisfies criteria for exemption of a foreign exchange, that allows customers to trade uncleared bilateral swaps (*i.e.*, OTC derivatives), from recognition as an exchange set by staff of the Ontario Securities Commission (the "**Commission**").

PART I INTRODUCTION

1. Description of the Applicant's Services to Ontarians

Part II Background of the Applicant

1. Ownership of the Applicant
2. Products Traded on the Applicant's Swap Execution Facility
3. Participants

PART I INTRODUCTION

1. Description of the Applicant's Services to Ontarians

1.1 The Applicant operates the SEF Platform, which is a swap execution facility ("**SEF**"), an exchange for the trading swaps that is regulated by the CFTC. The Applicant's SEF Platform offers trading of uncleared bilateral options in various currencies, which are regulated as swaps by the CFTC. Additional products may be added in the future, subject to obtaining any required regulatory approvals. The SEF Platform enables Participants to engage in transactions using the trading methodologies described in Section IV of the Applicant's rulebook (the "**SpectrAxe Rulebook**"), available online at https://www.spectraxesef.com. As explained in the SpectrAxe Rulebook, all the SEF Contracts allowed to be traded on the SEF Platform are uncleared bilateral swaps that are Permitted Transactions (as the term "Permitted Transactions" is defined in the CFTC's Regulations under the CEA). As set forth in Rule 404 of the SpectrAxe Rulebook, the SEF Platform offers Participants the following execution method for SEF Contracts: "Participants shall have the ability to post Orders on the Order Book in any Swap offered on the SEF in accordance with these Rules, for its own account or the account of any Client Account for whom it acts."

The SpectrAxe Rulebook provides the following definition of "Order Book" in Rule 101: "The term "Order Book" means the portion of the SEF in which Participants in the trading system or platform have the ability to enter Orders designated for the Order Book, observe or receive such Orders entered by other Participants, and execute such Orders."

Note that the SEF Platform's Order Book has no automatic algorithmic matching engine; instead, a Participant (Participant #1) may accept an open Order posted on the Order Book (*i.e.*, an open bid to purchase ("**Bid**") or an open offer to sell ("**Offer**") a SEF Contract) that has been posted by another Participant (Participant #2) in the Order Book. However, Participants are not allowed to selectively choose their counterparty. The Applicant offers a central limit order book for all products listed for trading on the SEF Platform where prices in that order book are ordered by price and then time priority. A Participant is 'matched' with another Participant by dealing on the best available price ordered by price/time priority.

1.2 The Applicant will offer direct access to trading on its SEF Platform to Ontario Users that satisfy the criteria for an ECP as defined in Section 1a(18) of the CEA and as further described in Part III below. Ontario Users may include Canadian financial institutions, registered dealers and advisors, government entities, pension funds and other well-capitalized, non-regulated entities.

1.3 The Applicant has no physical presence in Ontario and does not otherwise intend to carry on business in Ontario except as described herein.

PART II BACKGROUND OF THE APPLICANT

1. Ownership of the Applicant

1.1 The Applicant is a limited liability company organized under the laws of Delaware. The ultimate parent company of the Applicant is Spectra Holdings, LLC, a limited liability company organized under the laws of Delaware ("**Spectra Holdings**").

1.2 The Applicant is registered with the CFTC as a SEF under the terms of the CEA.

2. Products Traded on the Applicant's SEF Platform

2.1 The Applicant will provide its Participants with trading and execution services for uncleared bilateral swaps. A full list of the products traded on the Applicant's SEF Platform can be found on the Applicant's website, at https://spectraxesef.com.

3. Participants

3.1 The Applicant's SEF Platform will enable Participants to access the SEF Platform as an agent of their PFI to enter transactions on their own behalf or on behalf of Client Accounts. Persons seeking direct access to the SEF Platform as a Participant to post an open Order or accept an open Order for a SEF Contract using the Order Book, and submit indicative Bids/Offers or accept Bids/Offers of firm Orders for a SEF Contract, must apply for "**Trading Privileges**" pursuant to Rule 302 of the SpectrAxe Rulebook. In order for a person to become a Participant, such person must first enter into a Participant Agreement, which affirms that the person will abide by the SpectrAxe Rulebook and all other applicable terms. For the purposes of this application, holders of Trading Privileges on the SEF Platform are referred to as "**Participants**".

3.2 Participants include a wide range of sophisticated persons, including commercial and investment banks, corporations and other institutional customers. Each person that wishes to trade directly on the SEF Platform as a Participant must

qualify as an ECP. Further, Participants with Client Accounts must certify that each Client Account that such Participant acts on behalf of when using the SEF Platform is also an ECP.

3.3 The SEF Platform's requirements for Participants are described more fully in Part III, Paragraph 4.1 below.

PART III APPLICATION OF EXEMPTION CRITERIA TO THE APPLICANT

The following is a discussion of how the Applicant meets the criteria of the Commission for exemption of a foreign exchange that allows participants to trade OTC derivatives from recognition as an exchange.

1. Regulation of the Exchange

1.1 **Regulation of the Exchange – The exchange is regulated in an appropriate manner in another jurisdiction by a foreign regulator (Foreign Regulator).**

1.1.1 The Applicant is registered with the CFTC to operate a SEF in the U.S. pursuant to the CEA effective on and after December 5, 2022. The Applicant is subject to regulatory supervision by the CFTC. The Applicant is obligated to give the CFTC access to all records unless prohibited by law or such records are subject to attorney-client privilege. The CFTC reviews, assesses and enforces the Applicant's adherence to the CEA and the regulations thereunder on an ongoing basis, including the fifteen core principles for SEFs (each a "**Core Principle**" and collectively the "**SEF Core Principles**") required by Section 5h of the CEA. The SEF Core Principles relate to the operation and oversight of SEFs, including financial resources, systems and controls, maintenance of an orderly market, execution and settlement of transactions, rule-making and investor protection.

1.2 **Authority of the Foreign Regulator – The Foreign Regulator has the appropriate authority and procedures for oversight of the exchange. This includes regular, periodic oversight reviews of the exchange by the Foreign Regulator.**

1.2.1 The CFTC carries out the regulation of U.S. domiciled SEFs in accordance with certain provisions of the CEA. To implement SEF regulation, the CFTC has promulgated regulations ("**CFTC Regulations**") and guidelines that further interpret the SEF Core Principles and govern the conduct of SEFs. The CFTC also undertakes periodic in-depth audits or rule reviews of a SEF's compliance with certain of the SEF Core Principles.

1.2.2 The Applicant is required to demonstrate its compliance with the SEF Core Principles applicable to all U.S. SEFs. Among other things, the SEF Core Principles and CFTC Regulations require SEFs to have a rulebook and a compliance program, including a Chief Compliance Officer and a compliance manual ("**SpectrAxe Compliance Manual**"). A SEF's access criteria for Participants must be impartial and transparent and must be applied in a fair and non-discriminatory manner. The CFTC requires each SEF to have certain required trading protocols. A SEF must publish on its website certain daily trading data for each swap contract listed on the SEF and must report, or cause to be reported, all transactions executed on the SEF to a swap data repository. The CFTC reviews, assesses and enforces a SEF's adherence to CFTC Regulations on an ongoing basis.

1.2.3 A SEF is a self-regulatory organization under CFTC Regulations. A SEF is obliged under CFTC Regulations to have requirements governing the conduct of Participants, to monitor compliance with those requirements and to discipline Participants, including by means other than exclusion from the marketplace. The Applicant conducts market surveillance of trades on its platform for potential violations of the Applicant's rules through a combination of automated internal and human surveillance by the SEF Platform's Market Control Center and Compliance Department personnel. The Applicant does not use a third-party regulatory services provider.

2. Governance

2.1 **Governance – The governance structure and governance arrangements of the exchange ensure:**

(a) Effective Oversight of the Exchange

2.1.1 The board of Directors of the Applicant (the "Board") has the power to manage, operate and set policies for the Applicant. The Board has the power to appoint such officers of the Applicant as it may deem necessary or appropriate from time to time.

2.1.2 The Board has the power by itself or through agents, and is authorized and empowered on behalf and in the name of the Applicant, to perform all acts and enter into other undertakings that it may in its discretion deem necessary or advisable in order to promote the sound and efficient operation of the SEF Platform (except such as otherwise required by applicable law), including, but not limited to, the following:

(a) ensuring that the SEF Platform complies with all statutory, regulatory and self-regulatory responsibilities under the CEA;

(b) reviewing, approving and monitoring major strategic, financial and business activities, the Applicant's budget and financial performance;

(c) evaluating risks and opportunities facing the Applicant and proposing options for addressing such issues;

(d) overseeing and reviewing recommendations from the Applicant's committees and the Chief Compliance Officer; and

(e) having the sole power to set the payment dates and amounts of any dues, assessments or fees to be levied on holders of Trading Privileges, subject, of course, to all CFTC regulatory authorizations.

2.1.3 Each Director is expected to comply with all applicable law and Applicant policies and promote compliance by the Applicant and all of its employees with all applicable law and Applicant policies. The Board discharges its responsibilities and exercises its authority in a manner, consistent with applicable legal and regulatory requirements that promotes the sound and efficient operation of the Applicant and its swap execution activities.

2.1.4 The Board provides effective oversight of the SEF Platform as described in greater detail below.

Fitness Standards

2.1.5 The Applicant has established fitness standards for the Board as set forth in Chapter 2 of the SpectrAxe Rulebook (the "**Governance Provisions**"). The Governance Provisions have been adopted by the Board and included in the SpectrAxe Rulebook to assist the Board in the exercise of its responsibilities. The Governance Provisions are not intended to supersede or interpret any applicable law, and operate in conjunction with the Applicant's Second Amended and Restated Limited Liability Company Agreement, dated September 7, 2021 ("**LLC Agreement**"). The standards set for the Board reflect the Applicant's commitment to compliance in its role as a SEF subject to oversight by the CFTC and to the institutions and individuals who rely on the Applicant to provide swap execution services.

2.1.6 The Board is committed to conducting itself in a legal and ethical manner in fulfilling its responsibilities. Each Director is expected to comply with all applicable laws, rules and regulations, and Applicant's policies, and promote regulatory compliance by the Applicant and all of its employees. The Board discharges its responsibilities and exercises its authority in a manner consistent with applicable legal and regulatory requirements, and that promotes the sound and efficient operation of the Applicant and its swap execution activities.

Composition

2.1.7 Rule 201(b) of the SpectrAxe Rulebook provides that, at all times, at least 35% of the Directors of SpectrAxe shall be Public Directors (as defined below).

2.1.8 The Board currently consists of three Directors, two of which are Public Directors.

Rule 208 of the SpectrAxe Rulebook requires that a Public Director must "meet the qualifications of a Public Director specified by such CFTC Regulations, the CEA, [the SpectrAxe] Rulebook and other Applicable Law in effect for the period of such service."

Rule 201(c) provides that a Public Director must be found by the Board to have no material relationship with SpectrAxe, both at the time of nomination or appointment and as often as necessary in light of all circumstances relevant to such Director but in no case less than annually. A "material relationship" with SpectrAxe is defined in Rule 201(c)(i) as a relationship that reasonably could affect the independent judgment or decision-making of the Director. Rule 201(c)(i) states that the Board need not consider previous service as a Director of the SEF to constitute a "material relationship." Additionally, a Director shall be considered to have a "material relationship" with the SEF if any of the following circumstances exist or have existed within the past year:

(i) Such Director is an Officer or an employee of the SEF, or an officer or an employee of an Affiliate of the SEF;

(ii) Such Director is a Participant or Owner of the SEF;

(iii) Such Director is a director, an officer, or an employee of a Participant or Owner of the SEF;

(iv) Such Director is an officer of another entity, which entity has a compensation committee (or similar body) on which any Officer of the SEF serves;

(v) Such Director, or an entity with which the Director is a partner, an officer, an employee, or a director, receives more than $100,000 in combined annual payments for legal, accounting, or consulting services from the Applicant or its Affiliate, any Participant, or PFI, or any Affiliate of such Participant or PFI. Compensation for services as a Director of the Applicant or as a director of an Affiliate thereof does not count toward the $100,000 payment limit, nor does deferred compensation for services rendered prior to becoming a Director, so long as such compensation is in no way contingent, conditioned, or revocable; or

(vi) Notwithstanding section (v) above, in the case of a Public Director that is a member of the Regulatory Oversight Committee ("**ROC**") or the Participant Committee, such Public Director accepts, directly or indirectly, any consulting, advisory, or other compensatory fee from the Applicant or its Affiliate or any Participant or PFI, or any Affiliate of such Participant or PFI, other than deferred compensation for service rendered prior to becoming a member of the ROC or the Participant Committee, provided that such compensation is in no way contingent, conditioned, or revocable. This section (vi) does not apply to compensation received in the Public Director's capacity as a member of the ROC or Participant Committee.

2.1.9 Each Director (including Public Directors) shall be elected in accordance with the LLC Agreement, and shall serve for a term of two years from the date of his or her election (or the remainder of any Public Director term to which he or she is elected as a replacement) and until his or her successor is duly appointed, or until his or her earlier resignation, removal for cause or dismissal pursuant to the LLC Agreement.

Qualifications

2.1.10 In order to fulfill their responsibilities, Directors (including Public Directors) are selected based on their experience, qualifications, attributes, skills and the understanding that their leadership will play an integral role in fulfilling the Applicant's business objectives and legal obligations. In particular, Directors should:

(a) Demonstrate sufficient experience in the Applicant's scope or intended scope of financial services (including ancillary services valuable for the Applicant to fulfill its business purposes); and

(b) Be of sufficiently good repute, including the absence of any of the categories that would be disqualifying under CFTC Regulation 1.63(b). Additionally, in accordance with CFTC Regulation 1.64(b), 20% or more of the regular voting members of the Board shall be persons who: (i) are knowledgeable of futures trading or financial regulation or are otherwise capable of contributing to governing board deliberations; (ii) are not Participants on the SEF Platform, (iii) are not currently salaried employees of SpectrAxe; (iv) are not primarily performing services for SpectrAxe in a capacity other than as a member of the Board; and (v) are not officers, principals or employees of a firm which is a Participant on the SEF Platform either in its own name or through an employee on behalf of the firm. No person may serve on the Board who meets any of the categories listed in CFTC Regulation 1.63(b).

Verification of Qualifications

2.1.11 In order to verify that each Director is qualified to serve, the Applicant requires that each prospective Director provide a written summary of qualifications, biographical information and related background information that is then verified through a background check.

Each Director must inform the Applicant's Chief Compliance Officer in writing if any of the information provided materially changes thereafter. In addition, each Director must complete an annual board member disciplinary panel form attestation, confirming that the Director continues to be qualified to serve on the Board.

Conflicts of Interest

2.1.12 As set forth in Rule 213 of the SpectrAxe Rulebook and in Core Principle 12 of Section 5h(f) of the CEA, SpectrAxe shall (A) establish and enforce rules to minimize conflicts of interest in its decision-making process; and (B) establish a process for resolving the conflicts of interest.

2.1.13 Pursuant to Rule 213(b) of the SpectrAxe Rulebook and CFTC Regulation 1.69(b), a member of SpectrAxe's Board, Disciplinary Committee, Disciplinary Panel or Appeals Panel (collectively, the "**Oversight Panels**") must abstain from such body's deliberations and voting on any matter involving a named party in interest where such member:

(a) is a named party in interest;

(b) is an employer, employee or fellow employee of a named party in interest;

(c) has any other significant, ongoing business relationship with a named party in interest, not including relationships limited to executing transactions opposite of each other or to clearing transactions through the same clearing member;

(d) has a family relationship with a named party in interest (where a "family relationship" exists between a named party in interest or potential named party in interest in an Executive Proceeding and a potential Interested Person if one person is the other's spouse, former spouse, parent, stepparent, child, stepchild, sibling, stepbrother, stepsister, grandparent, grandchild, uncle, aunt, nephew, niece or in-law) (each of (a) through (d) being a "**Relationship Conflict of Interest**"); or

(e) has a direct and substantial financial interest in the result of the deliberations or vote of such body based upon either Applicant or non-Applicant positions that could reasonably be expected to be affected by the action (a "**Financial Conflict of Interest**").

2.1.14 Prior to the consideration of any matter involving a named party in interest, each member of the deliberating body must disclose to SpectrAxe's Chief Compliance Officer (the "**CCO**") whether he or she has one of the Relationship Conflicts of Interest or a Financial Conflict of Interest with a named party in interest. The CCO must then determine, based upon the information disclosed by the member and any other source of information that is held by and reasonably available to SpectrAxe, and taking into consideration the exigency of the matter, whether the member is subject to a conflicts restriction in any matter involving the named party in interest.

2.1.15 Rule 213(c)(ii) of the SpectrAxe Rulebook stipulates that, prior to the consideration of any significant action, each member of the deliberating body who does not choose to abstain from deliberations and voting may disclose to the CCO, or his designee, any information that may be relevant to a determination of whether such member has a direct and substantial financial interest in the result of the vote, including:

(A) Gross positions held at the Derivatives Clearing Organizations, as such term is defined in Section 1a(15) of the CEA ("**DCOs**") for such member's personal accounts or "controlled accounts," as defined in CFTC Regulation 1.3;

(B) Gross positions held at the DCOs in accounts of any entity in which such member is a "principal," as defined in CFTC Regulation 3.1(a); and

(C) Any other types of positions, whether maintained at the DCOs or elsewhere, held in such member's personal accounts or the proprietary accounts of such member's Affiliated firm, that the Company reasonably expects could be affected by the significant action

The CCO, or his designee, shall determine whether any member of the relevant deliberating body is subject to a conflicts restriction based upon a review of the most recent large user reports and clearing records available to the Applicant, information provided by such member with respect to positions pursuant to the above and any other source of information that is held by and reasonably available to the Applicant that the CCO or his designee deems to be accurate, taking into consideration the exigency of the significant action being contemplated.

2.1.16 Any Officer or member of the Board, Standing Committee, or Oversight Panel of SpectrAxe who would otherwise be required to abstain from deliberations and voting pursuant to paragraph 213(c) of the SpectrAxe Rulebook (excluding the CCO) may participate in deliberations, but not voting, if the deliberating body, after considering the factors specified below, determines that such participation would be consistent with the public interest; provided, however, that before reaching any such determination, the deliberating body shall fully consider any information disclosed pursuant to Rule 213(c)(ii). In making its determination, the deliberating body shall consider:

(A) whether such member's participation in deliberations is necessary to achieve a quorum; and

(B) whether such member has unique or special expertise, knowledge or experience in the matter being considered.

2.1.17 The minutes of any meeting to which the conflicts determination procedures set forth in Rule 213 of the SpectrAxe Rulebook apply shall reflect the following information:

(A) the names of all members of the relevant deliberating body who attended such meeting in person or who otherwise were present by electronic means;

(B) the name of any member of the relevant deliberating body who voluntarily recused himself or herself or was required to abstain from deliberations or voting on a matter and the reason for the recusal or abstention, if stated;

(C) information that was reviewed for each member of the relevant deliberating body, including position information in the case of a significant action conflict; and

(D) any determination made with respect to the member's participation in, or abstention from, deliberations or voting.

2.1.18 Pursuant to Section 10.6 of the SpectrAxe Compliance Manual, the CCO and Deputy CCO will resolve any conflicts of interest that may arise on the SEF Platform including: (i) conflicts between business considerations and compliance requirements; (ii) conflicts between business considerations and the requirement that the SEF Platform provide fair, open and impartial access as set forth in the CFTC Regulations; and (iii) conflicts between SpectrAxe's management and members of the Board. The CCO and Deputy CCO will also keep the ROC appraised of significant conflicts of interest on an ongoing basis, and less significant conflicts of interest on a quarterly basis.

2.1.19 Conflicts between SpectrAxe's Subsidiaries, Participants or PFIs

All employees, officers and Directors must avoid and report any actual or perceived conflict of interest or misappropriation of information which may improperly benefit one business unit of SpectrAxe, a Participant, or a PFI to the detriment of another business unit of SpectrAxe, a Participant, or a PFI. Conflicts of interest of employees should be reported as soon as the conflict or potential conflict is discovered. It is the responsibility of every employee, officer and Director of SpectrAxe to accurately and timely report any actual or potential conflict of interest as soon as the conflict or potential conflict is discovered. A report of conflict of interest involving SpectrAxe should be made to the CCO of SpectrAxe.

2.1.20 Conflicts with the CCO or Deputy CCO

In the event that the CCO or any other person becomes aware of any conflict of interest involving the CCO, such matter shall promptly be resolved by the Deputy CCO without the involvement of the CCO. If the Deputy CCO also has a conflict of interest, then the ROC shall appoint an individual without such conflict and meeting to the greatest extent practicable the requirements of a CCO to serve as CCO for the specific matter giving rise to the conflict.

Compensation

2.1.21 Compensation awarded to Public Directors and other non-executive Directors is not linked to the Applicant's business performance.

Certification and Compliance

2.1.22 Each Director must become familiar with, and abide by, the Governance Provisions. Each prospective Director and Director must, before taking office, acknowledge his or her receipt and understanding of the Governance Provisions, as well as upon any publication of a revised set of Governance Provisions or amendment thereto. In addition, (i) upon request from the Applicant, the Director shall certify that the qualification information he/she provided to the Applicant before being elected as a Director has not changed materially, and (ii) from time to time the Director shall provide an updated statement of qualification information that reflects any material changes.

2.1.23 Directors are required to report suspected violations of the Governance Provisions or of any applicable law, rule or regulation by any Director to the Board, the ROC or the CCO (who will subsequently relay any such suspected violations to the Board or the ROC, unless such reported violation is proven incorrect after a prompt initial review of its merits). The Board or the ROC, as applicable, shall determine whether to conduct an investigation and what appropriate action should be taken. Directors may consult with the CCO or legal counsel if there is any doubt as to whether a particular transaction or course of conduct complies with or is subject to the Governance Provisions.

Removal for Cause

2.1.24 Any Director failing to comply with, or certify compliance with, the Governance Provisions, or whose conduct otherwise is likely to be prejudicial to the sound and prudent management of the Applicant, may be removed for cause at any time by a majority-in-interest of the Members, pursuant to Section 4.07 of the LLC Agreement.

Board Committees

2.1.25 The Applicant's Governance Provisions contemplate three standing committees of the Board: the Nominating Committee, the Participant Committee, and the ROC. The Board may from time to time constitute and appoint additional standing committees as it may deem necessary or advisable. The Board may also from time to time establish one or more special committees as it may deem necessary or advisable.

2.1.26 The purpose of the Nominating Committee is to (1) identify individuals qualified to serve on the Board, consistent with the criteria approved by the Board and the composition requirements of Applicable Law and (2) administer a process for the nomination of individuals to the Board.

2.1.27 The ROC consists only of Public Directors. Each member of the ROC shall serve for a term of two calendar years from the date of his or her appointment or for the remainder of the term to which he or she is appointed as a replacement, and

until the due appointment of his or her successor, or until his or her earlier resignation or removal (as a member of the ROC or as a member of the Board) for cause or dismissal pursuant to the LLC Agreement. The ROC has responsibility to:

(i) Monitor SpectrAxe's self-regulatory program for sufficiency, effectiveness, and independence;

(ii) Oversee all facets of SpectrAxe's self-regulatory program, including trade practice, market surveillance, audits, examinations and other regulatory responsibilities with respect to participants (including ensuring compliance with, if applicable, financial integrity, financial reporting, sales practice, recordkeeping, and other requirements), and the conduct of investigations;

(iii) Review the size and allocation of SpectrAxe's regulatory budget and resources; and the number, hiring and termination, and compensation of regulatory personnel;

(iv) Review the performance of the CCO, and make recommendations with respect to such performance to the Board;

(v) Review all regulatory proposals prior to implementation and advise the Board as to whether and how such changes may impact regulation;

(vi) Maintain minutes and records of its meetings, deliberations and analyses, including records of all decisions made by the ROC such as decisions resolving conflicts of interest in accordance with the procedures described above under "Conflicts of interest;"

(vii) Recommend changes to SpectrAxe's self-regulatory program that would ensure fair, vigorous, and effective regulation; and

(viii) Exercise any other functions expressly assigned to it in the SpectrAxe Rulebook or the ROC charter.

(b) That business and regulatory decisions are in keeping with its public interest mandate,

2.1.28 The Applicant is committed to ensuring the integrity of its SEF Platform and the stability of the financial system, in which market infrastructure plays an important role. The Applicant must ensure the integrity of a transaction that occurs on the SEF Platform under Core Principle 7 – Financial Integrity of Transactions ("**Core Principle 7**"). The Applicant fulfills this requirement in part through compliance with other SEF Core Principles, such as Core Principle 3 – Swaps Not Readily Subject to Manipulation ("**Core Principle 3**"). Stability of the market infrastructure is enhanced through compliance with Core Principle 13 – Financial Resources ("**Core Principle 13**"). Core Principle 13 requires that SpectrAxe maintain adequate financial resources to discharge its responsibilities and ensure orderly operation of the market. The rules, policies and activities of the Applicant are designed and focused on ensuring that they maintain best practices and fulfil this public interest mandate. The Applicant operates on a basis consistent with applicable laws and regulations, and best practices of other SEFs and derivatives trading facilities.

(c) fair, meaningful and diverse representation on the board of directors (Board) and any committees of the Board, including:

(i) **appropriate representation of independent directors, and**

(ii) **a proper balance among the interests of the different persons or companies using the services and facilities of the exchange,**

2.1.29 At all times, at least 35% of the Directors shall be Public Directors. Each Director (including Public Directors) shall be elected in accordance with the LLC Agreement, and shall serve for a term of two years from the date of his or her election (or the remainder of any Public Director term to which he or she is elected as a replacement) and until his or her successor is duly appointed, or until his or her earlier resignation, removal for cause or dismissal pursuant to the LLC Agreement. The Board has two (2) Public Directors. The Board shall designate two of its members to serve as the ROC. Both members shall be Public Directors. Paragraph 2.1.8 above contains a discussion of the criteria for Public Director independence. Paragraph 2.1.10 above contains a discussion of director qualification. The Board complies with CFTC Regulation 1.64(b)(3), which requires that the Board's membership fairly represents the diversity of interests at such self-regulatory organization and is otherwise consistent with the composition requirements listed in CFTC Regulation 1.64.

(d) the exchange has policies and procedures to appropriately identify and manage conflicts of interest for all officers, directors and employees, and

2.1.30 The Applicant, through its conflicts of interest rules, policies and procedures in Rule 213 of the SpectrAxe Rulebook, as well as its compliance with Core Principle 12 – Conflicts of Interest ("**Core Principle 12**"), has established a robust set

of safeguards designed to ensure that the SEF Platform operates free from conflicts of interest or inappropriate influence as described above. The CFTC also conducts its own surveillance of the markets and market participants and actively enforces compliance with applicable CFTC Regulations. In addition to this regulatory oversight, the Applicant separately establishes and enforces rules governing the activity of all market participants in its market. The Applicant's conflict of interest policies are described in greater detail in Paragraphs 2.1.12 through 2.1.20 above.

(e) there are appropriate qualifications, remuneration, limitation of liability and indemnity provisions for directors, officers and employees of the exchange.

2.1.31 See Paragraph 2.1.10 above for information on the qualifications of Directors. Members of the Applicant's Management Team are recruited for their particular position based upon their skills and expertise. Their individual goals and performance are regularly assessed by their direct manager as part of the Applicant's performance management process.

2.1.32 Pursuant to the SpectrAxe Rulebook, the liability of each employee of the Applicant to third parties for obligations of the Applicant is limited to the fullest extent provided in the CEA and other applicable law. The Applicant's LLC Agreement provides for the indemnification by the Applicant against losses or damages sustained by a person with respect to third-party actions or proceedings due to the fact that such person is a Director or other officer of the Applicant. In addition, Rule 413 of the SpectrAxe Rulebook provides for limitation of liability of the Applicant, its Affiliates, their respective Directors, officers, managers and employees with respect to the SEF Platform's operations, except in case of fraud, gross negligence or willful misconduct.

2.2 **Fitness – The exchange has policies and procedures under which it will take reasonable steps, and has taken such reasonable steps, to ensure that each director and officer is a fit and proper person and past conduct of each officer or director affords reasonable grounds for belief that the officer or director will perform his or her duties with integrity.**

2.2.1 See Paragraphs 2.1.5 and 2.1.6 above for a description of the Applicant's fitness standards for the Board. See Paragraph 2.1.11 above for a description of the Applicant's policies and procedures for ensuring that each Director is a fit and proper person. See Paragraph 2.1.30 above for a description of the assessment applicable to the Applicant's Management Team.

3. Regulation of Products

3.1 **Review and Approval of Products – The products traded on the exchange and any changes thereto are submitted to the Foreign Regulator, and are either approved by the Foreign Regulator or are subject to requirements established by the Foreign Regulator that must be met before implementation of a product or changes to a product.**

3.1.1 The SEF Core Principles relevant to products traded on the SEF Platform include: Core Principle 2 – Compliance with Rules ("**Core Principle 2**"), Core Principle 3, Core Principle 4 – Monitoring of Trading and Trade Processing ("**Core Principle 4**"), Core Principle 6 – Positions Limits or Accountability, Core Principle 7, and Core Principle 9 – Timely Publication of Trading Information ("**Core Principle 9**"). As noted previously, Core Principle 3 requires SEFs to demonstrate that new products are not susceptible to manipulation.

3.1.2 Rules 401 and 902 of the SpectrAxe Rulebook describe the policies and procedures for adding new products or changing existing products (*i.e.*, SEF Contracts) as follows:

Rule 401. Swaps Traded on the SEF

(a) The Company shall determine which Swaps can be traded from time to time pursuant to these Rules, provided that any determination in respect of listing a Swap for trading pursuant to these Rules shall be submitted to the CFTC as required by the CEA and CFTC Regulations. As of the date of this Rulebook, the SEF will facilitate limit orders only.

(b) Subject to compliance with the CEA and CFTC Regulations, Swaps traded on the SEF may be uncleared swaps. As of the date of this Rulebook, the SEF does not permit the trading of cleared swaps.

(c) The Company shall permit trading only in Swaps that are not readily susceptible to manipulation and for which the Company has, prior to listing the Swap, submitted to the CFTC the information required in Appendix C to Part 38 of the CFTC's Regulations (Demonstration of Compliance that a Contract is not Readily Susceptible to Manipulation). The Company shall make such submission pursuant to Part 40 of the CFTC's Regulations.

Rule 902. Swap Specification Procedures

> Each Swap will meet such specifications, and all trading in such Swap will be subject to such procedures and requirements, as described in the terms and conditions governing such Swap (as set forth below and in the Company's technical specifications) and will be posted on the website of the Company. The specifications for, and the procedures and requirements for trading, any Swap may not be modified in any respect without the prior approval of the Company.
>
> In order to submit a swap to the CFTC as self-certified, SpectrAxe must: (i) meet the submission criteria contained in CFTC Regulation 40.2; (ii) determine that the swap is "not readily susceptible to manipulation" in accordance with Core Principle 3 and CFTC Regulations 37.300 and 37.301; and (iii) include in the self-certified submission the information required by Appendix C to Part 38 of the CFTC Regulations.

Section 7.1 of the SpectrAxe Compliance Manual states:

> "When listing a swap for trading, the CCO shall review the Swap to determine that it is not readily susceptible to manipulation, paying special attention to the reference price used to determine the cash flow exchanges. Once a Swap has been reviewed and approved by the CCO, the terms and conditions of the Swap must be submitted to the CFTC in accordance with the requirements of Parts 37 and 40 of the Commission Regulations. The CCO shall have authority to submit a Swap to the CFTC either with a request for prior approval pursuant to Commission Regulation § 40.3 (Voluntary Submission of New Products for Commission Review and Approval), or with a self-certification pursuant to Commission Regulation § 40.2 (Listing Products for Trading by Certification)."

Section 7.2 of the SpectrAxe Compliance Manual states:

> "At the time the SEF submits a new Swap to the CFTC in accordance with Part 40 of the Commission Regulations, it will include the information required by Appendix C to Part 38 of the Commission Regulations, titled "Demonstration of Compliance that a Contract is not Readily Susceptible to Manipulation." In addition, when listing a contract for trading, the SEF will identify the reference price to be used by a contract and ensure that the reference price is not readily susceptible to manipulation. When identifying the reference price of a contract, the SEF will calculate its own reference price using suitable and well-established acceptable methods or carefully select a reliable third-party index."

3.1.3 Only uncleared bilateral swaps that are Permitted Transactions may be traded as SEF Contracts on the SEF Platform.

3.2 **Product Specifications – The terms and conditions of trading the products are in conformity with the usual commercial customs and practices for the trading of such products.**

3.2.1 Among other things, the requirement that new swaps comply with the SEF Core Principles means that they contain an analysis of the underlying cash market and the deliverable supply of the underlying product. In response to the Applicant's process for introducing a new product or changing an existing product, as described above, the CFTC has the right to follow up with questions requesting additional information on the underlying market including, but not limited to: supply and demand characteristics, participant composition, market concentration, deliverable supply estimates, the relation of the swap size to the underlying market, the quality of the product across various delivery facilities and the delivery facilities used for the product. If the Applicant is unable to provide satisfactory answers to the CFTC's questions, it may require the Applicant to withdraw the proposed product addition or change. It is the Applicant's experience that the terms and conditions of swaps that trade on the SEF Platform are standardized, generally accepted and understood by its Participants.

3.3 **Risks Associated with Trading Products – The exchange maintains adequate provisions to measure, manage and mitigate the risks associated with trading products on the exchange that may include, but are not limited to, daily trading limits, price limits, position limits, and internal controls.**

3.3.1 Paragraph 9.3.1 of this Application covers the way that the Applicant measures, manages and mitigates the trading risk associated with products traded on the SEF Platform.

3.3.2 The Applicant's compliance function is responsible for ensuring that surveillance systems monitor trading by Participants to prevent manipulation, price distortion and other violations of SpectrAxe Rules and applicable law. The Applicant uses an automated system to detect market manipulation, price distortion, and other egregious activity on the SEF Platform. The automated system operates a number of algorithms to detect unusual patterns of order and trade data in real time, and raises potential incidents and threats via its case management tool. Consistent with other SEFs, the Applicant has determined that it is not necessary and appropriate to set position limits or position accountability levels for swaps at this time.

4. Access

4.1 **Fair Access**

(a) The exchange has established appropriate written standards for access to its services including requirements to ensure:

(i) **participants are appropriately registered as applicable under Ontario securities laws, or exempted from such requirements,**

(ii) **the competence, integrity and authority of systems users, and**

(iii) **systems users are adequately supervised.**

(b) The access standards and the process for obtaining, limiting and denying access are fair, transparent and applied reasonably.

(c) The exchange does not unreasonably prohibit, condition or limit access by a person or company to services offered by it.

(d) The exchange does not:

(iv) **permit unreasonable discrimination among participants, or**

(v) **impose any burden on competition that is not reasonably necessary and appropriate.**

(e) The exchange keeps records of each grant and each denial or limitation of access, including reasons for granting, denying or limiting access.

4.1.1 Consistent with applicable law, including the SEF Core Principles, the SEF Platform provides access to Participants on a fair, non-discriminatory and open basis. Participant status, and access to, and usage of, the SEF Platform in such capacity, is available to all market participants that meet the criteria set forth by the Applicant and engage in transactions on the SEF Platform in accordance with the SpectrAxe Rulebook. Chapter 3 of the SpectrAxe Rulebook sets out the admission and eligibility criteria that Participants must meet. Among other requirements, the SpectrAxe Rulebook requires that a Participant must:

- be of good financial standing and meet the financial and related reporting requirements set forth in the SpectrAxe Rulebook;
- upon initial application for Trading Privileges, represent to the Applicant that it is an ECP;
- notify SpectrAxe immediately upon becoming aware that it fails to meet its minimum financial requirements; and
- demonstrate a capacity to adhere to the SpectrAxe Rulebook and all applicable CFTC Regulations, including those concerning record-keeping, reporting, financial requirements and trading procedures.

4.1.2 Ontario Users using the SEF Platform must be registered under Ontario securities laws, exempt from such registration requirements, or not subject to such registration requirements.

4.1.3 Core Principle 11 requires that, unless necessary or appropriate to achieve the purposes of applicable law, a SEF should avoid (a) adopting any rules or taking any actions that result in any unreasonable restraints of trade; or (b) imposing any material anticompetitive burden on trading. As such, the Applicant does not implement rules that would impose any burden on competition that is not reasonably necessary and appropriate, because such rules would not meet SEF Core Principle requirements.

4.1.4 The Applicant may deny the grant of Trading Privileges, or prevent a person from becoming or remaining a Participant, if it would cause the Applicant to be in violation of any applicable law. The Applicant keeps records of each grant and each denial or limitation of access, including reasons for granting, denying or limiting access. Under Rule 507 of the SpectrAxe Rulebook, if SpectrAxe determines that the condition of a Participant is such that to allow that Participant to continue to have access to the SEF Platform would adversely affect SpectrAxe or the financial markets, SpectrAxe may impose additional limits (including, but not limited to, product restrictions and trade volume limits) on such Participant or terminate, in whole or in part, the Trading Privileges of such Participant, as well as the exercise of such Trading Privileges by its Authorized Traders.

4.1.5 Pursuant to Rule 204 of the SpectrAxe Rulebook, any person who is denied Trading Privileges or any Participant who has Trading Privileges removed may request a review of such decision by the SEF Participant Committee. As described

in Rule 204: The SEF Participant Committee "shall (i) determine the standards and requirements for initial and continuing Participant eligibility, (ii) review appeals of staff denials of Participant applications, and (iii) approve Rules that would result in different categories or classes of Participants receiving disparate access to the SEF" and "shall not permit [SpectrAxe] to, restrict access or impose burdens on access to the SEF in a discriminatory manner, within each category or class of Participants or between similarly-situated categories or classes of Participants."

Pursuant to Rule 302 of the SpectrAxe Rulebook, a person whose application for Trading Privileges has been denied or granted conditionally, and any Participant or Authorized User (as defined in the SpectrAxe Rulebook) whose Trading Privileges or status, respectively, is revoked, suspended or limited pursuant to Rules 303 or 305, may appeal the Applicant's decision to the Applicant's Compliance Department or a Disciplinary Panel in accordance with the provisions of Chapter 7 of the SpectrAxe Rulebook. A determination of the Applicant to revoke, suspend or limit a person's access to the SEF Platform pursuant to Rules 303 and 305 shall not take effect until the review procedures under Chapter 7 have been exhausted or the time for review has expired. Any decision by the Compliance Department or a Disciplinary Panel then made constitutes the final action of the SEF Platform with respect to the matter in question. In the event that the Compliance Department or a Disciplinary Panel upholds the decision to deny access, the person may then submit its dispute to arbitration under Chapter 8 of the SpectrAxe Rulebook.

5. Regulation of Participants on the Exchange

5.1 **Regulation – The exchange has the authority, resources, capabilities, systems and processes to allow it to perform its regulation functions, whether directly or indirectly through a regulation services provider, including setting requirements governing the conduct of its participants, monitoring their conduct, and appropriately disciplining them for violations of exchange requirements.**

5.1.1 A SEF is a self-regulatory organization under CFTC Regulations. A SEF is obliged under CFTC Regulations to have policies governing the conduct of its participants; to monitor participant compliance with applicable requirements; and to discipline participants, including by means other than exclusion from the marketplace. Participants are required to comply with a significant number of rules governing trading on the SEF Platform pursuant to the SpectrAxe Rulebook. The applicable rules are primarily located in Chapters 3 through 8 of the SpectrAxe Rulebook.

5.1.2 The Applicant is responsible for conducting trade practice surveillance and market surveillance of the SEF Platform. This includes reviewing deals on an ongoing basis to determine if there are any potential violations of the SpectrAxe Rulebook and monitoring compliance with market manipulation rules and the orderly liquidation of physically delivered expiring swaps. The Applicant's Compliance Department uses a **surveillance system** that triggers alerts for human review based on suspicious trading activities or results to effectively and efficiently profile markets and Participants and conduct daily monitoring of prices, volume and market news. In addition to the information reviewed passively, information is gathered, reviewed and/or audited by Applicant staff from a variety of random samples of trade data.

5.1.3 The Applicant expends considerable human, technological and financial resources that are focused on the maintenance of fair, efficient, competitive and transparent markets, and the protection of all SEF Platform Participants from fraud, manipulation and other abusive trading practices. The Applicant's market surveillance activities include a broad range of interconnected efforts that include trade practice reviews, data quality assurance audits and enforcement activities. To fulfill its mandate to effectively monitor and enforce the SEF Platform's rules, the Applicant has established a trade surveillance system capable of detecting potential trade practice violations of the SpectrAxe Rulebook. As noted above, Participants are required to comply with a significant number of rules governing trading on the SEF Platform, pursuant to the SpectrAxe Rulebook.

5.1.4 Investigating and enforcing rule violations are necessary components of regulatory safeguards. The SEF Platform's disciplinary rules include establishing review panels, conducting investigations, prosecuting violations and imposing sanctions, as set forth in Chapter 7 of the SpectrAxe Rulebook, which is discussed below in Part 7.

5.1.5 The Applicant is dedicated to safeguarding the integrity of its SEF Platform and ensuring that it is free from manipulation and other abusive practices. The efforts described in this Part 5 are a necessary component of markets that work efficiently and safely, thereby allowing Participants that use the SEF Platform to have access to a marketplace that is open, transparent and free from manipulation and market abuse.

5.1.6 Specifically with reference to regulatory technology, the Applicant has made significant investments in this area, including staff dedicated solely to the support and continuous development of its regulatory technology infrastructure, ensuring that the Applicant's regulatory and market protection capabilities anticipate and evolve with the changing dynamics of the marketplace. The Applicant has developed an audit trail of market activity, as well as powerful and flexible data query and analytical tools that allow its regulatory staff to examine real-time and historical orders and transaction data, maintain profiles of markets and Participants, and detect trading patterns potentially indicative of market abuses.

6. Rulemaking

6.1 Purpose of Rules

(a) **The exchange has rules, policies and other similar instruments (Rules) that are designed to appropriately govern the operations and activities of participants and do not permit unreasonable discrimination among participants or impose any burden on competition that is not reasonably necessary or appropriate.**

6.1.1 Pursuant to its obligations under the regulatory oversight under the CEA and under CFTC Regulations, the Applicant has instituted rules, policies and agreements that govern the operations and activities of its Participants. The Applicant's rules are covered across 11 chapters in the SpectrAxe Rulebook. The Applicant believes that its rules and policies that govern the activities of Participants are consistent with the rules and policies of other derivatives marketplaces and therefore do not impose any burden on competition that is not reasonably necessary or appropriate.

(b) **The Rules are not contrary to the public interest and are designed to**

(i) **ensure compliance with applicable legislation,**

(ii) **prevent fraudulent and manipulative acts and practices,**

(iii) **promote just and equitable principles of trade,**

(iv) **foster co-operation and co-ordination with persons or companies engaged in regulating, settling, processing information with respect to, and facilitating transactions in the products traded on the exchange,**

(v) **provide a framework for disciplinary and enforcement actions, and**

(vi) **ensure a fair and orderly market.**

6.1.2 The SpectrAxe Rulebook is subject to the standards and requirements outlined by the SEF Core Principles. At a high level, the SpectrAxe Rulebook seeks to ensure fair and orderly markets accessible to all eligible Participants. This aim is accomplished by establishing rules that reflect the criteria in the SEF Core Principles, that are not contrary to the public interest, and are designed to:

(i) **ensure compliance with applicable legislation**. The Applicant is obligated to comply with the CEA, the SEF Core Principles and the CFTC Regulations (collectively, the "**U.S. SEF Regulations**"). As a result, the Applicant must implement rules that require compliance with the U.S. SEF Regulations by its Participants. SEF Core Principle 1 requires a swaps trading facility to comply with all applicable CFTC Regulations to be designated a SEF and maintain such designation. The Applicant proactively ensures compliance with all applicable laws and regulations, evidenced in part by its regular dialogue with the CFTC. Core Principle 2 requires SEFs to ensure participants' consent to SEF rules and jurisdiction prior to accessing its markets. Chapter 3 of the SpectrAxe Rulebook governs membership requirements and establishes compliance with the rules, including one that requires Participants to consent to the jurisdiction of the SEF Platform and U.S. SEF Regulations.

(ii) **prevent fraudulent and manipulative acts and practices**. Core Principle 2 requires a SEF to collect information, examine participant records, direct supervision of the market, maintain sufficient compliance staff, establish procedures for and conduct audit trail reviews, perform real-time market monitoring and market surveillance and establish an automated trade surveillance system. The Applicant has instituted all these controls. Core Principle 3 requires a SEF to ensure the swaps it trades are not readily susceptible to manipulation. The Applicant complies with this Core Principle by including narrative descriptions of the product terms and conditions of every swap and by certifying in its CFTC Rule 40.2 submission that each swap is not readily susceptible to manipulation in accordance with Core Principle 3 and the criteria set forth in Appendix C to Part 38 of the CFTC Regulations. Also, Chapters 4 and 6 of the SpectrAxe Rulebook prescribe trading practices and trading conduct requirements and provide details on prohibited trading activities and the SEF Platform's prohibitions on fictitious trades, fraudulent activity and manipulation.

(iii) **promote just and equitable principles of trade**. Core Principle 9 requires a SEF to promote transparency by making timely public disclosures of trading information. The Applicant conforms to this Core Principle by publishing daily information on settlement prices, volume, open interests, and opening and closing ranges for actively traded swaps, where applicable to the method of execution and products traded on the SEF Platform. Core Principle 7 requires a SEF to ensure the financial integrity of transactions entered into on its markets. The Applicant's data and order entry feed systems offer simultaneous and equivalent access to all Participants. Core Principle 11 prohibits the imposition of unreasonable restraints or uncompetitive burdens on trade. Throughout the SpectrAxe Rulebook, the Applicant has established transparent and objective standards to prevent

unreasonable restraints on trade and foster competitive and open market participation. Additionally, Section 26.1 of the SpectrAxe Compliance Manual requires that compliance personnel ensure the Applicant does not adopt any rule or take any action that would result in any unreasonable restraint of trade or impose any material anticompetitive burden on trading. The Applicant believes that compliance with these Core Principles, which require transparency, financial integrity, fair access and fair competition among Participants, promotes just and equitable principles of trade.

(iv) **foster co-operation and co-ordination with persons or companies engaged in regulating, settling, processing information with respect to, and facilitating transactions in the products traded on the exchange**. Rule 1107 of the SpectrAxe Rulebook authorizes the Applicant to enter into information-sharing arrangements as it determines necessary or advisable to obtain any necessary information, to perform any monitoring of trading or trade processing, to provide information to the CFTC upon request and to carry out such international information-sharing agreements as the CFTC may require. Furthermore, the Applicant may enter into any arrangement with any other person (including any governmental authority, such as the Ontario Securities Commission, or trading facility) where the Applicant determines such person exercises a legal or regulatory function under any applicable law or considers the arrangement to be in furtherance of the operation or duties of the Applicant under applicable law.

(v) **promote a framework for disciplinary and enforcement actions**. Core Principle 2 requires a SEF to adopt a rule enforcement program, disciplinary procedures and sanctions. In response to this requirement, Chapter 7 of the SpectrAxe Rulebook describes the SEF Platform's rules for rule enforcement and Chapter 8 prescribes the Applicant's procedures for dispute resolution.

(vi) **ensure a fair and orderly market**. Core Principle 2 requires a SEF to establish rules governing the operation of the SEF, including orderly trading procedures and rule enforcement programs. Core Principle 3 requires a SEF to ensure that swaps traded on the facility are not readily subject to manipulation. Core Principle 4 requires a SEF to establish procedures for monitoring of trading and trade process. The Applicant complies with these Core Principles by prescribing trading rules, collecting and evaluating market activity data, by maintaining and auditing its real-time monitoring program, and by auditing historical data to detect trading abuses. Core Principle 9 requires timely public disclosure of trade information, all of which is published daily. Core Principle 14 requires a SEF to establish and maintain risk analysis, emergency procedure, and periodic systems testing programs. The Applicant periodically reviews its programs and procedures, including risk analysis, emergency planning, and systems testing. The Applicant regularly audits systems and technology tests both for technical and regulatory compliance. The Applicant believes that compliance with these SEF Core Principles, which require effective trading rules, real-time and post-trade monitoring, public data dissemination and risk management procedures and testing, ensure a fair and orderly market.

7. Due Process

7.1 **Due Process – For any decision made by the exchange that affects a participant, or an applicant to be a participant, including a decision in relation to access, exemptions, or discipline, the exchange ensures that:**

(a) **parties are given an opportunity to be heard or make representations, and**

(b) **it keeps a record of, gives reasons for, and provides for appeals or reviews of its decisions.**

7.1.1 Core Principle 2 requires the Applicant to adopt a rule enforcement program, disciplinary procedures and sanctions. In response to this requirement, Chapter 7 of the SpectrAxe Rulebook sets out the Applicant's rules for discipline and rule enforcement and Chapter 8 prescribes the Applicant's dispute resolution procedures.

7.1.2 The Applicant has the authority to initiate and conduct investigations, and enforce remedial action for breaches, and to impose sanctions for such violations. It is the duty of the Applicant's CCO to enforce the rules, but the CCO may also delegate specific responsibilities to it’s compliance department, which consist of employees of the Applicant and may consist of personnel that the Applicant may hire on a contract basis (“**Compliance Department**”).

7.1.3 The Compliance Department has the authority to conduct investigations of possible violations of the Rulebook, prepare written reports respecting such investigations, furnish such reports to the Applicant's disciplinary panel (“**Disciplinary Panel**”) and conduct the prosecution of such violations. An investigation must be commenced upon receipt of a request from CFTC staff or receipt of information by the Applicant that, in the judgment of its Compliance Department, indicates a reasonable basis for finding that a violation has occurred or will occur. The Applicant maintains records of all investigations conducted by the Applicant in accordance with its recordkeeping policy.

7.1.4 If it is concluded that a violation may have occurred, the Participant may be issued a warning letter or an investigation report concerning the matter may be filed with the Disciplinary Panel, depending on the outcome of the Compliance Department’s investigation. No more than one warning letter may be issued to the same person found to have committed

the same violation more than once in a rolling 12-month period. The investigation report must include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; the Compliance Department's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued. The report may also include the Participant's disciplinary history at the SEF Platform, including copies of any warning letters.

After the completion of an Investigation Report and the receipt of any submission made by the potential respondent, the Compliance Department will, within 30 days, take one of the following actions:

(i) If the Compliance Department determines that additional investigation or evidence is needed to decide whether a reasonable basis exists to believe that a violation within the Applicant's jurisdiction has occurred or is about to occur, it will conduct further investigation.

(ii) If the Compliance Department determines that a reasonable basis exists to believe that a violation within the Applicant's jurisdiction has occurred or is about to occur, the potential respondent will be served with a notice of charges and proceed in accordance with Chapter 7 of the SpectrAxe Rulebook.

(iii) If the Compliance Department determines that disciplinary proceedings are unwarranted, it may issue a warning letter setting forth, in writing, the facts and analysis supporting the decision.

(iv) If the Compliance Department determines that no reasonable basis exists to believe that a violation within the Applicant's jurisdiction has occurred or is about to occur, it may direct that no further action be taken. Upon such determination, the Compliance Department will provide a written statement setting forth the facts and analysis supporting the decision.

If the Compliance Department decides to serve a notice of charges to the respondent, the respondent must file an answer within 20 days after being served with such notice, or within such other time period determined appropriate by the CCO. To answer a notice of charges, the respondent must in writing: (i) for each allegation set forth in the notice of charges, (A) admit such allegation, (B) deny such allegation, or (C) affirmatively state that the respondent does not have and is unable to obtain sufficient information to admit or deny such allegation, which shall have the effect of a denial of such allegation. Any failure by the respondent to timely serve an answer to a notice of charges will be deemed to be an admission to the allegations in such notice. Any failure by the respondent to answer one or more allegations in a notice of charges will be deemed to be an admission of that allegation or those allegations. Any allegation in a notice of charges that the respondent fails to expressly deny will be deemed to be admitted. If a respondent admits or fails to specifically deny any of the allegations in the notice of charges, the Disciplinary Panel shall find that the violations set forth in such allegations have been committed and shall impose a sanction for such violations. A respondent shall be granted a hearing before a Disciplinary Panel for every instance in which such respondent (i) denies an allegation and requests a hearing in accordance with the SpectrAxe Rulebook's procedures, or (ii) requests a hearing in accordance with the SpectrAxe Rulebook's procedures.

7.1.5 If, after a hearing, the Disciplinary Panel determines that a reasonable basis exists for finding a violation, the CCO shall serve a notice of charges ("**Notice**") on the Participant alleged to have been responsible for the violation.

7.1.6 The respondent may appeal the notice of charges to the CCO within twenty (20) days of the date of service of the Notice. The written request for appeal must state in writing the grounds for appeal, including the findings of fact, conclusions or sanctions to which the respondent objects.

7.1.7 Formal hearings on any Notice shall be conducted by a Hearing Panel (whether a Disciplinary or Appeals Panel) selected by the CCO. The Hearing Panel may not include any members of the Compliance Department, or of any Disciplinary Panel involved in the matters on appeal. The Hearing Panel must meet the composition detailed in CFTC Regulation 1.64(c), which requires that whenever a Hearing Panel is acting with respect to a disciplinary action in which the respondent is a member of the Board, the Hearing Panel, or when the suspected violation involves manipulation (or attempted manipulation) of the price of a SEF Contract or conduct which directly results in financial harm to a non-member of the SEF Platform that: (a) at least one member of the Hearing Panel is not a member of the SEF Platform; and (b) the Hearing Panel include sufficient different membership interests so as to ensure fairness and to prevent special treatment or preference for any person in the conduct of the Hearing Panel's responsibilities.

7.1.8 Prior to the commencement of any hearing, the Hearing Panel may accept a written offer of settlement from the respondent, whereby the respondent, without either admitting or denying any violations must accept the jurisdiction of the Applicant over it and over the subject matter of the proceedings and consent to the entry of the findings and sanctions imposed under such offer of settlement.

7.1.9 Chapter 7 of the SpectrAxe Rulebook sets out the Applicant's procedures for holding a hearing. After the hearing is complete, Rule 714 requires the Hearing Panel to render a written decision based upon the weight of evidence and to provide a copy to the respondent. Rule 716 allows a respondent to appeal a decision by the Disciplinary Panel to be

heard by an Appeal Panel appointed by the CCO. In addition, a disciplinary action may be appealed to the CFTC pursuant to Part 9 of the CFTC Regulations.

8. Clearing and Settlement

8.1 **Clearing Arrangements –** Per Rule 401 of the SpectrAxe Rulebook, the SEF Platform does not offer any SEF Contracts that are intended to be cleared. As explained in Rule 401(b), "the SEF does not permit the trading of Cleared Swaps." Consequently, trades made on the SEF Platform are not cleared and no Participant or PFI is subject to CFTC Regulations related to clearing due to their activities on the SEF Platform.

8.2 **Settlement Arrangements –** Trades made on the SEF Platform are settled between the respective PFIs of the two Participant counterparties. The Applicant ensures that the trades are settled correctly, as it is responsible for reporting those trades under CFTC Regulations. All Participants and PFIs are subject to the CFTC Regulations related to swaps trading, as the SpectrAxe Rulebook makes clear. However, in terms of specific regulatory burdens, the Applicant and the PFIs handle the reporting requirements under CFTC Regulations.

9. Systems and Technology

9.1 **System and Technology – Each of the exchange's critical systems has appropriate internal controls to ensure completeness, accuracy, integrity and security of information, and, in addition, has sufficient capacity and business continuity plans to enable the exchange to properly carry on its business. Critical systems are those that support the following functions:**

(a) **order entry;**

(b) **order routing;**

(c) **execution;**

(d) **trade reporting;**

(e) **trade comparison;**

(f) **data feeds;**

(g) **market surveillance; and**

(h) **financial reporting.**

9.1.1 The SEF Platform has appropriate internal controls to ensure completeness, accuracy, integrity and security of information, and, in addition, has sufficient capacity and business continuity plans to enable the exchange to properly carry on its business.

9.1.2 The Applicant has put safeguards and security tools in place to protect the critical data and system components of its SEF Platform. As discussed in Paragraph 5.1.2 above, the Applicant uses a trade surveillance program that is capable of detecting potential trade practice violations of the SpectrAxe Rulebook, and maintains full responsibility for compliance obligations.

9.1.3 The Applicant captures and retains all audit trail data necessary to detect, investigate, and prevent customer and market abuses. Such data shall be sufficient to reconstruct all trades and trade-related activity within a reasonable period of time and to provide evidence of any violations of the SEF Platform's rules or policies. The Applicant has also developed risk monitoring tools and risk controls to prevent and reduce the potential risk of market disruptions, including but not limited to market restrictions that could pause or halt trading under market conditions prescribed by the Applicant.

9.1.4 The Applicant has established a business continuity plan and disaster recovery procedures with respect to the SEF Platform. The plan describes the Applicant's response to and addresses both small-scale and wide-scale service disruptions to the Applicant's SEF Platform. The main objectives of the Applicant's business continuity plan and disaster recovery procedures are to enable timely recovery and resumption of the SEF Platform's operations and the resumption of the Applicant's fulfillment of its responsibilities and obligations following any disruptions to SEF Platform operations, including: order processing; price reporting; market surveillance; and maintenance of a comprehensive audit trail.

9.1.5 The Applicant operates and provides to Participants a robust and scalable platform. Standard system monitoring metrics include capacity and performance level alerts. Additionally, the Applicant's system server provider allows for system capacity to expand on a use-as-needed basis. This ensures that the SEF Platform is well-positioned to provide adequate responsiveness to Participants. Systems, policies and processes are continually monitored by the SEF Platform's IT staff

and periodically audited in conjunction with the Applicant's Compliance Department, including as described in Paragraph 9.2.4 below.

9.2 **Without limiting the generality of Paragraph 9.1, for each of its systems supporting order entry, order routing, execution, data feeds, trade reporting and trade comparison, the exchange:**

(a) **makes reasonable current and future capacity estimates;**

(b) **conducts capacity stress tests to determine the ability of those systems to process transactions in an accurate, timely and efficient manner;**

(c) **reviews the vulnerability of those systems and data center computer operations to internal and external threats, including physical hazards and natural disasters;**

(d) **ensures that safeguards that protect a system against unauthorized access, internal failures, human errors, attacks and natural catastrophes that might cause improper disclosures, modification, destruction or denial of service are subject to an independent and ongoing audit, which should include the physical environment, system capacity, operating system testing, documentation, internal controls and contingency plans;**

(e) **ensures that the configuration of the system has been reviewed to identify potential points of failure, lack of back-up and redundant capabilities;**

(f) **maintains reasonable procedures to review and keep current the development and testing methodology of those systems; and**

(g) **maintains reasonable back-up, contingency and business continuity plans, disaster recovery plans and internal controls**.

9.2.1 The SEF Platform uses technology for its electronic trading platform that includes software provided by third-party vendors (see discussion of outsourcing in Paragraph 14.1.1 below).

9.2.2 The SEF Platform's system server provider allows for system capacity to expand on a use-as-needed basis.

9.2.3 The Applicant conducts regular performance and capacity tests in a production test environment which matches production in its size, scope and infrastructure.

9.2.4 The Applicant has internal policies and controls that govern system access, failures, and errors. Also, the Applicant and/or its service providers periodically conduct risk audits, internal physical security compliance inspections and covert internal and external intrusion tests. Additionally, the Applicant performs cybersecurity vulnerability testing. Such tests are designed to periodically assess the operating effectiveness of security controls as well as to monitor internal compliance with security policies and procedures. External threats such as physical hazards and natural disasters are addressed in the Applicant's business continuity plan and disaster recovery procedures.

9.2.5 The Applicant and/or its service providers review the configuration of SEF Platform's systems as part of its regular control procedures and conducts reviews as needed when issues are identified and resolved through its enterprise risk management and governance protocols. Configuration management is the subject of internal audits and is also included in the Applicant's business continuity plan and disaster recovery procedures.

9.2.6 The Applicant reviews and keeps current the development and testing methodology of the above systems pursuant to procedures contained in the SpectrAxe Compliance Manual, company policy, and the Applicant's business continuity plan and disaster recovery procedures. The Applicant's business continuity plan and disaster recovery procedures are designed to allow for the recovery and resumption of operations and the fulfillment of the duties and obligations of the Applicant following a disruption. The Applicant performs periodic tests to verify that the resources outlined in its business continuity plan and disaster recovery procedures are sufficient to ensure continued fulfillment of all duties of the Applicant under the CEA and CFTC Regulations.

9.2.7 Full and incremental backups are performed on a regular basis for audit logs and files that are irreplaceable, have a high replacement cost or are considered critical. Amazon Web Services ("**AWS**") provides systems server hosting and data backup services to the Applicant.

SpectrAxe will store all relevant data for two years for immediate retrieval and will keep it for a total of five years, as required by its record retention policy. Data is being backed up, in near real time, in two locations: (1) at the primary AWS site in Ohio and (2) at the backup AWS site in Virginia.

9.3 **Information Technology Risk Management Procedures – The exchange has appropriate risk management procedures in place, including those that handle trading errors and trading halts, and those that respond to market disruptions and disorderly trading.**

9.3.1 The Applicant provides extensive market integrity controls to ensure fair and efficient markets. As described in Rules 408, 409, and 412 of the SpectrAxe Rulebook, the Applicant has risk monitoring tools and risk controls to prevent and reduce the potential risk of market disruptions, such as by (i) imposing or modifying position limits, position accountability levels, price limits or intraday market restrictions; (ii) ordering the liquidation or transfer of open positions in any Swap; (iii) ordering the fixing of a settlement price of any SEF Contract; (iv) extending, limiting or changing the trading hours or expiration date in respect of one or more SEF Contracts; (v) suspending or curtailing trading, or limiting trading to liquidation only, in any or all SEF Contracts; (vi) transferring SEF Contracts and associated margin, or altering any SEF Contract's settlement terms or conditions; (vii) modifying or suspending any provision of the SpectrAxe Rulebook; and/or (viii) taking market actions as may be directed by the CFTC. The Applicant has not implemented any standing position limits or position accountability levels for swaps at this time but regularly reviews whether such limits or accountability levels are appropriate. SpectrAxe's Rulebook makes clear that the Applicant has the authority to impose such limits or accountability levels, separate and apart from any requirements that may be required by the CFTC. The Applicant also has the ability to impose certain other market restrictions under its emergency powers.

10. Financial Viability

10.1 **Financial Viability – The exchange has sufficient financial resources for the proper performance of its functions and to meet its responsibilities.**

10.1.1 The Applicant has adequate financial and staff resources to carry on its activities in full compliance with its regulatory requirements and with best practices. Under U.S. SEF Regulations, a SEF must submit financial statements to the CFTC and maintain adequate financial resources to cover its operating costs for a period of at least one year, calculated on a rolling basis. A SEF must also hold liquid financial assets equal to at least the greater of three months operating costs or the projected costs needed to wind down the SEF's operations. The Applicant maintains no less than the current minimum capital amounts needed and will maintain any future minimum capital amounts needed to comply with U.S. SEF Regulations.

11. Trading Practices

11.1 **Trading Practices – Trading Practices are fair, properly supervised and not contrary to the public interest.**

11.1.1 The Applicant is obligated to comply with U.S. SEF Regulations, which, as described in Paragraph 6.1.2 above, require trading practices that are fair, properly supervised and not contrary to the public interest. The U.S. SEF Regulations also require that the Applicant implement rules that require compliance with the U.S. SEF Regulations by its Participants. The SpectrAxe Rulebook, which addresses the SEF Platform's trading requirements and processes, is subject to the standards and requirements outlined by the SEF Core Principles. At a high level, the SEF Core Principles and the SpectrAxe Rulebook both seek to ensure fair and orderly markets accessible to all eligible Participants that are properly supervised and operated in a manner consistent with the public interest.

11.2 **Orders – Rules pertaining to order size and limits are fair and equitable to all market participants and the system for accepting and distinguishing between and executing different types of orders is fair, equitable and transparent.**

11.2.1 Rules pertaining to order size and limits are set forth in Chapter 4 of the SpectrAxe Rulebook. As noted in Paragraph 11.1.1 above, the SpectrAxe Rulebook is subject to the standards and requirements outlined by the SEF Core Principles and is subject to periodic review by the Applicant to ensure that the limits are fair, equitable and appropriate for the market. The Applicant submits that its rules for accepting and distinguishing between and executing different types of orders is fair, equitable and transparent.

11.3 **Transparency – The exchange has adequate arrangements to record and publish accurate and timely information as required by the Foreign Regulator. This information is also provided to all participants on an equitable basis.**

11.3.1 Core Principle 9 requires a SEF to make public timely information concerning swaps transactions executed on the SEF. The Applicant fulfills Core Principle 9 by posting trade data to its website daily, and by reporting swaps data to DTCC, the swap data repository for the SEF Platform.

12. Compliance, Surveillance and Enforcement

12.1 **Jurisdiction – The exchange or the Foreign Regulator has the jurisdiction to perform member and market regulation, including the ability to set rules, conduct compliance reviews and perform surveillance and enforcement.**

12.1.1 The Applicant operates a platform that is regulated by the CFTC as a SEF. A SEF is a self-regulatory organization under CFTC rules and has certain obligations to monitor Participants' trading activity on the platform under CFTC Regulation 37.203(e), 37.401, 37.402 and 37.403.

12.2 **Member and Market Regulation – The exchange or the Foreign Regulator maintains appropriate systems, resources and procedures for evaluating compliance with exchange and legislative requirements and for disciplining participants.**

12.2.1 Core Principle 2 requires a SEF to collect information, examine Participant records, direct supervision of the market, maintain sufficient compliance staff, establish procedures for and conduct audit trail reviews, perform real-time market monitoring and market surveillance and establish an automated trade surveillance system. The Applicant has instituted all these controls and has adequate resources available to ensure that controls are properly applied. Core Principle 2 also requires a SEF to adopt a rule enforcement program, disciplinary procedures and sanctions. Paragraph 7 of this application describes the resources available to the SEF Platform to investigate and discipline Participants for rule violations. Also, Chapter 7 of the SpectrAxe Rulebook sets out the Applicant's disciplinary rules and Chapter 8 prescribes the Applicant's dispute resolution procedures.

12.2.2 The CCO is appointed by the Board and assists the Applicant in meeting its regulatory obligations, as set out by the CFTC.

12.2.3 It is the duty of the CCO to enforce the SEF Platform's rules and to assess the quality of its compliance oversight and disciplinary policies and procedures. As noted in this application, the Applicant's Compliance Department , under the direction and direct supervision of the CCO, is responsible for conducting investigations of possible violations of any of the Applicant's rules (“Violations”), preparing written reports with respect to such investigations, furnishing such reports to the Applicant's disciplinary panels and conducting the prosecution of any Violations in accordance with Chapter 7 of the SpectrAxe Rulebook. The CCO, on an ongoing basis, reviews the performance of staff and, where necessary, establishes procedures for the remediation of noncompliance issues. The CCO reports directly to the Board. The CCO is supervised by the Board's ROC. The CCO is required to meet with the ROC at least quarterly and review the SEF Platform's self-regulatory program, including compliance oversight and disciplinary processes. The ROC reviews the performance of the CCO.

12.3 **Availability of Information to Regulators – The exchange has mechanisms in place to ensure that the information necessary to conduct adequate surveillance of the system for supervisory or enforcement purposes is available to the relevant regulatory authorities, including the Commission, on a timely basis.**

12.3.1 Please see Paragraph 16.1.1 below.

13. Record Keeping

13.1 **Record Keeping – The exchange has and maintains adequate systems in place for the keeping of books and records, including, but not limited to, those concerning the operations of the exchange, audit trail information on all trades, and compliance with, and/or violations of exchange requirements.**

13.1.1 The Applicant collects data on a daily basis related to its regulated activity in compliance with Core Principle 10. The Applicant is required to maintain records of all activities relating to its business, including data related to order messaging, order execution and pricing. The Applicant maintains a precise and complete data history, referred to as the audit trail, for every order entered and transaction executed across the SEF Platform. Audit trail information for each transaction includes the order instructions, entry time, modification time, execution time, price, quantity, account identifier and parties to the transaction. Files of all electronic orders are regularly archived and copies are stored at multiple locations to ensure redundancy and critical safeguarding of the data. Furthermore, as a safeguard, the CFTC and the Applicant require Participants to maintain all audit trail data in the manner, and for the time period, prescribed by the CEA, CFTC Regulations and the SpectrAxe Rulebook.

14. Outsourcing

14.1 **Outsourcing – Where the exchange has outsourced any of its key services or systems to a service provider, it has appropriate and formal arrangements and processes in place that permit it to meet its obligations and that are in accordance with industry best practices.**

14.1.1 The Applicant has entered into several licensing and services agreements with unaffiliated third parties for the use of (i) trade reporting technology, (ii) front, middle and back office functionality (including monitoring, invoicing and billing), (iii) software and (iv) various support services, including operations and compliance support, trade reporting, books and records, on-boarding of clients, telecommunications and information technology. These agreements permit the Applicant to meet its obligations and are in accordance with industry best practices. The outsourcing arrangements have terms that allow the Applicant to monitor the services provided to ensure that the Applicant meets its regulatory obligations with respect to the outsourced service and that any services are provided in accordance with industry best practices. The Applicant at all times retains responsibility for any functions delegated to any service provider and is the ultimate decision-making authority.

14.1.2 As described more fully in Paragraph 5.1.2 above, the Applicant employs an internal framework to perform surveillance, investigative and regulatory functions under the SpectrAxe Rulebook.

15. Fees

15.1 **Fees**

(a) **All fees imposed by the exchange are reasonable and equitably allocated and do not have the effect of creating an unreasonable condition or limit on access by participants to the services offered by the exchange.**

15.1.1 The CFTC requires that the Applicant must charge comparable fees for Participants receiving comparable access to, or services from, the SEF Platform. The Applicant complies with this requirement and therefore fees charged by the Applicant do not create an unreasonable condition or limit on access by Participants.

(b) **The process for setting fees is fair and appropriate, and the fee model is transparent.**

15.1.2 The Applicant is required by CFTC Regulations to charge all Participants fees that are impartial, transparent and applied in a fair and non-discriminatory manner. The Applicant has the sole authority to set the times and amounts of any assessments or fees to be paid by Participants. All fee changes must be submitted to the CFTC for certification or approval under Part 40 of the CFTC Regulations prior to their implementation. The Applicant provides its fee schedule to each Participant pursuant to the applicable notice requirements in the CFTC Regulations and the SpectrAxe Rulebook.

16. Information Sharing and Oversight Arrangements

16.1 **Information Sharing and Regulatory Cooperation – The exchange has mechanisms in place to enable it to share information and otherwise cooperate with the Commission, self-regulatory organizations, other exchanges, and other appropriate regulatory bodies.**

16.1.1 It is the Applicant's policy to respond promptly and completely, through its Compliance Department and/or legal counsel, to any proper regulatory inquiry or request for documents. All inquiries and other communications from the Commission will be referred immediately to the Applicant's CCO.

16.1.2 Rule 1107 of the SpectrAxe Rulebook authorizes the Applicant to enter into information-sharing agreements or other arrangements or procedures necessary to allow the Applicant to obtain any necessary information to perform any monitoring of trading and trade processing, provide information to other markets, the CFTC, the Commission or any other governmental body with jurisdiction over the Applicant upon request and which allow the Applicant to carry out such international information-sharing agreements as may be required. Also, the Applicant may enter into any information-sharing arrangement with any person or body (including the CFTC, the Commission, any self-regulatory organization, any SEF, DCM, market, clearing organization or governmental body). The Applicant shares or will share information with DTCC, which is its swap data repository.

16.2 **Oversight Arrangements – Satisfactory information sharing and oversight agreements exist between the Ontario Securities Commission and the Foreign Regulator.**

16.2.1 The CFTC has entered into memorandum of understanding ("**MOU**") arrangements for co-operative enforcements with foreign regulatory authorities in numerous jurisdictions. The MOUs typically provide for access to non-public documents and information already in the possession of the regulatory authorities, and often include undertakings to obtain documents and to take testimony of, or statements from, witnesses on behalf of a requesting regulatory authority. The CFTC and the Commission are parties to an MOU that was entered into by the parties on March 25, 2014. The MOU is available at: https://www.osc.ca/en/about-us/domestic-and-international-engagement/international-mous/notice-memorandum-understanding-4.

17. IOSCO Principles

17.1 **IOSCO Principles – To the extent it is consistent with the laws of the foreign jurisdiction, the exchange adheres to the standards of the International Organisation of Securities Commissions (IOSCO) including those set out in the "Principles for the Regulation and Supervision of Commodity Derivatives Markets" (2011).**

17.1.1 The Applicant adheres to the standards of IOSCO by virtue of the fact that it must comply with the CEA and CFTC Regulations, which reflect the IOSCO standards. The Applicant is regularly examined by the CFTC and during these examinations the IOSCO standards to which they are subject are taken into account.

PART IV SUBMISSIONS BY THE APPLICANT

1.1 The swaps that trade on the SEF Platform fall under the definition of "derivative" set out in Section 1(1) of the OSA. The SEF Platform operated by the Applicant falls under the definition of "marketplace" set out in Section 1(1) of the OSA because it brings together buyers and sellers of derivatives and uses established, non-discretionary methods under which orders interact with each other.

1.2 An "exchange" is not defined under the OSA; however, subsection 3.1(1) of the companion policy to National Instrument 21-101 – *Marketplace Operation* provides that a "marketplace" is considered to be an "exchange" if it, among other things, sets requirements governing the conduct of marketplace participants or disciplines marketplace participants. A SEF is a self-regulatory organization under CFTC rules and has certain obligations to monitor participants' trading activity. Because a SEF regulates the conduct of its participants, it is considered by the Commission to be an exchange for purposes of the OSA.

1.3 Pursuant to OSC Staff Notice 21-702 – *Regulatory Approach for Foreign-Based Stock Exchanges*, the Commission considers an exchange located outside Ontario to be carrying on business as an exchange in Ontario if it provides Ontario Users with direct access to the exchange. Since the Applicant provides Ontario Users with direct access to trading derivatives on its SEF Platform, it is considered by the Commission to be "carrying on business as an exchange" in Ontario and therefore must either be recognized or exempt from recognition by the Commission.

1.4 The Applicant satisfies all the criteria for exemption from recognition as an exchange set out by Commission Staff, as described under Part III of this application. Ontario market participants that trade in swaps would benefit from the ability to trade on the Applicant's SEF Platform, as they would have access to a range of swaps and swap counterparties that otherwise may not be available in Ontario. Stringent CFTC oversight of the SEF Platform as well as the sophisticated information systems, regulations and compliance functions that have been adopted by the Applicant will ensure that Ontario Users of the SEF Platform are adequately protected in accordance with international standards set by IOSCO.

1.5 Based on the foregoing, we submit that it would not be prejudicial to the public interest to grant the Requested Relief.

PART V CONSENT TO PUBLICATION

The Applicant consents to the publication of this application for public comment.

Yours very truly,

(signed) Ramandeep Grewal

Ramandeep K. Grewal

Encl. SpectrAxe, LLC Verification Statement

Cc: Alvin Chopra, *Chief Operating Officer, SpectrAxe, LLC*

Michael Lee, *Chief Compliance Officer, SpectrAxe, LLC*

Annex I
Draft Order

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S. 5,
AS AMENDED
(THE ACT)

AND

IN THE MATTER OF
SPECTRAXE, LLC

ORDER
(Section 147 of the Act)

WHEREAS SpectrAxe, LLC (**Applicant**) has filed an application dated September 6, 2023 (**Application**) with the Ontario Securities Commission (**Commission**) requesting the following relief (collectively, the **Requested Relief**):

(a) exempting the Applicant from the requirement to be recognized as an exchange under subsection 21(1) of the Act pursuant to section 147 of the Act; and

(b) exempting the Applicant from the requirements in National Instrument 21-101 *Marketplace Operation* (NI 21- 101) pursuant to section 15.1 of NI 21-101, the requirements of National Instrument 23-101 *Trading Rules* (NI 23-101) pursuant to section 12.1 of NI 23-101 and the requirements of National Instrument 23-103 *Electronic Trading and Direct Electronic Access to Marketplaces* (NI 23-103) pursuant to section 10 of NI 23-103;

AND WHEREAS the United States Commodity Futures Trading Commission (**CFTC**) granted the Applicant permanent registration as a swap execution facility (**SEF**) on December 5, 2022;

AND WHEREAS the Applicant has represented to the Commission that:

1.1 The Applicant is a limited liability company organized under the laws of Delaware. The ultimate parent company of the Applicant is Spectra Holding, LLC, a Delaware private limited liability company. At all times, at least 35% of the Directors shall be Public Directors (which have no ownership interest in the Applicant and no “material relationship” with the Applicant);

1.2 The Applicant is a marketplace for trading derivatives that are regulated as swaps by the CFTC. The Applicant's SEF Platform supports an order book and request for quote functionality. Additional trading functionality may be added in the future, subject to obtaining any required regulatory approvals;

1.3 In the United States, the Applicant operates under the jurisdiction of the CFTC and obtained registration with the CFTC to operate a SEF on December 5, 2022;

1.4 The Applicant is obliged under CFTC Regulations to have requirements governing the conduct of Participants, to monitor compliance with those requirements and to discipline Participants, including by means other than exclusion from the marketplace;

1.5 The Applicant employs an internal framework to administer surveillance;

1.6 Because the Applicant regulates the conduct of its Participants, it is considered by the Commission to be an exchange;

1.7 Because the Applicant has Participants located in Ontario, including (a) entities with their headquarters or legal address in Ontario (*e.g.*, as indicated by their Legal Entity Identifier (**LEI**)) and all traders conducting transactions on behalf of such Participants, regardless of the traders' physical location (inclusive of non-Ontario branches of Ontario legal entities), and (b) traders physically located in Ontario who conduct transactions on behalf of any other entity, it is considered by the Commission to be carrying on business as an exchange in Ontario and is required to be recognized as such or exempted from recognition pursuant to section 21 of the Act;

1.8 The Applicant does not offer access to retail clients;

1.9 The Applicant has no physical presence in Ontario and does not otherwise carry on business in Ontario except as described above; and

1.10 The Applicant satisfies all the SEF Criteria as described in Appendix 1 to Schedule “A”;

AND WHEREAS the products traded on the Applicant's SEF Platform are not commodity futures contracts as defined in the *Commodity Futures Act* (Ontario) and the Applicant is not considered to be carrying on business as a commodity futures exchange in Ontario;

AND WHEREAS the Applicant has acknowledged to the Commission that the scope of the Requested Relief and the terms and conditions imposed by the Commission attached hereto as Schedule "A" to this Order, or the determination whether it is appropriate that the Applicant continue to be exempted from the requirement to be recognized as an exchange, may change as a result of the Commission's monitoring of developments in international and domestic capital markets or the Applicant's activities, or as a result of any changes to the laws in Ontario affecting trading in derivatives or securities;

AND WHEREAS based on the Application, together with the representations made by and acknowledgements of the Applicant to the Commission, the Commission has determined that Applicant satisfies the criteria set out in Appendix 1 to Schedule "A" and that the granting of the Requested Relief would not be prejudicial to the public interest;

IT IS HEREBY ORDERED by the Commission that, (i) pursuant to section 147 of the Act, the Applicant is exempt from recognition as an exchange under subsection 21(1) of the Act, and (ii) pursuant to sections 15.1(1) of NI 21-101, 12.1 of NI 23-101 and 10 of NI 23-103, the Applicant is exempt from the requirements in NI 21-101, NI 23-101 and NI 23-103;

PROVIDED THAT the Applicant complies with the terms and conditions contained in Schedule "A" .

DATED _____, 2023.

_____

_____

Schedule "A"
Terms and Conditions

Meeting Criteria for Exemption

1. The Applicant will continue to meet the criteria for exemption included in Appendix 1 to Schedule "A" to this Schedule.

Regulation and Oversight of the Applicant

2. The Applicant will maintain its registration as a swap execution facility (**SEF**) with the United States Commodity Futures Trading Commission (**CFTC**) and will continue to be subject to the regulatory oversight of the CFTC.

3. The Applicant will continue to comply with the ongoing requirements applicable to it as a SEF registered with the CFTC.

4. The Applicant must do everything within its control, which includes cooperating with the Ontario Securities Commission (**Commission**) as needed, to carry out its activities as an exchange exempted from recognition under subsection 21(1) of the *Securities Act* (Ontario) in compliance with Ontario securities law.

Access

5. The Applicant will not provide direct access to a Participant in Ontario, including such entities with its headquarters or legal address in Ontario (*e.g.*, as indicated by their Legal Entity Identifier (**LEI**)), and all traders conducting transactions on its behalf, regardless of the traders' physical location (inclusive of non-Ontario branches of Ontario legal entities), as well as any trader physically located in Ontario who conducts transactions on behalf of any other entity (**Ontario Users**) unless the Ontario User is appropriately registered as applicable under Ontario securities laws or is exempt from or not subject to those requirements, and qualifies as an "eligible contract participant" under the United States' Commodity Exchange Act, as amended (**CEA**).

6. For each Ontario User provided direct access to its SEF Platform, the Applicant will require, as part of its application documentation or continued access to the SEF Platform, the Ontario User to represent that it is appropriately registered as applicable under Ontario securities laws or is exempt from or not subject to those requirements.

7. The Applicant may reasonably rely on a written representation from the Ontario User that specifies either that it is appropriately registered as applicable under Ontario securities laws or is exempt from or not subject to those requirements, provided the Applicant notifies such Ontario User that this representation is deemed to be repeated each time it enters an order, request for quote or response to a request for quote on the Applicant.

8. The Applicant will require Ontario Users to notify the Applicant if their registration as applicable under Ontario securities laws has been revoked, suspended, or amended by the Commission or if they are no longer exempt from or become subject to those requirements and, following notice from the Ontario User and subject to applicable laws, the Applicant will promptly restrict the Ontario User's access to the SEF Platform if the Ontario User is no longer appropriately registered or exempt from those requirements.

Trading by Ontario Users

9. The Applicant will not provide access to an Ontario User to trading in products other than swaps, as defined in section 1a(47) of the CEA (and for greater certainty, excluding security-based swaps), without prior Commission approval.

Submission to Jurisdiction and Agent for Service

10. With respect to a proceeding brought by the Commission arising out of, related to, concerning or in any other manner connected with the Commission's regulation and oversight of the activities of the Applicant in Ontario, the Applicant will submit to the non-exclusive jurisdiction of (i) the courts and administrative tribunals of Ontario and (ii) an administrative proceeding in Ontario.

11. The Applicant will submit to the Commission a valid and binding appointment of an agent for service in Ontario upon whom the Commission may serve a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal, penal or other proceeding arising out of, related to, concerning or in any other manner connected with the Commission's regulation and oversight of the Applicant's activities in Ontario.

Prompt Reporting

12. The Applicant will notify staff of the Commission promptly of:

    (a) any authorization to carry on business granted by the CFTC is revoked or suspended or made subject to terms or conditions on the Applicant's operations;

(b) the Applicant institutes a petition for a judgment of bankruptcy or insolvency or similar relief, or to wind up or liquidate the Applicant or has a proceeding for any such petition instituted against it;

(c) a receiver is appointed for the Applicant or the Applicant makes any voluntary arrangement with creditors;

(d) the Applicant marketplace is not in compliance with this order or with any applicable requirements, laws or regulations of the CFTC where it is required to report such non-compliance to the CFTC;

(e) any known investigations of, or disciplinary action against, the Applicant by the CFTC or any other regulatory authority to which it is subject; and

(f) the Applicant makes any material change to the eligibility criteria for Ontario Users.

Semi-Annual Reporting

13. The Applicant will maintain the following updated information and submit such information in a manner and form acceptable to the Commission on a semi-annual basis (by July 31 for the first half of the calendar year and by January 31 of the following year for the second half), and at any time promptly upon the request of staff of the Commission:

(a) a current list of all Ontario Users and whether the Ontario User is registered under Ontario securities laws or is exempt from or not subject to registration, and, to the extent known by the Applicant, other persons or companies located in Ontario trading as customers of Participants (**Ontario Customers**);

(b) the LEI assigned to each Ontario User, and, to the extent known by the Applicant, to Ontario Customers in accordance with the standards set by the Global Legal Entity Identifier System;

(c) a list of all Ontario Users against whom disciplinary action has been taken since the previous report by the Applicant (or its regulation services provider ("**RSP**") acting on its behalf), or, to the best of the Applicant's knowledge, by the CFTC with respect to such Ontario Users' activities on the Applicant and the aggregate number of disciplinary actions taken against all Participants since the previous report by the Applicant (or its RSP acting on its behalf);

(d) a list of all active investigations since the previous report by the Applicant (or its RSP acting on its behalf) relating to Ontario Users and the aggregate number of active investigations since the previous report relating to all Participants undertaken by the Applicant;

(e) a list of all Ontario applicants for status as a Participant who were denied such status or access to the Applicant since the previous report, together with the reasons for each such denial; and

(f) for each product,

(i) the total trading volume and value originating from Ontario Users, and, to the extent known by the Applicant, from Ontario Customers, presented on a per Ontario User or per Ontario Customer basis; and

(ii) the proportion of worldwide trading volume and value on the Applicant conducted by Ontario Users, and, to the extent known by the Applicant, by Ontario Customers, presented in the aggregate for such Ontario Users and Ontario Customers;

provided in the required format.

Information Sharing

14. The Applicant will provide (or, if applicable, cause its RSP to provide) such information as may be requested from time to time by, and otherwise cooperate with, the Commission or its staff, subject to any applicable privacy or other laws (including solicitor-client privilege) governing the sharing of information and the protection of personal information.

Appendix 1 to Schedule "A"
Criteria for Exemption of a Foreign Exchange Trading OTC Derivatives from Recognition as an Exchange

PART 1 REGULATION OF THE EXCHANGE

1.1 Regulation of the Exchange

The exchange is regulated in an appropriate manner in another jurisdiction by a foreign regulator (Foreign Regulator).

1.2 Authority of the Foreign Regulator

The Foreign Regulator has the appropriate authority and procedures for oversight of the exchange. This includes regular, periodic oversight reviews of the exchange by the Foreign Regulator.

PART 2 GOVERNANCE

2.1 Governance

The governance structure and governance arrangements of the exchange ensure:

(a) effective oversight of the exchange,

(b) that business and regulatory decisions are in keeping with its public interest mandate,

(c) fair, meaningful and diverse representation on the board of directors (Board) and any committees of the Board, including:

  (i) appropriate representation of independent directors, and

  (ii) a proper balance among the interests of the different persons or companies using the services and facilities of the exchange,

(d) the exchange has policies and procedures to appropriately identify and manage conflicts of interest for all officers, directors and employees, and

(e) there are appropriate qualifications, remuneration, limitation of liability and indemnity provisions for directors, officers and employees of the exchange.

2.2 Fitness

The exchange has policies and procedures under which it will take reasonable steps, and has taken such reasonable steps, to ensure that each director and officer is a fit and proper person and past conduct of each officer or director affords reasonable grounds for belief that the officer or director will perform his or her duties with integrity.

PART 3 REGULATION OF PRODUCTS

3.1 Review and Approval of Products

The products traded on the exchange and any changes thereto are submitted to the Foreign Regulator and are either approved by the Foreign Regulator or are subject to requirements established by the Foreign Regulator that must be met before implementation of a product or changes to a product.

3.2 Product Specifications

The terms and conditions of trading the products are in conformity with the usual commercial customs and practices for the trading of such products.

3.3 Risks Associated with Trading Products

The exchange maintains adequate provisions to measure, manage and mitigate the risks associated with trading products on the exchange that may include, but are not limited to, daily trading limits, price limits, position limits, and internal controls.

PART 4 ACCESS

4.1 Fair Access

(a) The exchange has established appropriate written standards for access to its services including requirements to ensure

(i) participants are appropriately registered as applicable under Ontario securities laws, or exempted from these requirements,

(ii) the competence, integrity and authority of systems users, and

(iii) systems users are adequately supervised.

(b) The access standards and the process for obtaining, limiting and denying access are fair, transparent and applied reasonably.

(c) The exchange does not unreasonably prohibit, condition or limit access by a person or company to services offered by it.

(d) The exchange does not

(i) permit unreasonable discrimination among participants, or

(ii) impose any burden on competition that is not reasonably necessary and appropriate.

(e) The exchange keeps records of each grant and each denial or limitation of access, including reasons for granting, denying or limiting access.

PART 5 REGULATION OF PARTICIPANTS ON THE EXCHANGE

5.1 Regulation

The exchange has the authority, resources, capabilities, systems and processes to allow it to perform its regulation functions, whether directly or indirectly through a regulation services provider, including setting requirements governing the conduct of its participants, monitoring their conduct, and appropriately disciplining them for violations of exchange requirements.

PART 6 RULEMAKING

6.1 Purpose of Rules

(a) The exchange has rules, policies and other similar instruments (Rules) that are designed to appropriately govern the operations and activities of participants and do not permit unreasonable discrimination among participants or impose any burden on competition that is not reasonably necessary or appropriate.

(b) The Rules are not contrary to the public interest and are designed to

(i) ensure compliance with applicable legislation,

(ii) prevent fraudulent and manipulative acts and practices,

(iii) promote just and equitable principles of trade,

(iv) foster co-operation and co-ordination with persons or companies engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in the products traded on the exchange,

(v) provide a framework for disciplinary and enforcement actions, and

(vi) ensure a fair and orderly market.

PART 7 DUE PROCESS

7.1 Due Process

For any decision made by the exchange that affects a participant, or an applicant to be a participant, including a decision in relation to access, exemptions, or discipline, the exchange ensures that:

(a) parties are given an opportunity to be heard or make representations, and

(b) it keeps a record of, gives reasons for, and provides for appeals or reviews of its decisions.

PART 8 CLEARING AND SETTLEMENT

8.1 Clearing Arrangements

The exchange does not offer products which are intended to be cleared.

8.2 Risk Management of Clearing House

The exchange does not offer products which are intended to be cleared.

PART 9 SYSTEMS AND TECHNOLOGY

9.1 Systems and Technology

Each of the exchange's critical systems has appropriate internal controls to ensure completeness, accuracy, integrity and security of information, and, in addition, has sufficient capacity and business continuity plans to enable the exchange to properly carry on its business. Critical systems are those that support the following functions:

(a) order entry,

(b) order routing,

(c) execution,

(d) trade reporting,

(e) trade comparison,

(f) data feeds,

(g) market surveillance, and

(h) financial reporting.

9.2 System Capability/Scalability

Without limiting the generality of section 9.1, for each of its systems supporting order entry, order routing, execution, data feeds, trade reporting and trade comparison, the exchange:

(a) makes reasonable current and future capacity estimates;

(b) conducts capacity stress tests to determine the ability of those systems to process transactions in an accurate, timely and efficient manner;

(c) reviews the vulnerability of those systems and data center computer operations to internal and external threats, including physical hazards and natural disasters;

(d) ensures that safeguards that protect a system against unauthorized access, internal failures, human errors, attacks and natural catastrophes that might cause improper disclosures, modification, destruction or denial of service are subject to an independent and ongoing audit which should include the physical environment, system capacity, operating system testing, documentation, internal controls and contingency plans;

(e) ensures that the configuration of the system has been reviewed to identify potential points of failure, lack of back-up and redundant capabilities;

(f) maintains reasonable procedures to review and keep current the development and testing methodology of those systems; and

(g) maintains reasonable back-up, contingency and business continuity plans, disaster recovery plans and internal controls.

9.3 Information Technology Risk Management Procedures

The exchange has appropriate risk management procedures in place including those that handle trading errors, trading halts and respond to market disruptions and disorderly trading.

PART 10 FINANCIAL VIABILITY

10.1 Financial Viability

The exchange has sufficient financial resources for the proper performance of its functions and to meet its responsibilities.

PART 11 TRADING PRACTICES

11.1 Trading Practices

Trading practices are fair, properly supervised and not contrary to the public interest.

11.2 Orders

Rules pertaining to order size and limits are fair and equitable to all market participants and the system for accepting and distinguishing between and executing different types of orders is fair, equitable and transparent.

11.3 Transparency

The exchange has adequate arrangements to record and publish accurate and timely information as required by applicable law or the Foreign Regulator. This information is also provided to all participants on an equitable basis.

PART 12 COMPLIANCE, SURVEILLANCE AND ENFORCEMENT

12.1 Jurisdiction

The exchange or the Foreign Regulator has the jurisdiction to perform member and market regulation, including the ability to set rules, conduct compliance reviews and perform surveillance and enforcement.

12.2 Member and Market Regulation

The exchange or the Foreign Regulator maintains appropriate systems, resources and procedures for evaluating compliance with exchange and legislative requirements and for disciplining participants.

12.3 Availability of Information to Regulators

The exchange has mechanisms in place to ensure that the information necessary to conduct adequate surveillance of the system for supervisory or enforcement purposes is available to the relevant regulatory authorities, including the Commission, on a timely basis.

PART 13 RECORD KEEPING

13.1 Record Keeping

The exchange has and maintains adequate systems in place for the keeping of books and records, including, but not limited to, those concerning the operations of the exchange, audit trail information on all trades, and compliance with and/or violations of exchange requirements.

PART 14 OUTSOURCING

14.1 Outsourcing

Where the exchange has outsourced any of its key services or systems to a service provider, it has appropriate and formal arrangements and processes in place that permit it to meet its obligations and that are in accordance with industry best practices.

PART 15 FEES

15.1 Fees

(a) All fees imposed by the exchange are reasonable and equitably allocated and do not have the effect of creating an unreasonable condition or limit on access by participants to the services offered by the exchange.

(b) The process for setting fees is fair and appropriate, and the fee model is transparent.

PART 16 INFORMATION SHARING AND OVERSIGHT ARRANGEMENTS

16.1 Information Sharing and Regulatory Cooperation

The exchange has mechanisms in place to enable it to share information and otherwise co-operate with the Commission, self-regulatory organizations, other exchanges, and other appropriate regulatory bodies.

16.2 Oversight Arrangements

Satisfactory information sharing and oversight agreements exist between the Commission and the Foreign Regulator.

PART 17 IOSCO PRINCIPLES

17.1 IOSCO Principles

To the extent it is consistent with the laws of the foreign jurisdiction, the exchange adheres to the standards of the International Organisation of Securities Commissions (IOSCO) including those set out in the "**Principles for the Regulation and Supervision of Commodity Derivatives Markets**" (2011).

B.11.3 Clearing Agencies

B.11.3.1 The Canadian Depository for Securities Limited and CDS Clearing and Depository Services Inc. – Notice of Exemption Order

NOTICE OF EXEMPTION ORDER

THE CANADIAN DEPOSITORY FOR SECURITIES LIMITED AND CDS CLEARING AND DEPOSITORY SERVICES INC.

October 26, 2023

On October 19, 2023, the Commission made an order under section 147 of the *Securities Act* (Ontario) granting a temporary exemption from a term of the Commission's order recognizing The Canadian Depository for Securities Limited and CDS Clearing and Depository Services Inc. (**CDS**) as clearing agencies (**Recognition Order**). The order exempts CDS from a requirement in section 4.3(b) of Part II of the CDS Recognition Order that CDS must ensure that at least 33% of its board of directors are representatives of Participants, as defined in the CDS Recognition Order. The order expires on the earlier of (i) the date of the annual general meeting of CDS shareholders in 2025 or (ii) October 26, 2025.

A copy of the exemption order is published in Chapter B.2 of the October 26, 2023 OSC Bulletin.

B.11.3.2 Canadian Derivatives Clearing Corporation (CDCC) – Proposed Amendments to Rules, Operations Manual, Risk Manual and Default Manual of the CDCC Regarding the Implementation of the Secured General Collateral (SGC) Repurchase Transaction – Notice of Material Rule Submission

NOTICE OF MATERIAL RULE SUBMISSION

CANADIAN DERIVATIVES CLEARING CORPORATION (CDCC)

PROPOSED AMENDMENTS TO RULES, OPERATIONS MANUAL, RISK MANUAL AND DEFAULT MANUAL OF THE CDCC REGARDING THE IMPLEMENTATION OF THE SECURED GENERAL COLLATERAL (SGC) REPURCHASE TRANSACTION

CDCC has submitted to the Commission proposed amendments to the CDCC Rules, Operations Manual, Risk Manual and Default Manual regarding the implementation of the SGC repurchase transaction program.

The purpose of the proposed amendments, which are subject to Commission approval, is to offer an investment alternative to Banker's Acceptances (**BAs**) using CDCC's clearing services in light of the Canadian Dollar Offered Rate (**CDOR**) cessation in June 2024.

The proposed amendments have been posted for public comment on CDCC's **website.** The comment period ends on November 26, 2023.

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