Securities

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What was the most interesting development of 2024, and why?

The Supreme Court of Canada's ruling in *Poonian v British Columbia (Securities Commission)* stands out as a significant development to the securities regulatory regime. A husband-and-wife team was found to have run a "pump-and-dump" scheme. After being declared bankrupt, they applied for a discharge from bankruptcy which the Commission opposed.

The Court held that under the *Bankruptcy and Insolvency Act*, Parliament must have intended to exclude orders of administrative tribunals for discharge of debts resulting from "court orders of fines, penalties, and restitutions". A further exception for "debts or liabilities arising from fraudulent means" required the existence of a "direct link" between the fraudulent conduct and the debt or liability. As such, the Commission's $5.6 million disgorgement order would survive the discharge, as it represented the value of the Poonians' fraud. However, the administrative penalties (totaling $13.5 million) were dischargeable.

Since the decision's release, the B.C. Securities Commission has openly called for legislative changes to the bankruptcy regime, describing the current BIA as leaving an "escape hatch" for fraudsters. This led Canada's Superintendent of Bankruptcy to step up to defend the BIA, indicating that the bankruptcy system is intended to carefully balance a variety of interests and denying the existence of any "escape hatches" in the legislation. Time will tell whether and how the federal government responds.

What's the primary takeaway for businesses from the past year?

The B.C. Securities Commission's decision in NorthWest Copper Corp raised the bar for establishing joint actorship on the part of shareholders, requiring evidence of a mutual agreement, commitment, or understanding for a specific purpose. This decision, while providing clarity on early warning requirements, limits an issuer's arsenal of defences in dealing with shareholder activism and potential take-over bids.

What's a decision you are waiting for in 2025?

The Supreme Court of Canada is set to rule on the definition of "material change" under the *Securities Act* in the appeal of *Lundin Mining Corporation v Dov Markowich*. This decision, the Court's first direct examination of securities disclosure standards in a decade, will be crucial for public issuers. It is expected to provide guidance on the distinction between "material facts" (which do not require immediate disclosure) and "material changes" (which must be disclosed promptly). The Court heard the *Lundin* appeal on January 15, 2025, where our team at Lenczner Slaght represented an intervenor, CFA Societies Canada. The decision is under reserve.

What's one trend you are expecting in 2025?

Crypto regulation and enforcement proceedings have been a priority for Canadian securities regulators for some years. However, it is widely expected that changes in the U.S. government will change the attitude of the world's most powerful security regulator to crypto regulation and enforcement. Will Canada follow suit? If not, will Canada's crypto investment industry migrate south?

Regulators face the ongoing challenge of balancing the growing public interest in digital assets against their heightened volatility, while also appearing responsive to high profile scandals such as the collapse of FTX, Quadriga, or high profile "memecoins".

In Ontario, diversifying investment funds into other crypto assets will be difficult, if not impossible, if the proposed amendments to National Instrument 81-102 Investment Funds, released for public comment in early 2024, are enacted. A key aspect of these amendments is the restriction to crypto assets that trade on a "recognized exchange." Critics argue that these stringent rules may push investors towards unregulated markets and service providers. Notably, the Canadian Securities Administrators' most recent Year in Review reported that over half of the 1,054 investor alerts and warnings to the public were related to crypto. Given these challenges, Canadian regulators might reconsider and opt for a less restrictive regime to reduce the need for extensive investigations and proceedings.

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OUR SECURITIES EXPERTISE

Lenczner Slaght has extensive experience in litigating securities-related disputes before the courts, including the defence of professional negligence and other claims brought against investment advisors and dealers and significant expertise defending shareholder class action proceedings. We also help clients conduct internal corporate investigations relating to potential breaches of securities and other laws either prior to, or in conjunction with, inquiries by regulatory authorities.