WeirFoulds LLP

WeirFoulds Securities Law Updates: Concise, Informative Updates on Certain Securities Law Developments in the Canadian Marketplace in 2025

September 3, 2025

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Recent developments include:

- An increase to the amount of funds that may be raised under the listed issuer financing exemption.
- OSC decision providing clarification on registrable activities associated with dealing of securities.
- TSX Venture Exchange updates Escrow Policy for New Issuers.

LISTED ISSUER FINANCING EXEMPTION AMENDMENTS

In November of 2022, the listed issuer financing exemption (the "**Exemption**") came into force, which allowed reporting issuers with equity securities listed on a stock exchange in Canada to raise capital by issuing freely tradable securities without filing a prospectus.

The capital market participants, in providing their feedback to the Canadian Securities Administrators ("**CSA**") on the Exemption, pointed out that the capital raising limits imposed when using the Exemption had restricted the use of the Exemption. The limitations imposed on the use of Exemption were as follows: An issuer in a 12-month period could not raise more than the greater of (1) $5,000,000, or (2) 10% of the aggregate market value of the listed securities of an issuer up to a maximum of $10,000,000.

The CSA, in order to address the limitations mentioned above, published Coordinated Blanket Order 45-935 *Exemptions from Certain Conditions of the Listed Issuer Financing Exemption* (the "**Blanket Order**"). The Blanket Order, which came into force on May 15, 2025, increased that cap on the amount that the issuer may raise under the Exemption. Pursuant to the Blanket Order, subject to a 50% dilution limit, an issuer in a 12-month period may not raise more than the greater of (1) $25,000,000, or (2) 20% of the aggregate market value of the listed securities of an issuer up to a maximum of $50,000,000.

The Blanket Order provides that for the purposes of the 50% dilution limit:

1. the timing for calculating the outstanding securities is (i) the date of the news release announcing the offering if an issuer has not relied on the exemption or the Blanket Order in the last 12 months or (ii) the date of the news release announcing the first offering completed in reliance on the exemption or the blanket order in the last 12 months; and

2. issuers can exclude securities issuable on exercise of warrants from the calculation if they are not convertible within 60 days of

closing of the offering.

The Blanket Order imposes additional limits such that a distribution cannot: (i) result in a new control person, or (ii) result in a person or company acquiring ownership of, or exercising control or direction over, securities that would result in the person or company being entitled to elect a majority of directors.

OSC DECISION CLARIFYING DEALER REGISTRABLE ACTIVITIES

Under the Canadian securities regime, generally any person in the business of dealing or advising must register with the relevant securities regulator(s) of the respective Canadian jurisdiction(s) pursuant to the relevant securities act or regulation of the Canadian jurisdiction (the "**Act**"). The requirement to register as a dealer is triggered when a person trades securities for a business purpose. This issue often comes up in cases where issuers with an underlying business raise money regularly for legitimate business purposes and so at what point does trading in securities that is ancillary to a business purpose cross the line into registrable activity.

The Ontario Capital Markets Tribunal (the "**Tribunal**") looked into this issue in Go-To Developments Holdings Inc (Re), 2025 ONCMT 8 (the "**Case**"), where a real estate developer (the "**Developer**") raised over $80,000,000 from over 80 investors to invest in 9 projects under 10 separate limited partnerships. The staff of the Ontario Securities Commission ("**OSC**") alleged, among other things, that the capital raised by the Developer crossed into the domain of registrable category as its conduct fell within the definition of being in the business of "trading in securities" and therefore the Developer was required to be registered under the Act.

OSC, in its submission, stated that the capital raising for the different projects should be seen as a single ongoing business as there was a single directing mind, being the Developer, that solicited investments for all of the projects with repetition, regularity and continuity. OSC also cited Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (the "**Companion Policy**") which sets out the relevant criteria ("**Criteria**"), listed below, in determining whether an entity was in the business of trading:

1. engaging in activities similar to a registrant;

2. intermediating trades or acting as a market maker;

3. directly or indirectly carrying on the activity with repetition, regularity or continuity;

4. being, or expecting to be, remunerated or compensated; and

5. directly or indirectly soliciting.

The Developer did not dispute OSC's allegation that it was trading in securities but submitted that such trading did not cross the line between permissible capital raising and the registrable business of trading. The Developer further submitted that each limited partnership financed a different project and therefore represented a separate business, accordingly there was no reason to disregard the separate legal personality of each limited partnership. Additionally, the Developer submitted that each limited partnership should be seen as a separate start-up raising capital.

The Tribunal held that the Developer's conduct *did not* cross over into the domain of registrable category. In coming to this decision, the Tribunal, in respect of the Criteria, stated that no one factor on its own is determinative as to whether an entity is in the business of trading in securities, but rather a holistic view must be taken. The Tribunal observed that as per the Companion Policy (i) the presence of an underlying bona-fide business for which capital was being raised is a factor that weighs against a finding that the Developer is in the business of trading requiring registration as a dealer, and (ii) issuers in the start-up stage raising capital to start a

non-securities business will be considered to have an active non-securities business.

Certain of the factual findings the Tribunal made in coming to its decision are as follows:

1. Irrelevant of whether the projects / limited partnerships were seen as a single business or separate businesses, each capital raising was for a defined underlying business in respect of a particular property development.

2. There was no evidence to suggest that his activity related to soliciting investments consumed more than a modest fraction of his time, nor that he was compensated based on the quantum raised.

3. The fees received by the Developer was typical for the administration of property development projects.

4. None of the investor witnesses suggested that they viewed the Developer as being in the business of trading securities. All of them said, in one way or another, that the Developer was a real estate development business.

5. The Tribunal contrasted the Case with a couple of others decided by Tribunal on the same issue. In *Paramount*[1], the respondents offered units in pooled mortgage investment funds and direct mortgage investments on a continuous basis. The Tribunal cautioned that, just because an issuer carries on a core or other business, it does not preclude a conclusion that the issuer is engaged in the business of trading in securities. The Tribunal focused on other factors such as the amount of management time spent on soliciting investors, the regularity and continuity of sales of securities, and the expectation of those engaged in the trading activity to be compensated for it. The Tribunal concluded that the business trigger test had been met. In *Stinson*[2], on the other hand, the respondents were pursuing a strategy to acquire, renovate, convert and operate a hotel and condominium project. Despite an agreed statement of facts that purported to admit to a breach of the registration section, the Tribunal determined that the Commission had not established that the respondents had met the business trigger test. It found that the respondents did not cross the line from capital raising for a specific underlying business, to engaging in the business of trading in securities.

6. In the view of the Tribunal, the Case is more analogous to that of the respondents in *Stinson* than those in *Paramount*. Though the Developer had 9 separate projects, each was the subject of a separate capital raising. The focus of the Developer was to raise capital for those businesses the Developer was found to not be in the business of trading in securities.

TSX VENTURE EXCHANGE UPDATES

The TSX Venture Exchange ("**TSXV**") effective June 2, 2025, updated its Policy 5.4 – *Capital Structure, Escrow and Resale Restrictions* (the "**Updated Policy**") on capital structure, escrow and seed share resale restrictions in respect of new listings on the TSXV inclusive of IPOs, reverse take overs, change of business and qualifying transactions (together, "**New Listings**"). The former TSXV Policy 5.4 used evidence of value requirement for New Listings to (i) validate the capital structure, and (ii) determine whether securities held by principals of issuers would be subject to the value securities escrow regime or the surplus securities escrow regime. As described in more detail below, TSXV, pursuant to the Updated Policy, has eliminated the surplus securities escrow regime and only maintained what was formerly known as the value securities escrow regime. Accordingly, the focus of Part 2 of the Updated Policy is to simply set out the manners in which an issuer seeking a New Listing may demonstrate to TSXV that its capital structure is acceptable. Listed below are the amendments pursuant to the Updated Policy.

Demonstration of Acceptable Capital Structure

The Updated Policy has expanded ways in which an issuer can demonstrate a capital structure acceptable to the TSXV for listing purposes. The following ways are acceptable methods pursuant to the Updated Policy:

1. ***Contemporaneous equity financing***: Any contemporaneous equity financing(s) where a majority of the securities are issued to subscribers who are not non-arms length parties of the issuer or the target company, and either (i) issuance of at least 10% of the issued and outstanding shares, or (ii) raising gross proceeds of at least $5,000,000, including in both cases equity financings completed by the target company within the immediately preceding six months at a price that is not less than the Discounted Market Price (as defined in TSXV Policy 1.1).

2. ***Appraisal or valuation***: An appraisal or valuation that supports at least 50% of the Consideration (as defined in the Updated Policy).

3. ***Expenditures***: In relation to an asset, expenditures incurred within the five previous years that support at least 50% of the Consideration.

4. ***Net tangible assets of the target company***: Net tangible assets of the target company equating to at least 50% of the Consideration.

5. ***Operating cash flow of the target company***: Ten times the average annual cash flows from operating activities of the target company (calculated over the last eight fiscal quarters) is equal to at least 50% of the Consideration.

6. ***Securities issued by the target company***: Where an issuer proposes to acquire a target company, at least 50% of the outstanding equity securities of the target company have been issued either (i) at or above prices which would constitute the Discounted Market Price of the issuer's listed shares, or (ii) at least 12 months prior to the dissemination of a news release announcing the transaction at prices that are at least 50% of the current market price of the issuer's listed shares.

7. ***Current listing***: The Issuer has been listed and trading on a recognized stock exchange, other than TSXV, for at least one year.

8. ***Initial public offering***: The New Listing involves an Initial Public Offering that includes a financing (i.e. not by way of a non-offering Prospectus).

Escrowed Securities for the Principals

The Updated Policy, in respect of securities held by the principals, has eliminated the surplus securities escrow regime and such securities will now be escrowed according to the value securities release schedule. Some of the amendments are as follows:

1. ***Schedule of escrow release***: Securities held by principals of an issuer will follow a simplified release schedule consistent with National Policy 46-201 – *Escrow for Initial Public Offerings* ("**NP 46-201**"). The overall length of the escrow period has not changed but releases will no longer be more heavily weighted to later in the term. So, the overall length of escrow for Tier 1 Issuers remains at 18 months and for Tier 2 Issuers remains at 36 months, however the release schedule for Tier 1 issuers is 25% on the Bulletin Date and 25% every 6 months thereafter and for Tier 2 Issuers is 10% on the Bulletin Date and 15% released every 6 months thereafter. The "**Bulletin Date**" is the date of the TSXV bulletin confirming final acceptance by the TSXV of the applicable transaction.

2. ***Non-IPO transaction exemptions***: Non-IPO transactions are subject to substantially the same escrow requirements as NP 46-201 but with certain notable exceptions. For example, while escrow is required where the issuer will have a market capitalization of at least $100 million upon completion of the non-IPO transaction, the issuer may request an exemption in its application listing.

Seed Share Resale Restrictions

Seed share resale restrictions ("**SSRRs**") are hold periods imposed on certain securities held by persons who are not principals of the issuer on completion of the applicable transaction. Updated Policy simplifies the restrictions, including which securities are caught or exempted. The SSRR securities will now have a one-year hold period with 20% of the SSRR securities being released every three months, with the first release being on the Bulletin Date.

Transition Provisions Applicable to New Listings in the Last 36 Months

The TSXV, having recognized that if the Updated Policy had been in effect over the last 36 months then the escrowed securities of issuers listed on TSXV during that period may have been released by now, included provisions to allow for such issuers as follows:

1. Escrow agreements under the old policy currently in effect will remain in force. However, issuers can apply to the TSXV to amend these escrow agreements to reflect the provisions of Updated Policy. Such amendments must (i) receive approval of the disinterested shareholders and (ii) be made in accordance with the terms of the escrow agreement.

2. Issuers can apply to the TSXV to amend the terms of any existing SSRRs to reflect the provisions of Updated Policy. This does not require shareholder approval.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] Paramount Equity Financial Corporation (Re), 2022 ONSEC 7 (***Paramount***).

[2] Stinson (Re), 2023 ONCMT 26 (***Stinson***).

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