Incentives, Experts, and Regulatory Renewal

Douglas Sarro[*]

Updating rules to reflect new information about the world is easier said than done. Common approaches include providing for periodic review of legislation by the legislature and periodic review of regulation by a regulator. But Ontario securities law does something different. It calls for a full-scale review of securities legislation and regulation every four years by a committee of third-party experts appointed by the Minister responsible for administering securities law. This article takes a hard look at this process, which has generated significant controversy within the securities industry over the past year. Advisory committee members bring expertise to their roles and, unlike the government's in-house experts (civil servants), presumably have no incentive to lean towards making recommendations that expand bureaucratic power. But it appears these third-party experts bring other incentives to the table—incentives that could impair the quality of their recommendations and subsequent legislative and regulatory change. This article identifies these potential incentives and proposes reforms that could mitigate the risks they pose. More broadly, the article serves as a case study illustrating the need to exercise care when outsourcing regulatory renewal to third-party experts.

[*] Bombardier Scholar, University of Toronto Faculty of Law. Many thanks to Anthony Niblett and the anonymous reviewers for their comments on drafts of this article. All errors are my own.

Introduction

Updating rules to reflect new information about the world is easier said than done. One approach is for a legislature to commit to revisiting its rules periodically.[1] But when it comes to matters that are largely technical rather than politically charged, legislators may lack the incentive to develop the expertise to carry out this review in a meaningful way—put another way, legislators may find they can achieve higher political returns by devoting their scarce time and attention to other matters.[2] An alternative is to task civil servants with reviewing rules periodically and implementing needed changes on their own or

1. See e.g. *Bank Act*, SC 1991, c 46, s 21; *Copyright Act*, RSC 1985, c C-42, s 92; *Securities Act*, CQLR c V-1.1, s 352 [*Securities Act* QC].

2. See Jeremy D Fraiberg & Michael J Trebilcock, "Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform" (1998) 43:4 McGill LJ 835 at 843 (politicians rationally would seek to maximize votes); Frank R Baumgartner & Bryan D Jones, *Agendas and Instability in American Politics*, 2nd ed (Chicago & London, UK: University of Chicago Press, 2009) at xxiii, 19–21, 250 (legislators' time and attention constraints mean most policy issues will receive only sporadic attention from them). See also Robert Yalden, "The OSC's Rise and the Legislature's Decline: Securities Law Reform During the Brown Years" in Paul D Paton, ed, *Taking Stock: Challenge and Change in Securities Regulation* (Kingston: Queen's Annual Business Law Symposium, 2005) 53 at 56–59 (observing that the Ontario legislature has provided little attention to securities law).

making recommendations to the legislature, as appropriate.[3] Civil servants may have the expertise to carry out this work, but their incentive to use the review process to justify the expansion of their own powers and jurisdiction renders suspect any conclusions they reach.[4]

Ontario securities law employs a structure that seems to avoid these pitfalls. It provides that, every four years, the Minister responsible for administering the *Securities Act* (generally the Minister of Finance) will appoint an advisory committee to review the entire body of securities "legislation, regulations and rules".[5] Committee members work much like a team of consultants, generating recommendations for change and delivering them to the Minister at the end of their engagement.[6] The possible advantages of this structure are obvious: committee members bring expertise and, unlike the government's in-house experts (civil servants), presumably will not have any reason to lean towards making recommendations that expand bureaucratic power.

The appointment of a new Advisory Committee in 2020 was highly anticipated and long overdue—it was only the second convened since the structure was introduced in 1994.[7] But its work would not receive the kind of reception one would expect for an independent, technocratic review. The draft recommendations included in the Committee's July 2020 consultation paper faced what one media report called a "barrage of criticism" from stakeholders, who viewed the recommendations as "ill-conceived" and likely to "threaten investor protection".[8] Other stakeholders took issue with the sixty-day period the committee allowed for comments, saying it did not give

3. See Cary Coglianese, "Moving Forward with Regulatory Lookback" (2013) 30:1 Yale J Reg 57 at 58–59; Cass R Sunstein, "The Regulatory Lookback" (2014) 94:3 BUL Rev 579. Relatedly, principles-based regulation contemplates giving civil servants more scope to update rules without legislative involvement. See Cristie Ford, "Principles-Based Securities Regulation in the Wake of the Global Financial Crisis" (2010) 55:2 McGill LJ 257 at 278.

4. See Anita Anand & Andrew Green, "Regulating Financial Institutions: The Value of Opacity" (2012) 57:3 McGill LJ 399 at 410; Donald C Langevoort, "The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formulation" (1990) 47:3 Wash & Lee L Rev 527 at 529–30; Andrew Green, "Regulations and Rule Making: The Dilemma of Delegation" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 125 at 127, 130–31.

5. RSO 1990 c S.5, ss 1(1) "Minister", 143.12(1) [*Securities Act*].

6. See *ibid*, ss 143.12(2)–(3).

7. See Rudy Mezzetta, "Reg Task Force Has Work Cut Out for It", *Investment Executive* (6 March 2020), online: <www.investmentexecutive.com/newspaper_/news-newspaper/reg-task-force-has-work-cut-out-for-it>.

8. James Langton, "Task Force Report Draws Criticism", *Investment Executive* (21 September

them enough time to fully consider the forty-seven reform proposals disclosed in the consultation paper.[9] Others said the proposals were not supported by enough reasoning to meaningfully engage with them[10]—proposals tended to receive brisk treatment in the consultation paper, with the committee at times pointing to "concerns" raised by "stakeholders" as a basis for acting without citing any evidence substantiating these concerns.[11] The Committee's final report, published in January 2021, also received mixed reviews, with one columnist calling it a "grab bag of ideas" that "fails to offer the kind of detail and analytical depth needed to support the recommendations".[12] Nonetheless, the Committee's recommendations were well-received by government, and appear set to have a transformative impact on Ontario securities law.[13]

Without commenting in any comprehensive way on the work of the 2020 Committee, this article aims to identify why Ontario's advisory committee process might fail to work as intended, and what changes to the legal structure

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2020), online: <www.investmentexecutive.com/newspaper_/news-newspaper/task-force-report-draws-criticism/> [Langton, "Task Force Report"].

9. See Letter from Osler, Hoskin & Harcourt LLP to the Capital Markets Modernization Taskforce (7 September 2020) at 4, online (pdf): *Osler, Hoskin & Harcourt LLP* <www.osler.com/osler/media/Osler/Content/PDFs/Modernization-Taskforce-Osler-Hoskin-Harcourt-LLP-comment-letter-Sept-7-2020-003.pdf> [Osler Letter].

10. See Letter from Torys LLP to the Capital Markets Modernization Taskforce (7 September 2020) at 1, online (pdf): *Torys LLP* <www.torys.com/-/media/files/pdfs/letter-to-capital-markets-modernization-taskforce-consultation-report.pdf> [Torys Letter].

11. Ontario, Capital Markets Modernization Taskforce, *Consultation Report* (July 2020) at 21, 24, 40, online (pdf): <files.ontario.ca/books/mof-capital-markets-modernization-taskforce-report-en-2020-07-09.pdf> [2020 Consultation Report]. See also Part I.C, *below* (listing some of the proposals).

12. Terence Corcoran, "This Is Not the Market Fix Canada Needs", *Financial Post* (27 January 2021), online: <financialpost.com/opinion/terence-corcoran-this-is-not-the-market-fix-canada-needs>. For the final report, see Ontario, Capital Markets Modernization Taskforce, Final Report (Toronto: Capital Markets Modernization Taskforce, January 2021), online: <www.ontario.ca/document/capital-markets-modernization-taskforce-final-report-january-2021> [2020 Final Report].

13. The government incorporated several of the Committee's key recommendations into its 2021 budget bill. See *Protecting the People of Ontario Act (Budget Measures), 2021*, SO 2021, c 8, Sched 9 [*2021 Budget Bill*]; Ministry of Finance, Ontario's Action Plan: Protecting People's Health and Our Economy (2021 Ontario Budget), by The Honourable Peter Bethlenfalvy, Minister of Finance and President of the Treasury Board (Toronto: Queen's Printer for Ontario, 2021) at 110, online (pdf): <budget.ontario.ca/2021/pdf/2021-ontario-budget-en.pdf> [*2021 Budget*].

governing this process could mitigate this possibility.[14] These changes could be implemented as part of the pending overhaul of securities laws in Ontario announced by the government in response to the 2020 Committee's report.[15] More broadly, this article serves as a case study illustrating the need to exercise care when outsourcing regulatory renewal to third-party experts. While offering a potential solution to the problem of inattentive legislators and overreaching bureaucrats, these experts also bring their own set of incentives to the table. Absent adequate guardrails around these experts' mandates and deliberative processes, these incentives could give rise to new sets of problems.

Advisory committee members often are mid-career professionals who stand to benefit from using their committee work to bolster their profile within the securities industry, whether in the hopes of advancing in their private sector careers or securing a senior appointment at a regulator.[16] To further this interest, advisory committee members might gravitate towards recommendations they deem likely to attract attention from industry and be embraced by the Minister. These incentives are a strength: they give committee members a reason to think outside of the box, broach topics career civil servants might be too risk averse to raise, and develop reforms that reflect the priorities of the government chosen by the public. But they are also a weakness, in that they could lead these third-party experts to choose recommendations for their political salience and potential to attract attention rather than their quality.

Low-quality, incentive-driven recommendations from third-party experts pose problems if they (i) are worse than the status quo or (ii) divert resources away from worthwhile reforms that otherwise would have been generated within government. Imposing guardrails around the committee's consultation process would mitigate the first of these risks. Minimum periods for

14. This article does not seek to identify politicians' likely motivations for appointing advisory committees, but a recent study of the ad hoc advisory committees struck by political appointees at US federal agencies offers findings that could be applicable here as well. See Brian D Feinstein & Daniel J Hemel, "Outside Advisers Inside Agencies" (2020) 108 Geo LJ 1139 at 1139 (use of advisory committees is more common "when the preferences of civil servants and the presidential administration diverge . . .. Democratic administrations appear to rely more on advisory committees at agencies with relatively conservative career staffs (such as the Pentagon), whereas Republicans rely more on these outside panels at agencies with liberal-leaning careerists (such as the Environmental Protection Agency)").

15. See *2021 Budget*, *supra* note 13 at 110. See also 2020 Final Report, *supra* note 12 at 11. I argue that these recommendations would remain of value even if the revised statute were to contemplate a broader shift in the architecture of Ontario securities law towards more principles-based regulation. See Part IV.A, *below*.

16. See Part II.A, *below*.

consultation and a requirement that comment letters be published would ensure proposed recommendations are subjected to meaningful scrutiny before they are adopted. And a deadline for completion of the committee's work (which would be subject to extension) also could improve the overall quality of recommendations by keeping the committee focused on those issues it views as most important.

Focusing the committee's mandate on securities legislation, as opposed to regulation, would mitigate the second of these risks. Absent an advisory committee's involvement, legislation seems unlikely to receive sufficient attention from politicians (who might prefer to focus on more politically salient matters) or securities regulators (who might prefer to focus on regulatory reforms they can undertake without having to make demands on politicians' time).[17] This more targeted mandate would allow these third-party experts to play a distinct role that complements, rather than displaces, the work undertaken by the government's in-house experts. By contrast, the committee's current mandate to review the entire body of securities law (i.e., both legislation and subordinate regulation) all but guarantees that a good portion of a committee's work will involve second-guessing and displacing reforms generated by securities regulators. What is more, this second-guessing seems unnecessary to ensuring regulation evolves in line with broader government priorities, given that securities law provides several other mechanisms for achieving this objective.

Part I of this article provides relevant context, including the circumstances that led to the adoption of the advisory committee structure in Ontario and the work of the two advisory committees that have been constituted since then. Part II discusses the possible incentives of advisory committee members, having regard to the backgrounds and career trajectories of past committee members. Part III describes these incentives' potential implications for the advisory committee process and subsequent legislative and regulatory change, drawing on Ontario's experience with prior advisory committees. This Part also describes potential drawbacks of allowing advisory committee recommendations to displace reforms generated by the in-house experts at Ontario's securities regulator, the Ontario Securities Commission (OSC). Part IV discusses potential reforms.

I. The Advisory Committee Process in Context

The advisory committee process was part of a package of amendments to the *Securities Act* enacted in 1994,[18] after years of political inattention to

17. See Parts III.C and IV.A, *below*.

18. See *Securities Amendment Act, 1994*, SO 1994, c 33 [*1994 Amendments*].

securities law brought about a legislative and regulatory failure that threatened to topple much of the infrastructure of rules and policies underlying Ontario's capital markets. After introducing the problem of rule obsolescence and how committing a legislature or regulator to revisit its rules periodically could address this problem, this Part reviews the events that led to Ontario's adoption of the advisory committee process and Ontario's experience with this process.

A. Legislative and Regulatory Obsolescence

Over time, rules become obsolete and must be revisited. Scholarship discussing the challenge of identifying and updating obsolete rules stretches back over a half-century.[19] One way to meet this challenge is via a legislative "sunset clause", under which the legislation will automatically expire after a period of time unless the legislature re-enacts it.[20] Variants on the sunset clause include provisions that cause licenses granted under the legislation to expire absent periodic extension by the legislature (found in the federal *Bank Act*),[21] or require legislators to review legislation after a fixed period (found in the federal *Copyright Act*),[22] in some cases with the benefit of a report from the minister responsible for that legislation (found in Quebec's *Securities Act* and various federal statutes).[23] These clauses are intended to serve as commitment devices that force the legislature to revisit its legislation and consider whether it should be maintained in its present form, modified, or allowed to expire. As part of this process, the legislature has an opportunity to take in new information about the legislation and its effects, allowing it to better calibrate that legislation to present realities.[24]

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19. See e.g. Grant Gilmore, "On Statutory Obsolescence" (1967) 39:4 U Colo L Rev 461; Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, MA: Harvard University Press, 1982); Thomas O McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process" (1992) 41:6 Duke LJ 1385.

20. See Jacob E Gersen, "Temporary Legislation" (2007) 74:1 U Chicago L Rev 247 at 247–48.

21. See *supra* note 1, s 21.

22. See *supra* note 1, s 92.

23. See *Securities Act* QC, *supra* note 1, s 352; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 285(1); *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 63(1); *Cannabis Act*, SC 2018, c 16, ss 151.1(1)–(2).

24. See Gersen, *supra* note 20 at 248. For the potential benefits of employing sunsets in financial

But a sunset clause is no guarantee that legislators will update a statute to reflect new information or developments. Legislators face demands for their time and attention that far outstrip their supply of these qualities.[25] A legislator interested in re-election has reason to budget their scarce time and attention towards projects they believe will maximize their political support.[26] Accordingly, while a sunset clause for a matter of high political salience, such as taxing and spending legislation, might be expected to attract a high degree of attention, the same may not be the case for more technocratic, less politically salient matters.[27] For these matters, legislators might limit themselves to enacting changes desired by well-organized interest groups or, if they deem even this to be not worth the effort, simply re-enact the legislation as-is.[28]

One could seek to avoid these pitfalls by entrusting the task of periodically reviewing rules to civil servants. Regulators could be required to engage in a "regulatory lookback" in which they identify rules that should be modified or repealed.[29] And a shift towards a more principles-based approach to regulation, in which legislatures limit themselves to setting "broad regulatory goals" and leave it to a regulator to fill in the details (and keep them up-to-date), would give civil servants more scope to update rules on their own

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legislation, see Roberta Romano & Simon A Levin, "Sunsetting as an Adaptive Strategy" (2021) 118:26 Proceedings of the National Academy of Sciences 1.

25. See Baumgartner & Jones, *supra* note 2 at xxiii, 19–21, 250; Green, *supra* note 4 at 127.

26. See Fraiberg & Trebilcock, *supra* note 2 at 843. This proposition derives from public choice theory (politicians and civil servants will work to maximize their self-interest). For discussion of public choice theory's implications for regulation, see George J Stigler, "The Theory of Economic Regulation" (1971) 2:1 Bell J Economics & Management Science 3; Sam Peltzman, "Toward a More General Theory of Regulation" (1976) 19:2 JL & Econ 211. For discussion of its implications for government and democracy more broadly, see generally Theodore J Lowi, *The End of Liberalism: The Second Republic of the United States*, 40th anniversary ed (New York & London, UK: WW Norton & Co, 2009); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (New Haven: Yale University Press, 1993).

27. See Gersen, *supra* note 20 at 276–77; David B Spence & Frank Cross, "A Public Choice Case for the Administrative State" (2000) 89:1 Geo LJ 97 at 124.

28. See Rebecca M Kysar, "Lasting Legislation" (2011) 159:4 U Pa L Rev 1007 at 1043–44. See also Iain Ramsay, "Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada" (2003) 53:4 UTLJ 379 at 382; Gersen, *supra* note 20 at 276–77 (observing that sunset clauses sometimes appear to be renewed reflexively with little deliberation).

29. See Coglianese, *supra* note 3.

without legislative involvement.[30] A regulator might be expected to engage in a fact-based analysis, informed by expertise, that gives more attention to technocratic issues that, though important, are not politically salient.[31] And through a process of deliberation—reasoned exchange internally and with outside stakeholders, oriented towards the public interest—a regulator can place itself in an even better position to develop sound proposals for updating rules.[32]

But regulators, like legislators, have incentives that might torque their positions on potential reforms.[33] They might recommend expanding their jurisdiction, budgets, or staff in a bid to enhance their prestige and, with it, their careers.[34] Career concerns might also leave regulatory staff reluctant to embrace change, out of fear that being associated with failed policy experiments will harm their reputations, and hence their future job prospects.[35] Preserving the status quo also preserves the value of staff's deep knowledge of current regulation, an asset that makes them marketable to

30. Ford, *supra* note 3 at 278. See also Julia Black, "Forms and Paradoxes of Principles-Based Regulation" (2008) 3:4 Capital Markets LJ 425; Julia Black, "The Rise, Fall and Fate of Principles-Based Regulation" in Kern Alexander & Niamh Moloney, eds, *Law Reform and Financial Markets* (Cheltenham & Gloucestershire: Edward Elgar, 2011) 3; Cristie L Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45:1 Am Bus LJ 1.

31. See Sunstein, *supra* note 3 at 582; Spence & Cross, *supra* note 27 at 135–36, 142. Regarding the benefit of regulators' expertise in the design of well-functioning rules, see e.g. James M Landis, *The Administrative Process* (New Haven: Yale University Press, 1938) at 18, 23–24; Jeffrey E Shuren, "The Modern Regulatory Administrative State: A Response to Changing Circumstances" (2001) 38:2 Harv J on Legis 291 at 292; Green, *supra* note 4 at 127.

32. See Alice Woolley, "Legitimating Public Policy" (2008) 58:2 UTLJ 153 at 169–71; Green, *supra* note 4 at 139.

33. See generally Stigler, *supra* note 26; Peltzman, *supra* note 26; Anthony Downs, *Inside Bureaucracy* (Boston: Little, Brown, 1967); Gordon Tullock, *The Politics of Bureaucracy* (Washington: Public Affairs Press, 1965); William Niskanen, *Bureaucracy & Representative Government* (Chicago: Aldine-Atherton, 1971).

34. See Anand & Green, *supra* note 4 at 410; Langevoort, *supra* note 4 at 529–30; Downs, *supra* note 33 at 16–18; Tullock, *supra* note 33 at 134–35; Niskansen, *supra* note 33 at 38–41.

35. See Langevoort, *supra* note 4 at 530–31; Downs, *supra* note 33 at 96–97, 99. Corporate managers might avoid investing in risky capital projects for similar reasons. See Bengt Holmstrom, "Managerial Incentive Problems: A Dynamic Perspective" (1999) 66:1 Rev Economic Studies 169.

prospective employers.[36] Capturing the benefits of civil servants' expertise while mitigating the risk that perverse incentives will influence their policy recommendations is a central concern of administrative law and institutional design.[37]

B. The Lead-Up to the 1994 Amendments

Until 1994, the power to create new securities rules in Ontario rested exclusively with politicians. Cabinet was responsible both for approving legislative amendments for presentation to the legislature and enacting new regulations.[38] Thus, to implement any desired rule changes, the OSC needed to persuade the Minister to present these changes to cabinet.

Cabinet time is a scarce resource and, given that it would be rational for cabinet members interested in securing re-election to allocate this time to items yielding the highest expected political return, one would not expect them to prioritize updates to securities law.[39] And OSC leadership, presumably aware of securities law's low political salience, and dependent on their Minister's favour to remain in office, would have had little incentive to risk antagonizing their Minister by pressing for the cabinet time necessary to keep legislation and regulation up to date.[40]

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36. See Wentong Zheng, "The Revolving Door" (2015) 90:3 Notre Dame L Rev 1265 at 1276. Career concerns may also lead staff to eschew bright-line rules (which might attract criticism if they fail to capture undesirable conduct after the fact) in favour of vague standards (which preserve staff's discretion to penalize such conduct after the fact, thus avoiding reputational risk). See Langevoort, *supra* note 4 at 530–31. Injecting discretion into the regulatory framework also creates more demand for the technical and interpretive experience staff possess. See Zheng, *supra* note 36 at 1292–94.

37. See generally Green, *supra* note 4; Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969); Mathew D McCubbins, Roger G Noll & Barry R Weingast, "Administrative Procedures as Instruments of Political Control" (1987) 3:2 JL Econ & Org 243; David B Spence, "Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control" (1997) 14:2 Yale J Reg 407; John D Huber & Charles R Shipan, "Politics, Delegation, and Bureaucracy" in Donald A Wittman & Barry R Weingast, eds, *The Oxford Handbook of Political Economy* (Oxford: Oxford University Press, 2006) 256.

38. See *The Province of Ontario Task Force on Securities Regulation — Interim Report — Request for Comments*, OSC, (1994) 17 OSCB 913 at 924 [Daniels Interim Report].

39. See *supra* note 2.

40. The OSC Chair and Vice-Chairs depend on the Minister to remain in office. They are

And it appears OSC leadership did not press for cabinet time. Instead, when rules needed to be introduced or changed, they made do by using their power to issue (formally non-binding) "policy statements" to engage in a form of rulemaking by stealth. They, as well as other Canadian securities regulators, inserted language into these policy statements that sounded like binding obligations, perhaps in the hope that industry would choose to act as if the policy statements were binding rather than test them in court.[41] But industry eventually did test these policy statements, and won, in the 1992 *Pezim v British Columbia (Superintendent of Brokers)*[42] and 1993 *Ainsley Financial Corp v Ontario Securities Commission*[43] decisions, which called into question the validity of much of the infrastructure of policy statements Canadian securities regulators had developed.

Ainsley's and *Pezim*'s potential repercussions proved too serious for the government to ignore. The Minister appointed a task force, chaired by Professor Ron Daniels, to review the legislative framework for securities regulation in light of these decisions.[44] The resulting report endorsed amending the *Securities Act* to grant rulemaking power to the OSC, but also

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appointed on recommendation of cabinet for renewable terms of two to five years. See Ontario, Management Board of Cabinet, *Agencies and Appointments Directive* (Toronto: Queen's Printer for Ontario, 19 May 2020), s 3.2.2, online: *Government of Ontario* <www.ontario.ca/page/agencies-and-appointments-directive>.

41. See *Responsibility and Responsiveness — Final Report of the Ontario Task Force on Securities Regulation*, OSC, (1994) 17 OSCB 3208 at 3212–13, 3218–19 [Daniels Report]. See also Jeffrey G MacIntosh, "The Excessive Use of Policy Statements by Canadian Securities Regulators" (1993) 1 Corporate Financing 19.

42. (1992), 96 DLR (4th) 137 (BC CA) at paras 29–31, 66 BCLR (2d) 257, rev'd [1994] 2 SCR 557, 114 DLR (4th) 385 [*Pezim*]. The Supreme Court of Canada reversed the Court of Appeal for British Columbia's decision only on the basis that the British Columbia Securities Commission decision under review could be grounded in the statute; it did not address the Court of Appeal for British Columbia's statement that a policy statement cannot give rise to binding obligations.

43. (1993), 106 DLR (4th) 507, 14 OR (3d) 280 (Ont Gen Div), aff'd 121 DLR (4th) 79, 21 OR (3d) 104 (Ont CA) [*Ainsley*].

44. Reportedly, Minister Floyd Laughren had by this time already committed privately to granting the OSC rulemaking powers. See Ontario, Legislative Assembly, Standing Committee on Finance and Economic Affairs, Securities Amendment Act, 1994 (Committee Hearing Transcript), 35-3 (1 December 1994) at 10h:10m:00s (CD Bruner), online: <www.ola.org/en/legislative-business/committees/finance-and-economic-affairs/parliament-35/transcript/committee-transcript-1994-dec-01> [*Legislative Hearings*].

recommended a series of measures intended to "preserve appropriate political responsibility for the system of securities regulation".[45] One such recommendation was to codify "a procedure whereby the Minister would every five years strike a Committee to review and to advise . . . on the legislative needs of the OSC".[46]

The Daniels Report provided a blueprint for amendments to the *Securities Act* enacted in 1994 (the 1994 amendments), which adopted the advisory committee review recommendation largely as proposed. The amendments require the committee to undertake a "notice and comment process" before presenting a final report to the Minister,[47] who in turn tables the report with the legislature, a committee of which will hear from interested persons and make recommendations to the legislature regarding amendments to securities legislation.[48] The 1994 amendments differ from the Daniels Report's proposal in that, while the Daniels Report recommended only that the committee advise on the OSC's "legislative needs",[49] the amendments empowered the advisory committee to "review the legislation, regulations and rules relating to matters dealt with by the [OSC]".[50] This expansion of the advisory committee's remit could have been intended as a safeguard to keep the OSC from abusing its new rulemaking powers.[51] Further amendments introduced in 2004 provided that an advisory committee must be appointed every forty-eight months rather than every five years.[52]

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45. Daniels Report, *supra* note 41 at 3216.

46. *Ibid* at 3239. The idea appears to have originated from comments submitted to the task force. See Daniels Interim Report, *supra* note 38 at 934–35 (initial set of recommendations on involving the legislature in securities regulation); Daniels Report, *supra* note 41 at 3285, 3292 (comments on these recommendations proposing a periodic review of the *Securities Act*).

47. *Securities Act*, *supra* note 5, s 143.12(2).

48. See *ibid*, ss 143.12(3)–(5).

49. Daniels Report, *supra* note 41 at 3239.

50. *Securities Act*, *supra* note 5, s 143.12(1); *1994 Amendments*, *supra* note 18, s 8.

51. This concern is reflected in the legislative hearings on the amendments. See *Legislative Hearings*, *supra* note 44. Dr. Philip Anisman, who was counsel for the plaintiffs in the *Ainsley* case and one of the authors of the 1994 amendments, commented that the OSC was being given rulemaking powers "against a background of conduct during the last 10 years when the commission has exceeded its jurisdictional limits on a substantial number of occasions, in my view, and has engaged in regulatory conduct knowing that that conduct was beyond its jurisdiction" (*ibid* at 15h:31m:00s, Philip Anisman). See also *ibid* at 10h:00m:00s (CD Bruner) (expressing similar sentiments). Comments submitted to the Daniels task force also reflected this concern. See Daniels Report, *supra* note 41 at 3276–78, 3284, 3293.

52. See *Budget Measures Act (Fall), 2004*, SO 2004, c 31, Sched 34, s 26 (introducing a revision

C. Ontario's Experience with Advisory Committees

Notwithstanding the accountability measures contemplated in the Daniels task force's recommendations, legislative inattention to securities regulation remains the norm. After the 1994 amendments, ministers stopped amending the *Securities Act* via standalone bills, instead using budget or omnibus bills, a move that reflects "a desire to move these matters swiftly through the [Legislative] Assembly" without "extensive debate."[53] And the legislature has not held ministers to their statutory deadline for appointing advisory committees. Only two advisory committees have been appointed since the 1994 amendments came into force: one in 2000, and another in 2020.[54] Despite having the experience of only two committees to draw from, the radically different processes these committees followed illustrates the latitude securities legislation provides these committees, subject to ministerial oversight, to set their own priorities and design their own consultation processes.

The first Committee, chaired by corporate lawyer and long-time public company CEO Purdy Crawford, was appointed in March 2000 by then-Finance Minister Ernie Eves.[55] It does not appear that Eves set any deadlines or other parameters constraining the Committee's work. The Committee's first publication, released in April 2000, presented a preliminary list of issues the Committee was planning to examine, and asked stakeholders to comment on the list and submit empowering ideas for reforms.[56] From there, the Committee

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to s 143.12(1) and a new s 143.12(1.1) bringing this change into effect). See also 1*994 Amendments*, *supra* note 18, s 8 (introducing the initial version of s 143.12 of the *Securities Act*, *supra* note 5).

53. Yalden, *supra* note 2 at 57. For the current legislative history, see Ontario, "Securities Act, R.S.O. 1990, c. S.5", online: <www.ontario.ca/laws/statute/90s05>. If the government follows through on its plan to introduce a new Capital Markets Act, it would be Ontario legislature's first standalone bill concerning securities law in over a quarter-century.

54. See "Legislative Reviews" (last visited 16 October 2021), online: *Ontario Securities Commission* <www.osc.ca/en/securities-law/legislation/legislative-reviews> [Legislative Reviews]. Ministers had reason to put off these reviews, as at the time it was widely believed that the OSC soon would be replaced by a national or interprovincial securities regulator. See Anita Anand, "The Time is Ripe for a Review of Securities Law", *The Globe and Mail* (24 June 2019), online: <www.theglobeandmail.com/business/commentary/article-the-time-is-ripe-for-a-review-of-securities-law/>.

55. See *Five-Year Review of Securities Legislation in Ontario—Request for Comments*, OSC, (2000) 23 OSCB 3034 at 3045 [2000–2003 Issues List].

56. See *ibid* at 3035.

engaged in over two years of review and private meetings with stakeholders, re-emerging in May 2002 with a draft report containing eighty-five proposed recommendations.[57] Initially, stakeholders were given seventy-eight days to comment,[58] but the Committee agreed to accept comment letters submitted after the deadline, with the final group of letters arriving over four months after the draft report was published.[59]

The Committee published its final report, weighing in at over 300 pages, with ninety-five recommendations, in May 2003—over three years after the Committee was appointed.[60] By this point, the OSC, and even the legislature, had run somewhat ahead of the Committee. Many of the core recommendations included in the committee's draft report, including statutory amendments expanding enforcement powers and permitted penalties, empowering the OSC to adopt rules relating to audit committees and CEO and CFO review of financial statements in response to the Enron and WorldCom scandals, and adopting a regime for secondary market liability, already had been introduced into the legislature as part of the government's 2002 and 2003 budgets.[61] The OSC and its counterparts among the Canadian Securities Administrators (CSA) also had already made significant progress

57. See *Five Year Review Committee Draft Report—Reviewing the Securities Act (Ontario)* (Toronto: Five Year Review Committee, 2002) at 6–17, online (pdf): *Ontario Securities Commission* <www.osc.ca/sites/default/files/2020-12/fyr_20020529_5yr-draft-report.pdf> [2000–2003 Draft Report].

58. See *ibid* at 7.

59. See Letter from Robert H Karp to Purdy Crawford (3 October 2002) at 1, online (pdf): Ontario Securities Commission <www.osc.ca/sites/default/files/2020-12/fyr_20021003_report_com_tory.pdf> (referencing a conversation with a committee member in which the member confirmed that the committee was accepting late submissions); "Comment Letters for Five Year Review Committee Draft Report of Reviewing the Securities Act (Ontario)" (last visited 16 October 2021), online: *Ontario Securities Commission* <www.osc.ca/en/securities-law/instruments-rules-policies/0/00-058/five-year-review-committee-draft-report-reviweing-securities-act-ontario/comment-letters>.

60. See *Five Year Review Committee Final Report—Reviewing the Securities Act (Ontario)* (Toronto: Queen's Printer for Ontario, 2003) [2000–2003 Final Report].

61. See Ontario, Ministry of Finance, *Eves Government is Enhancing Investor Confidence in Fair and Efficient Financial Markets*, Backgrounder (Toronto: Ministry of Finance, 29 May 2003), online (pdf): *Ontario Securities Commission* <www.osc.ca/sites/default/files/2020-12/fyr_20030529_bkgrder.pdf>.

on work to harmonize continuous disclosure requirements for public companies.[62] By this point, a new advisory committee was due to be appointed in only twenty-one months. The government, presumably having no appetite for undertaking another overhaul of securities law that soon, arranged to amend the *Securities Act* to extend its deadline for appointing a new advisory committee to 2007.[63]

Reflecting on the 2000–2003 Committee's process in testimony before a legislative committee, Chair Crawford commented that the Committee's mandate "was so broad in scope, reviewing all the rules of the [OSC], the *Securities Act* and the regulations", adding that "[w]e were probably too ambitious and tried to cover too many areas."[64] The Committee had received comment letters that seemed, at least indirectly, to take issue with its delay, proposing that future committees' work be subject to deadlines.[65] The Committee declined to make a recommendation to this effect, stating they would have needed a budget and full-time staff to complete their work on a shorter timeframe, and that "the Minister and future committees have the ability to shorten the time frame required to complete future reports by casting the mandate of the Committee more narrowly".[66]

Given the sprawling scope of the Committee's final report, it likely was inevitable that, at the margin, there would be some recommendations that arguably do not meet the level of quality achieved by the report as a whole. Some appear nebulous, such as the recommendations that the OSC

62. See *Notice and Request for Comment—Proposed NI 51-102 and 51-102CP*, OSC Notice, (2002) 25 OSCB 3701 (proposed national instrument respecting continuous disclosure obligations). The new National Instrument 51-102 took effect in March 2004. See *Notice of Ministerial Approval*, OSC Notice, (2004) 27 OSCB 3143.

63. See *Budget Measures Act (Fall), (2004)*, *supra* note 52, Sched 34, s 26.

64. Standing Committee on Finance and Economic Affairs, *Ontario Securities Commission Review—Five Year Review Committee*, 38-1 (19 August 2004) at 09h:01m:00s (Purdy Crawford), online: *Legislative Assembly of Ontario* <www.ola.org/en/legislative-business/committees/finance-economic-affairs/parliament-38/transcripts/committee-transcript-2004-aug-19> [2004 Legislative Hearing].

65. See 2000–2003 Final Report, *supra* note 60 at 87. In addition, given the timing of the report—it arrived only a couple of months before the government called an election—it is possible the Committee was asked (informally) to deliver its report before the end of the government's mandate.

66. *Ibid*. The 2000–2003 and 2020 Committees received part-time assistance from government staff and lawyers affiliated with the committee chair's law firm. The 2000–2003 Committee also was assisted by an academic. See *ibid* at 1; 2020 Final Report, *supra* note 12 at 2.

"be willing to adopt practical, if not perfect, solutions" to policy problems,[67] and "limit the number of projects it takes on".[68] Others were to some extent in tension with one another: implementing the recommendation that the OSC adopt a general practice of "conduct[ing] or commission[ing] empirical studies to assess the effectiveness, costs and benefits"[69] of proposed rules likely would make it more difficult for the OSC to "streamline its internal rulemaking process".[70] Some recommendations merely endorsed work that was already ongoing, such as the OSC's participation in the International Organization of Securities Commissions and the work that culminated in the adoption of International Financial Reporting Standards.[71]

After an almost seventeen-year pause, the appointment of a second committee, chaired by corporate lawyer Walied Soliman, was announced in February 2020 by then-Finance Minister Rod Phillips.[72] According to Soliman, the idea of striking a new committee originated with a conversation he had with Premier Doug Ford in early 2019, and preparatory talks regarding the Committee's mandate and membership continued over the next several months.[73] Cabinet allowed the Committee roughly one year to complete its work.[74]

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67. 2000–2003 Final Report, *supra* note 60 at 81.

68. *Ibid*.

69. *Ibid* at 83.

70. *Ibid* at 81.

71. See *ibid* at 50–51.

72. See Ontario, News Release, "Ontario Appoints Members of Taskforce to Review Capital Markets" (6 February 2020), online: *Government of Ontario* <news.ontario.ca/en/release/55674/ontario-appoints-members-of-taskforce-to-review-capital-markets>. The government disclosed its intention to appoint a new committee in its fall 2019 economic statement. See also Ministry of Finance, *A Plan to Build Ontario Together: 2019 Ontario Economic Outlook and Fiscal Review* by The Honourable Rod Phillips, Minister of Finance (Toronto: Queen's Printer for Ontario, 2019) at 70, online (pdf): *Government of Ontario* <budget.ontario.ca/2019/fallstatement/pdf/2019-fallstatement.pdf>.

73. See Walied Soliman, "Remarks at Technical Briefing on the Final Report of the Capital Markets Modernization Taskforce", Remarks, (notes on file with the author, 29 January 2021).

74. See OIC 1720/2019, 1 (28 November 2019). Curiously, the order in council cites royal prerogative, rather than s 143.12 of the *Securities Act*, as the basis for establishing the Committee. It could be that cabinet intended a broader mandate for the Committee than the *Securities Act* provides: it calls for a review of the "capital markets regulatory framework" (*ibid*, Preamble),

The government's deadline required the Committee to move at a breakneck pace. In July 2020, following five months of closed-door consultations with 119 stakeholders, the Committee published a consultation paper disclosing forty-seven of the "over 70" proposals the Committee was considering for its final report.[75] The sweeping proposals included spinning off the OSC's adjudicative functions into a separate "Ontario Securities Tribunal",[76] splitting the OSC's Chair and CEO roles,[77] moving smaller public companies to semi-annual (rather than quarterly) reporting requirements,[78] curbing some of the OSC's enforcement powers,[79] and adding "the fostering of capital formation and competitive capital markets" to the OSC's mandated goals.[80]

As noted in the Introduction, the Committee's proposals were not universally welcomed. One media report cited a "barrage of criticism" from the Canadian Coalition for Good Governance and the OSC's independent Investor Advisory Panel, as well as the nine Canadian securities regulators outside of Ontario, which argued that many of the proposals could harm investors and hamstring the enforcement of securities laws.[81] Commenters added that the Committee's sixty-day consultation period was not long enough for them to fully consider the Committee's proposals.[82] Commenters also expressed

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a phrase that perhaps was meant to cover rules governing commodities, insurance, and other investment products not governed by securities law. At least one of the comment letters submitted to the 2020 Committee raised the question of whether the Committee was intended to be constituted under s 143.12 of the *Securities Act*. See Letter from Robert Yalden & Ben Fickling, Faculty of Law, Queen's University, to the Capital Markets Modernization Taskforce (7 September 2020) at 1 (on file with the author). The Committee's initial November 2020 deadline was later extended to January 2021. See OIC 1575/2020, s 2 (26 November 2020).

75. 2020 Consultation Report, *supra* note 11 at 2–5.

76. *Ibid* at 6–7.

77. See *ibid*.

78. See *ibid* at 11.

79. See *ibid* at 39–42.

80. *Ibid* at 6.

81. Langton, "Task Force Report", *supra* note 8.

82. See e.g. Osler Letter, *supra* note 9 at 4; Letter from the Canadian Coalition for Good Governance to Walied Soliman, Taskforce Chair, Capital Markets Modernization Taskforce (7 September 2020) at 1, online (pdf): *Canadian Coalition for Good Governance* <ccgg.ca/wp-content/uploads/2020/09/CCGG-Submission-Consultation-Modernizing-Ontarios-Capital-Markets_.pdf>.

concern about the lack of evidence or analysis supporting the Committee's recommendations,[83] which at least one commenter felt hindered their ability to meaningfully respond to the proposals.[84] Consider, for example, its proposal for new rules governing proxy advisors, which was similar to a contemporaneous US rule proposal that proved controversial and was later watered down significantly.[85] The proposal was supported by only sixty-seven words of analysis, pointing to "concerns" raised by "[i]ssuers and other stakeholders" about proxy advisors' work product and potential conflicts of interest without citing any evidence substantiating these concerns.[86]

The Committee's final report, published in January 2021, included nearly all the proposals the Committee disclosed in its consultation paper.[87] And, as contemplated in its consultation paper, the report included dozens of new recommendations, for a final tally of seventy-four. While these choices would seem to suggest the Committee received largely supportive comments on its consultation paper, the following suggests otherwise: first, in a break

83. See e.g. Letter from Davies Ward Phillips & Vineberg LLP to the Capital Markets Modernization Taskforce (7 September 2020) at 28–33, 50, online (pdf): *Davies Ward Phillips & Vineberg LLP* <www.dwpv.com/-/media/Files/PDF_EN/2020/Capital-Markets-Modernization-Taskforce-Comment-Letter.ashx> [Davies Letter]; Letter from Philip Anisman to the Capital Markets Modernization Taskforce (4 September 2020) at 3 (on file with the author).

84. See Torys Letter, *supra* note 10 at 1.

85. For background on the controversy surrounding the US rule proposals, see Peter Rasmussen, "Divided SEC Passes Controversial Proxy Advisor Rule", *Bloomberg Law* (29 July 2020), online: <news.bloomberglaw.com/bloomberg-law-analysis/analysis-divided-sec-passes-controversial-proxy-advisor-rule>.

86. 2020 Consultation Report, *supra* note 11 at 24.

87. The Committee appears to have abandoned only two proposals: those to (i) require institutional investors to disclose their holdings of large public company securities each quarter, and (ii) involve the OSC in reviewing shareholder proposals presented at shareholder meetings. Other proposals were retained, but watered down, most prominently a proposed prohibition on big banks' practice of tying capital markets and commercial lending services, replaced in the final report by a proposal for restrictions on the practice. See Greg McArthur, "Ontario Task Force Recommends Sweeping Overhaul for OSC", *The Globe and Mail* (22 January 2021), online: <www.theglobeandmail.com/business/article-ontario-task-force-recommends-sweeping-overhaul-for-osc/>.

with custom, the Committee did not publish copies of the comment letters it received;[88] and second, several commenters have criticized the Committee for giving inadequate attention to their feedback.[89] Like the consultation paper, the final report also faced criticism for the thin analysis supporting its recommendations.[90]

The report nonetheless appears set to have a transformative influence on securities law in Ontario. The *2021 Budget Bill* included provisions implementing the Committee's proposed changes to the OSC's mandate, as well as its proposals to separate its Chair and CEO roles and establish a separate tribunal.[91] In its 2021 budget document, the government also stated that Ministry of Finance staff and the OSC were actively reviewing the remainder of the Committee's recommendations.[92]

II. Incentives

The 2000–2003 and 2020 Committees both produced recommendations that were high in volume (ninety-five and seventy-four, respectively) and wide-ranging in scope, even though they were subject to very different procedural parameters—the former appears not to have had any formal constraints on its discretion to set its own process, while the latter was given a one-year deadline.[93]

88. The Committee published only a list of organizations (not individuals) who provided comments, with a statement that letters can be obtained on request. I used this mechanism to access four of the comment letters received. Some other commenters published their letters themselves. By contrast, the 2000–2003 Committee made all the comment letters it received available for download on the OSC's website; the OSC does the same with comments on its own consultations as a matter of course.

89. See e.g. Lawrence E Ritchie et al, "Ontario Capital Markets Modernization Taskforce Final Report: A Set of Thoughtful Ideas or a Blueprint for Change?" (26 February 2021), online (blog): *Osler Hoskin & Harcourt LLP* <www.osler.com/en/blogs/risk/february-2021/ontario-capital-markets-modernization-taskforce-final-report-a-set-of-thoughtful-ideas-or-a-bluepri>; James Langton, "CSA Concerned by Certain Task Force Proposals", *Investment Executive* (22 February 2021), online: <www.investmentexecutive.com/newspaper_/news-newspaper/csa-concerned-by-certain-task-force-proposals/>.

90. See e.g. Ritchie et al, *supra* note 89; Corcoran, *supra* note 12.

91. See *supra* note 13, Sched 9, ss 8, 11, 25, 40(7).

92. See *2021 Budget*, *supra* note 13 at 110, 113.

93. But see 2000–2003 Final Report, *supra* note 60. The 2000–2003 Committee may have been encouraged informally to complete its report before the end of the government's mandate.

This Part draws from the backgrounds of past advisory committee members to identify incentives that might influence the behaviour of a typical advisory committee member. This discussion lays the foundation for Part III's exploration of how these incentives might affect a committee's recommendations and deliberative process.

A. Backgrounds of Committee Members

A review of advisory committee members' backgrounds and career trajectories reveals four commonalities relevant to identifying their incentives. First, many committee members were mid-career professionals at the time of their appointment. Five of the eleven individuals who have served on an advisory committee (three of the six members of the 2000–2003 Committee and two of the five members of the 2020 Committee) were aged fifty or younger at the time of their appointment, and the chair of the 2020 Committee was under forty-five at the time of his appointment.[94] Only one committee member (the chair of the 2000–2003 Committee) was over age sixty-five at the time of his appointment.[95] Of the 2000–2003 Committee members,

94. Advisory committee members' ages can be determined using media reports and, for those members who have served as directors of public companies, securities disclosures: see Aecon Group Inc, "Notice of Annual Meeting of Shareholders and Management Information Circular" (2 June 2020) at 13, online (pdf): *Aecon Com Files* <aeconcomfiles.blob.core.windows.net/web-live/docs/default-source/investor-briefcase/management-information-circular.pdf> (Susan Wolburgh Jenah) [Wolburgh Jenah disclosure]; Life Storage, Inc, "Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934" (19 April 2018) at 7, online: *Securities and Exchange Commission* <www.sec.gov/Archives/edgar/data/0000944314/000119312518122657/d444143ddef14a.htm> (Carol Hansell) [Hansell disclosure]; Toronto-Dominion Bank, "Notice of Annual Meeting of Common Shareholders and Management Proxy Circular" (26 March 2015) at 11, online: *Securities and Exchange Commission* <www.sec.gov/Archives/edgar/data/947263/000119312515053980/d846153dex991.htm> (Helen Sinclair); Bloomberg News, "Toronto Lawyer Walied Soliman Appointed Chairman of Norton Rose Canada", *Financial Post* (28 March 2017), online: <financialpost.com/news/fp-street/toronto-lawyer-walied-soliman-appointed-chairman-of-norton-rose-canada> (biographical information on Walied Soliman); Doug Steiner, "Wes Hall: From Mail Room Clerk to Bay Street Power Broker", *The Globe and Mail* (30 January 2014), online: <www.theglobeandmail.com/report-on-business/rob-magazine/make-friends-now-or-enemies-later/article16579456/> (biographical information on Wes Hall).

95. See Foot Locker, Inc, "Proxy Statement Pursuant to Section 14(a) of the Securities Exchange

three went on to have significant changes in career after their committee service concluded. David Wilson, a co-CEO of Scotia Capital at the time of his appointment, was appointed OSC Chair following his committee service.[96] Susan Wolburgh Jenah, who was general counsel of the OSC at the time of her appointment, was appointed an OSC Vice-Chair following her committee service, and later became the first President and CEO of the Investment Industry Regulatory Organization of Canada, the self-regulatory organization for Canadian investment dealers.[97] Carol Hansell, a partner at the law firm Davies, Ward & Beck at the time of her appointment, went on to found her own firm (which provides a combination of legal, governance, and strategic communications advice), and to serve on the boards of various public companies and the Bank of Canada.[98]

Second, advisory committee members have deep connections to the securities industry. Only one advisory committee member (Ms. Wolburgh Jenah) was a public sector employee at the time of her appointment; every other committee member was either employed in the securities industry or served clients in this industry.[99]

Third, committee members appear to have at least a passing interest in politics. The names of all five members of the 2020 Committee appear in federal or Ontario political party donor databases,[100] and the Committee's chair had

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Act of 1934" (25 May 2005) at 27, online: *Securities and Exchange Commission* <www.sec.gov/Archives/edgar/data/850209/000095011705001353/a39434.htm> (biographical information on Purdy Crawford).

96. See IE Staff, "W. David Wilson Formally Appointed New OSC Chair", *Investment Executive* (15 September 2005), online: <www.investmentexecutive.com/news/from-the-regulators/w-david-wilson-formally-appointed-new-osc-chair/>.

97. See IE Staff, "Wolburgh-Jenah Named Vice Chairwoman of OSC", *Investment Executive* (9 March 2004), online: <www.investmentexecutive.com/news/people/wolburgh-jenah-named-vice-chairwoman-of-osc/>; Wolburgh Jenah disclosure, *supra* note 94.

98. See Hansell McLaughlin Advisory Group, "Carol Hansell" (last visited 17 October 2021), online: <www.hanselladvisory.com/team-member/carol-hansell/>.

99. See 2000–2003 Draft Report, *supra* note 57 at 171. Melissa Kennedy, a member of the 2020 Committee, had worked at the OSC earlier in her career. See 2020 Consultation Report, *supra* note 11 at 48.

100. The Committee members' names are associated with a total of over $79,000 in donations made to political parties or candidates between 2014 and year-end 2020. The chair of the 2020 Committee is listed as having donated over $60,000 to Conservatives or Progressive Conservatives (PCs) and $832 to Liberals; another Committee member is listed as having donated over $14,000 to Liberals and $1,800 to Conservatives or PCs; remaining Committee

served as campaign chair for Ontario's governing Progressive Conservatives.[101] The names of the members of the 2000–2003 Committee also match the names of donors listed in these databases, but these databases do not cover any periods prior to the completion of that Committee's final report.[102]

Fourth, while advisory committee members bring a variety of fields of expertise to their roles (including law, investment banking, trading, and providing governance advice),[103] one commonality is that much of their human capital appears to be tied up in their reputations as leaders and strategic thinkers within the securities industry, as well as the broader community. Four of six members of the 2000–2003 Committee had served as public company directors at the time of their appointment (the remaining two would serve in this capacity later in their careers),[104] as had three of five members of the 2020 Committee.[105] And four of six members of the 2000–2003 Committee, as well as four of five members of the 2020 Committee, had served as a co-founder, CEO, or chair of a public or private organization

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members account for a total of under $2,000 in donations to Liberals and Conservatives or PCs. In total, over $64,000 was donated to Conservatives or PCs and over $15,000 was donated to Liberals. No donations to other parties are listed for the period covered. For available data, see Elections Canada, "Search for Contributions" (last modified 26 June 2021), online: <www.elections.ca/wpapps/WPF/EN/CCS/Index>; Elections Ontario, "Political Financing and Party Information" (last visited 17 October 2021), online: <finances.elections.on.ca/en/finances-overview>. Totals include donations associated with a professional corporation and apparent misspellings of names.

101. See Walied Soliman, "Every Ontario Conservative Should Be Proud to Have Doug Ford Leading Us", *National Post* (21 March 2018), online: <nationalpost.com/opinion/why-ontarios-pcs-should-be-excited-about-the-future-especially-june-7>.

102. Elections Ontario's data dates to 2014; Elections Canada's data dates to 2004.

103. See 2000–2003 Draft Report, *supra* note 57 at 171; 2020 Consultation Report, *supra* note 11 at 48–49.

104. See 2000–2003 Draft Report, *supra* note 57 at 171; The Loewen Group Inc, "Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934" (28 April 2000) at 12–13, online: <www.sec.gov/Archives/edgar/data/845577/000091205700020423/0000912057-00-020423.txt> (biographical information on William Riedl); Hansell disclosure, *supra* note 94 (served post-2003); Wolburgh Jenah disclosure, *supra* note 94 (served post-2003).

105. See 2020 Consultation Report, *supra* note 11 at 48–49; Equity Financial Holdings Inc, "Notice of Annual Meeting of Shareholders and Management Information Circular" (25 April 2014) at 8, online (pdf): *SEDAR* <www.sedar.com/GetFile.do?lang=EN&docClass=10&issuerNo=00020011&issuerType=03&projectNo=02204208&docId=3532144> (referring to Wesley Hall's service as a director).

at the time of their appointment.[106] The two remaining members of the 2000–2003 Committee would go on to serve in this capacity after their committee service.[107] Committee members' biographies also highlight their history of service with community and charitable organizations, demonstrating their interest in service and leadership beyond the securities industry.[108]

B. Career Concerns

Committee members volunteer their time while serving in demanding, typically private sector jobs. Beyond pure altruism, what might motivate an individual with the type of background described above to join an advisory committee?

Committee members' embeddedness within the securities industry raises one possibility: perhaps they aim to craft recommendations that serve the interests of their corner of this industry, in the hope of being rewarded with a promotion or new client work.[109] A Minister could mitigate the risk of lopsided recommendations by ensuring, as recommended by the 2000–2003 Committee, that committee members "represent a diversity of backgrounds and interests relevant to the capital markets".[110] The converse is also true, though—a Minister could choose committee members based on where they sit within industry in the hope that they will be predisposed to reach a desired set of conclusions. For instance, a committee comprised of public company CEOs and their service providers could be expected to reach recommendations that would insulate public company managers from investor scrutiny, while a committee comprised of asset managers and their service providers could be expected to reach recommendations designed to do the opposite.[111]

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106. See 2000–2003 Draft Report, *supra* note 57 at 171; 2020 Consultation Report, *supra* note 11 at 48–49.

107. See Hansell disclosure, *supra* note 94; Wolburgh Jenah disclosure, *supra* note 94.

108. See 2000–2003 Draft Report, *supra* note 57 at 171; 2020 Consultation Report, *supra* note 11 at 48–49.

109. *Cf* Christopher Adolph, *Bankers, Bureaucrats, and Central Bank Politics: The Myth of Neutrality* (Cambridge: Cambridge University Press, 2013) at 15–17 (finding that financial sector professionals who served temporarily as central bankers tended to adopt policies that served the interests of their past (and presumably future) employer, their "shadow principal").

110. 2000–2003 Final Report, *supra* note 60 at 87.

111. For examples of managers' and asset managers' diverging policy and governance preferences, see Michael Cappucci, "The Proxy War Against Proxy Advisors" (2020) 16:3 NYUJL & Bus 579; Marcel Kahan & Edward Rock, "Symbolic Corporate Governance Politics" (2014) 94:6 BUL Rev 1997 at 1998–2021.

Even if the Minister strikes an appropriate balance in choosing committee members, these committee members have another option for using their committee work to advance career concerns. Rather than catering to the interests of a specific industry segment, committee members may seek to showcase their abilities as regulatory thought leaders and influencers, by making recommendations that attract attention and result in material changes to securities law. Establishing such a track record may be especially helpful given the types of career paths taken by advisory committee members, such as serving on public company boards, founding a new firm, or being appointed to a senior post at a regulator.[112] Thus, in contrast to frontline regulatory staff, who might be more concerned about *avoiding damage* to their reputations,[113] advisory committee members' career concerns may orient them more towards actions that *enhance* their reputations.

Career concerns' potential to encourage this type of attention-grabbing, reputation-enhancing behaviour has been described in other contexts. For example, enforcement lawyers may take an aggressive stance towards their opponents to demonstrate their talent, and thus their potential value as private sector defence lawyers.[114] Law professors appointed to law reform bodies may promote bold proposals for reform to enhance their reputations within (and potentially outside) academia.[115] One study looking at venture capital firms illustrates the potential harms of reputation-enhancing behaviour: newer firms might take companies public too soon in an effort to build their reputations early—effectively selling their current investors short for the sake of pursuing new investors.[116]

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112. Guides offering advice on how to secure a public board appointment often recommend building one's public profile and reputation by producing thought leadership. See e.g. Fred Hassan & Ken Banta, "So You Want to Join a Board", *Harvard Business Review* (4 August 2014), online: <hbr.org/2014/08/so-you-want-to-join-a-board>; Susan S Muck, "Want to Join a Corporate Board? Here's How" (26 February 2020), online: *Harvard Law School Forum on Corporate Governance* <corpgov.law.harvard.edu/2020/02/26/want-to-join-a-corporate-board-heres-how/>.

113. See *supra* note 35 and accompanying text.

114. See Zheng, *supra* note 36 at 1276–80; Ed deHaan et al, "The Revolving Door and the SEC's Enforcement Outcomes: Initial Evidence from Civil Litigation" (2015) 60:2–3 J Accounting & Economics 65.

115. See Alan Schwartz & Robert E Scott, "The Political Economy of Private Legislatures" (1995) 143:3 U Pa L Rev 595 at 610–11, 628–29.

116. See Paul A Gompers, "Grandstanding in the Venture Capital Industry" (1996) 42:1 J Financial Economics 133. Agents' incentives to torque their current work to secure future employment has been documented in other contexts. See e.g. Cristie Ford & David Hess, "Can

Advisory committee members' incentive structure is complicated by the fact that, like corporate lawyers, they formally serve as agents for an amorphous body ("the public" or "the corporation") but report to an individual who is another agent of that body ("the Minister", "the general counsel", or "the CEO"), who has considerable power over them.[117] The Minister's powers over advisory committee members are twofold. First, because it is effectively up to the Minister whether the committee's recommendations will translate into action or be cast aside to gather dust, the reputational boost that comes with advisory committee service depends in large part on how the Minister reacts to these recommendations.[118] Second, for committee members who aspire to a senior appointment at the OSC, the Minister is effectively a potential future client—it is the Minister who proposes these appointments to cabinet.[119] Thus, whether in the hope of securing an appointment or maximizing the likelihood that their recommendations will be implemented, committee members have strong reason to calibrate their work to the Minister's preferences.

III. Implications

The implications that could flow from structuring an advisory committee to favour a particular segment of the securities industry can be spelled out briefly: the committee develops recommendations reflecting the interests of the industry segment(s) with which it affiliates; the committee rushes its consultation process and minimizes the transparency of that process to reduce the likelihood that valid objections to these recommendations will reach the public record (as valid objections that are public record could leave the

Corporate Monitorships Improve Corporate Compliance?" (2009) 34:3 J Corp L 679 at 729; Adolph, *supra* note 109.

117. See generally Ralph Jonas, "Who is the Client?: The Corporate Lawyer's Dilemma" (1988) 39:3 Hastings LJ 617.

118. It is the Minister who would introduce any bills to amend securities legislation. See Ontario, Legislative Research Service, *How an Ontario Bill Becomes Law* (Toronto: Legislative Assembly of Ontario, August 2011) at 8, online (pdf): <www.ola.org/sites/default/files/common/how-bills-become-law-en.pdf>. And the OSC presumably would take its cues from the Minister with respect to committee recommendations for regulatory change (given OSC leadership's incentive to preserve its relationship with the Minister).

119. *Cf A Drafter's Guide to Cabinet Documents* (Ottawa: "Privy Council Office", 2013) at 1, online (pdf): *Government of Canada* <www.canada.ca/content/dam/pco-bcp/documents/pdfs/dr-guide-eng.pdf>.

committee feeling boxed in, fearing that their reputations would be at risk if they ignored these objections);[120] and the Minister and the OSC are left with recommendations that are not designed to serve the public interest. This outcome may not necessarily be negative for the Minister. If the Minister were deliberate in choosing advisory committee members, this may be exactly the outcome they hoped to achieve, perhaps because the committee's recommendations serve the interests of stakeholders the Minister relies on for political support.

This Part imagines a scenario in which the Minister instead has achieved an appropriate balance in choosing advisory committee members, such that the only incentive advisory committee members have in common is to produce recommendations that attract attention and are seen to result in material changes to securities law. This Part explores how this incentive could affect the substance of the committee's recommendations, the process it employs to reach these recommendations, and subsequent legislative and regulatory change. Where relevant, it also describes how the Minister's preferences and behaviour could interact with the effects of this incentive to influence both the committee's work and its impact on securities law.

A. Advisory Committee Recommendations

Advisory committee members have reason to maximize the attention their recommendations attract without impairing the recommendations' likelihood of being implemented. Attracting attention would mean favouring the adoption of bold recommendations over incremental ones. Maximizing the total number of recommendations has additional value as a headline—a proxy for activity and achievement that can be readily understood without having to engage with the details of the recommendations.[121]

Because advisory committee members bear none of the immediate burdens of implementing their recommendations, such as allocating scarce

120. The potential for manipulating comment periods and consultation techniques to support pre-desired outcomes has been discussed in reviews of US regulatory agencies. See Rachel Augustine Potter, *Bending the Rules: Procedural Politicking in the Bureaucracy* (Chicago & London: University of Chicago Press, 2019) at 114–28. See also Part IV.B, *below*.

121. The Chair of the 2020 Committee has highlighted the Committee's total number of recommendations in media interviews. See e.g. "Ontario's Capital Markets Won't Grow by Bringing in the Likes of Disney or Coke: Walied Soliman" (25 January 2021) at 00h:01m:30s, online (video): *BNN Bloomberg* <www.bnnbloomberg.ca/video/ontario-s-capital-markets-isn-t-going-to-grow-by-bringing-in-companies-like-disney-or-coke-walied-soliman~2125662.amp.html> ("we met with over 130 stakeholders, thousands of hours, over 116 pages, and 74 recommendations").

staff time and resources and securing any needed agreement with other CSA members, they would seem to have little reason to limit their recommendations in number or ambition. As such, committees may be inclined to go overboard, developing ever-longer lists of ever-bolder recommendations. Committee members would have reason to feel justified in acting in line with this incentive: if their role, at least in theory, is merely to produce recommendations for others to consider, why not go for broke and let those to whom the recommendations are addressed decide which ones are worth pursuing? Why risk being accused of leaving issues off the table? Especially when this may be their best chance in their professional careers to influence how the industry in which they work is regulated?[122]

The need to avoid impairing the likelihood of recommendations being implemented should prevent the committee from making recommendations that are entirely unworkable, but it also, as discussed in Part II, makes the committee highly dependent on the Minister. This dependence creates a strong incentive for advisory committee members, whether or not they aspire to public service, to align their recommendations with what they perceive to be the preferences of the Minister.

Of course, this dependence is moot if the Minister is politically indifferent to securities regulation. This would seem, however, to be too strong an inference to draw from politicians' long history of inattention towards securities regulation. Securities regulation may come with low political stakes relative to other matters in a Minister of Finance's portfolio, but it is not devoid of these stakes. There has been a change of OSC Chair within two years of each change in party government in Ontario since 1995, each time accompanied by press speculation about policy or other differences between the sitting Minister and outgoing chair.[123] And given governments' uneven record of appointing advisory committees, the mere fact that a committee has been appointed may give a committee member reason to suspect the Minister has political appetite for securities reforms. Even if the Minister lacks explicit or well-formed views about what these reforms should look like, advisory committees could look to

122. As Tullock observes, "It is always difficult to distinguish between 'what is good for me' and 'what is good.'" Tullock, *supra* note 33 at 24.

123. See Adam Mayers, "Rescue Ontario's Stock Watchdog", *Toronto Star* (19 October 1996) D2; Karen Howlett & Janet McFarland, "OSC Head Brown to Step Down", *The Globe and Mail* (19 November 2004) B1; Greg McArthur, David Milstead & Christine Dobby, "Maureen Jensen to Resign From OSC Amid Clashes with Ford Government", *The Globe and Mail* (21 January 2020), online: <www.theglobeandmail.com/business/article-maureen-jensen-resigning-as-head-of-the-ontario-securities-commission/>.

stakeholders known to be friendly to the Minister and their political party as proxies for the Minister's thinking.[124]

Advisory committee members' incentives to cater to the Minister and to develop numerous, ambitious recommendations are somewhat in tension, as recommendations that involve changes to securities legislation require work on the part of the Minister to implement. An advisory committee may try to resolve this tension by being sparing in recommending changes to securities legislation, and instead channelling its energies towards developing recommendations for securities regulation (which the OSC, rather than the Minister, bears the burden of implementing). Note that only about one-third of the 2000–2003 Committee's ninety-five recommendations required legislative or cabinet action, with the remaining two-thirds focused on OSC rules and practices.[125] This tension need not be resolved, however, if the committee believes the Minister would be interested in seeing substantial proposals for legislative change. While slightly more than half of the 2020 Committee's recommendations did call for changes to securities legislation, the Committee recommended that the changes be rolled into the government's proposal for a new Capital Markets Act rather than incorporated into the existing *Securities Act*.[126] This move not only lessens the immediate burden of these changes on the Minister (instead of being required to present a new piece of legislation, they need only have staff consider modifications to an already planned piece of legislation), it signals alignment between the committee's recommendations and the government's prior intention to overhaul securities legislation.

But would a committee member's aspirations to join OSC leadership not lead them to be sparing in making recommendations for regulatory change, since, if selected, they would be burdened with implementing these recommendations? Such a committee member may be aware of this risk but nonetheless feel justified taking it. Like a politician running for office, they may choose to run on an overambitious platform that helps them win even if they believe the platform could create problems for them later.

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124. Committee members could get a sense of these views as part of their consultation process. Committee members' interest in politics indicates it would not be unreasonable to expect that they would be able to identify these stakeholders. See *supra* notes 100–102 and accompanying text.

125. See Ontario, Legislative Assembly, "Remarks By David A Brown, QC, Chair, Ontario Securities Commission at the Standing Committee on Finance and Economic Affairs", Sessional Paper, 35-1 (18 August 2004) at 3, online (pdf): *Ontario Securities Commission* <www.osc.ca/sites/default/files/2020-12/sp_20040818_db-legislative-assembly.pdf>.

126. See 2020 Final Report, *supra* note 12 at 16. The thirty-eight recommendations that appear to call for legislative change are recommendations 1–7, 13, 18, 30–32, 34, 36, 38, 43–44, 46, 48, 55–67, and 69–74.

B. Advisory Committee Process

Securities legislation provides considerable flexibility with respect to the design of an advisory committee's deliberative process, as illustrated by the over three-year process undertaken by the 2000–2003 Committee and the eleven-month process undertaken by the 2020 Committee. It requires only that the committee undertake some form of notice and comment process as part of its work.[127] It does not say how long this process should be, or whether the comments received in that process should be made public. It also sets no deadline for completion of the committee's work.

In designing its process, a committee can choose up to two of the following three outcomes, barring an expansion of its budget and staff resources: a quick turnaround from appointment to report completion, a high volume of (impactful) recommendations, and clear evidence of deliberation (e.g., lengthy, public comment processes, and in-depth analysis explaining the rationale for its recommendations).[128] The choices made by a committee acting in line with its incentives would seem to depend on the committee's assessment of the Minister's and industry's views on what a reasonable consultation process looks like.

If the Minister wants quick action, the committee may be reluctant to lobby for more time. Such lobbying could damage the committee's relationship with the Minister, putting at risk both the implementation of their recommendations and any aspirations committee members might have for a future government appointment. Assuming the committee rules out negotiating for more time, their remaining choices lie between the following two extremes. They could limit the number and boldness of their recommendations and carry out a deliberative process that reflects these limitations (stakeholders would need less time for comment in light of the recommendations' limited scope, and the committee would need less time to develop fulsome reasons for adoption of its final recommendations). Alternatively, they could choose not to limit the scope of their recommendations and sacrifice deliberation instead.

Given committee members' interest in maximizing attention and impact on securities law, they may be inclined to lean towards this alternative option. But in doing so, they face a constraint: being seen as skimping on deliberation may put committee members' reputations at risk and lessen the likelihood that their recommendations will be implemented. Stakeholders who oppose the committee's recommendations could accuse committee members of having

127. See *Securities Act*, *supra* note 5, s 143.12(2).

128. For a deeper description of what kinds of actions evidence deliberation, see Woolley, *supra* note 32 at 179–81.

run a kangaroo consultation, with prejudged recommendations and insufficient opportunity for stakeholders to provide input. This charge might be more salient for media, legislators, or other generalist observers than more technical arguments rooted in the substance of the recommendations.[129] Such criticism could cause a Minister to distance themselves from the committee's recommendations. In the event of a change in Minister, underinvesting in deliberation also gives a new Minister with different preferences an easy excuse to ignore the committee's recommendations. This constraint leaves a committee with a difficult balancing act: it must design a deliberative process that is just elaborate enough to appear legitimate in the eyes of stakeholders, while also meeting the Minister's (perceived or actual) deadline and satisfying its members' interest in developing a report with numerous, significant recommendations.

How might a committee act if it judges that the Minister is indifferent to the amount of time the committee takes to carry out its work—a situation not far off from what the 2000–2003 Committee appears to have faced? In this scenario, a committee may opt to capture the reputational benefits that come with offering bold, numerous recommendations, while minimizing reputational risk by adopting a deliberative process that reflects the volume and significance of these recommendations. This would mean opting against a quick turnaround for its work. Instead, the committee could continue working until it feels it has completed the job assigned to it as well as could reasonably be done.

C. Subsequent Legislative and Regulatory Change

The act of making ambitious or numerous recommendations is not in itself harmful. Recommendations by advisory committees and other third-party experts can stimulate discussion and provide the impetus for clearing away outdated rules and responding to current policy problems. Recommendations that align with the political preferences of the Minister of the day are not inherently harmful, either. On the contrary, as the Daniels Report observed, it is appropriate that regulation evolve in a way that reflects the broader priorities of the government chosen by voters.[130]

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129. These arguments may be more difficult to explain to a generalist observer and more obviously self-interested. A process-based argument can be more easily cloaked in public interest concerns, as a truncated deliberative process typically is expected to result in worse decisions. See e.g. Woolley, *supra* note 32 at 168–69.

130. See *supra* note 41 at 3216. But see Anand & Green, *supra* note 4 at 410–13 (reviewing arguments that regulators should, at least to a degree, be insulated from politicians). See also Matthew C Stephenson, "Optimal Political Control of the Bureaucracy" (2008) 107:1 Mich L Rev 53.

What matters is how these recommendations feed into the policy-making process. Are policy-makers likely to filter out recommendations they judge to have been poorly thought out? Might they feel obliged to divert resources away from worthwhile reforms generated within government towards rival reforms recommended by an advisory committee? The answers to these questions would seem to differ depending on whether the recommendations concern legislative changes, which require the Minister to undertake considerable work to implement, or merely regulatory changes, which do not.

It seems unlikely that the Minister would choose to reflexively endorse recommendations for legislative change, as the Minister bears the burden of implementing these recommendations. The Minister must budget staff and time to translate proposals into legislation and bring this legislation before cabinet and, subsequently, the legislature. To the extent problems with proposals are detected during this process (e.g., in legislative committee hearings), additional work may be needed to amend this legislation. Before deciding to make this investment, one would expect a Minister to seek assurance—perhaps from the OSC or from Ministry staff—that this investment is worthwhile.[131] In addition, allocating resources towards an advisory committee's recommendations for legislative change would seem unlikely to entail diverting resources away from other, internally generated proposals. As discussed in Part I, securities law's low political salience suggests the Minister will be unlikely to devote much attention to it if left to their own devices, and OSC leadership's incentive to preserve its relationship with the Minister suggests they will be reluctant to make demands on the Minister's attention in this vein.

In the case of regulatory changes, by contrast, the Minister has the option of issuing a blanket endorsement of recommendations that align with their political preferences and leaving the OSC to undertake the work involved in implementing them. As the Minister does not bear the burden of implementing these recommendations, they may feel less of a need to scrutinize them before issuing an endorsement. And while the OSC may be obliged to undertake notice and comment processes soliciting stakeholder views before implementing such recommendations, these processes may prove little more than a formality given the Minister's endorsement.[132]

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131. This does not mean that the Minister's judgments always will be unassailable. The Minister could make choices that are ill-informed or self-serving, and that are not corrected as part of the legislative process. But an imperfect stopgap is still a stopgap.

132. The strong deference traditionally accorded to securities regulators suggests the threat of judicial review would be low. See *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 49. But more recently there has been some division within the Supreme Court of Canada over whether rules created by an agency should be afforded deference or treated as jurisdictional questions subject to a

Even messaging that falls short of a blanket endorsement could, coupled with an advisory committee's relationship to the Minister and the legislature, leave OSC leadership feeling obliged to show that they are implementing at least a substantial number of the committee's recommendations. Indeed, in August 2004, in connection with legislative hearings on the 2000–2003 Committee's report, the OSC published a report highlighting the progress made in implementing the Committee's recommendations.[133] To the extent such efforts reflect an intent to preserve the OSC's relationship with the Minister rather than a belief that the committee's recommendations are worth pursuing, they could result in the allocation of resources away from other, potentially more worthwhile, initiatives.

This notion presumes that there are other policy initiatives being generated within the OSC that could be crowded out by advisory committee recommendations. Drawing from the literature on bureaucratic inertia,[134] one could instead predict that there is enough slack within the organization to implement advisory committee recommendations without endangering ongoing, internally generated policy initiatives. But the incentives of OSC leadership, which very much differ from those of frontline regulatory staff, complicate this prediction, at least in respect of regulatory changes that do not require ministerial or legislative involvement.[135] OSC Chairs and Vice-Chairs are not permanent employees, but rather are appointed by the

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standard of correctness. See *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at paras 9, 23, McLachlin CJ; paras 56–74, Côté J, dissenting; paras 113–24, Brown J, dissenting; para 127, Rowe J, dissenting. And it remains to be seen how the Court would determine this issue under the framework for substantive review it described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

133. See Ontario Securities Commission, *Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario) – Status of Recommendations* (Toronto: Ontario Securities Commission, 18 August 2004), online (pdf): <www.osc.ca/sites/default/files/2020-12/fyr_20040818_fairness_status-rpt.pdf>. It appears not to have been relevant that there was a change of government (from Progressive Conservative to Liberal) following the Committee's completion of its report.

134. See e.g. Langevoort, *supra* note 4 at 529; Jeffrey J Rachlinski & Cynthia R Farina, "Cognitive Psychology and Optimal Government Design" (2002) 87:2 Cornell L Rev 549 at 605; Stephen J Choi & AC Pritchard, "Behavioral Economics and the SEC" (2003) 56:1 Stan L Rev 1 at 30–31.

135. For a discussion of the potential incentives of front line regulatory staff, see *supra* notes 34–36 and accompanying text. For a discussion of how OSC leadership's incentives may lead them to be reluctant to lobby for legislative change, see *supra* Part II.A.

Lieutenant Governor in Council for a limited term (recently, Chairs typically have served for only four to six years).[136] And they might expect, much like advisory committee members, to be judged by industry based on whether they left their mark on the regulatory landscape—whether they piloted a cohesive set of policy and operational initiatives through the OSC during their limited time there. Assuming OSC leadership members pursue such an agenda, and there is evidence to suggest they do,[137] the advisory committee process could be viewed as a means of second-guessing and diverting resources away from this agenda.

This leads to another potential objection—why prefer OSC leadership's agenda to that of an advisory committee? One reason is that OSC leadership bears the burden of overseeing implementation of its own initiatives, and thus has reason to be discerning in choosing them. Another is the potentially tempering influence of staff, who in contrast to OSC leadership may be inclined to uncover reasons why incrementalism may be preferable to radical change.[138] Staff's technical expertise may lead them to discover and point out potential problems with proposed initiatives, as well as possible refinements.[139] And staff's connections with counterparts in other jurisdictions give them visibility into potential problems achieving interprovincial consensus, a key barrier to change

136. See *supra* note 123. Of the five people who have served as permanent OSC Chair since 1993, only one served for longer than this range. See Ontario Securities Commission, "OSC Dialogue 2020" (4 November 2020), online: *Internet Archive* <web.archive.org/web/20210117153854/https://www.osc.gov.on.ca/en/osc-dialogue-2020.htm>.

137. For example, Chair David Brown is credited with revitalizing the OSC's enforcement work and deciding to follow the US in adopting corporate governance reforms following the Enron and WorldCom scandals, and Chair Maureen Jensen with initiatives to increase gender diversity on public company boards and enhance the duties securities firms owe their retail clients. See Janis Sarra, "Shades of Brown – A Comment on the Legacy of the David Brown Years at the Ontario Securities Commission" in Paton, *supra* note 2, 41 at 42–43; Barbara Shecter, "Maureen Jensen's Term as OSC Chair Extended Until 2021", *Financial Post* (6 November 2017), online: <financialpost.com/news/fp-street/maureen-jensens-term-as-osc-chair-extended-until-2021>.

138. *Cf* James D Cox & Randall S Thomas, "Revolving Elites: The Unexplored Risk of Capturing the SEC" (2019) 107:4 Geo LJ 845 at 897–99 (suggesting that surrounding senior regulatory officials recruited from industry with career staff could mitigate the risk that these senior officials will make decisions that cater to their former employers).

139. Even self-serving arguments, if grounded in reasoned consideration of the matter at hand, can contribute to meaningful deliberation. See Woolley, *supra* note 32 at 180–81; Downs, *supra* note 33 at 105.

relevant to OSC leadership's choice of priorities.[140] An advisory committee, perhaps comforting itself that it is developing mere recommendations, might feel less constrained by this barrier. Accordingly, rote implementation of their recommendations might tend to render securities law less harmonized, likely imposing additional compliance costs on firms that operate across Canada.[141]

Favouring OSC leadership's choices of priorities is not tantamount to immunizing the bureaucracy from accountability. OSC leadership are subject to several mechanisms designed to ensure their choices of priorities reflect the government's broader agenda and changes in the capital markets. First, the Lieutenant Governor in Council's power to appoint OSC leadership allows the Minister to indirectly influence the OSC's policy direction. That changes in OSC leadership have closely followed changes in party government suggests this accountability mechanism works not only in theory but in practice.[142] Second, the requirement imposed on the OSC under securities legislation to consult on its annual priorities gives stakeholders regular opportunities to respond to OSC leadership's agenda and highlight additional issues for consideration.[143] Third, the Minister can direct the OSC to study specific issues of interest to the Minister—this statutory tool can facilitate the development of timely, targeted recommendations for change.[144]

Finally, allowing third-party experts and in-house experts to set overlapping, rival policy agendas would seem to be a recipe for incoherence and instability. This imposes costs on industry, which with each change in regulatory leadership and each appointment of a new set of third-party experts must anticipate a new

140. Staff coordinate with one another via a series of standing and ad hoc CSA committees. See "CSA Structure" (last visited 17 October 2021), online: *Canadian Securities Administrators* <www.securities-administrators.ca/aboutcsa.aspx?id=92>.

141. Several of the publicly available comment letters to the 2020 Committee highlighted the costs of less harmonized securities regulation. See e.g. Davies Letter, *supra* note 83 at 1– 2; Osler Letter, *supra* note 9 at 4; Torys Letter, *supra* note 10 at 1.

142. See *supra* note 123 and accompanying text.

143. See *Securities Act*, *supra* note 5, s 143.9; Daniels Report, *supra* note 41 at 3239.

144. See *Securities Act*, *supra* note 5, s 143.7. The work of the Regulatory Burden Reduction Taskforce serves as an example of how OSC leadership and staff can work quickly to develop targeted proposals for change. Within twelve months of its establishment, they reported back with 107 decisions (to be implemented by the OSC, subject to notice and comment to the extent required) and recommendations (for consideration by the Minister or others) for reducing regulatory burden. See Ontario Securities Commission, *Reducing Regulatory Burden in Ontario's Capital Markets* (Toronto: Ontario Securities Commission, 2019) at 7, online (pdf): <www.osc.ca/sites/default/files/pdfs/irps/20191119_reducing-regulatory-burden-in-ontario-capital-markets.pdf>.

set of priorities, develop responses to a new set of rule proposals, change their operations to comply with those proposals that are implemented, and discard the work completed in anticipation of the previous set of priorities. At some point, industry might adapt to this instability by taking compliance less seriously.[145] While the infrequency with which advisory committees have been appointed makes this concern merely hypothetical for Ontario securities law, this risk is worth considering when determining whether and to what extent to rely on third-party experts to foster renewal in other areas of law.

IV. Potential Reforms

The release of the 2020 Committee's final report, together with the government's plans to replace existing securities legislation with a new Capital Markets Act, make this an opportune time to revisit the legal structure governing advisory committees.[146] This Part proposes imposing two sets of guardrails around this structure. First, to avoid the problem of third-party experts' recommendations displacing ongoing renewal initiatives by in-house experts, advisory committees' mandate should be restricted to rules that politicians and securities regulators are likely to fail to revisit and renew if left to their own devices. This means limiting their mandate to legislation. Second, guardrails around the committee's deliberative process could prevent a committee from going overboard with its recommendations, running too far over schedule, or gerrymandering its process to cater to politicians—all problems that could lead to the adoption of low-quality recommendations. This Part also discusses a third option for reform: new requirements regarding who can be selected to join an advisory committee and what public sector jobs they can take after the committee's work is completed. This option may be less desirable, however, as it likely will make recruiting qualified individuals more difficult.

A Substantive Guardrails

The virtually unlimited scope of an advisory committee's mandate almost invites the committee to go overboard with its recommendations. The Chair of the 2000–2003 Committee seemed to flag this concern in his comments to legislators.[147] Adopting a more targeted mandate, focused on areas where the incentives of politicians and securities regulators are most likely to nudge them

145. See Aaron L Nielson, "Sticky Regulations" (2018) 85:1 U Chicago L Rev 85 at 120–24.

146. See *2021 Budget*, *supra* note 13 at 110.

147. See 2004 Legislative Hearing, *supra* note 64 at 09h:01m:00s (Purdy Crawford).

towards inertia, could direct a committee's creative energies where they might be most beneficial. And, as flagged by the 2000–2003 Committee in its final report, a more targeted mandate could have the added benefit of reducing the amount of time required to properly consider and craft recommendations.[148]

The obvious choice would be to limit the committee's mandate to making recommendations for necessary changes to securities legislation—precisely the mandate contemplated in the Daniels Report in 1994.[149] This more limited mandate would respond to a real issue. Securities regulation's relatively low political salience and OSC leadership's lack of incentive to raise issues forcefully with the Minister create a climate where securities legislation seems likely to stagnate. This issue is compounded by the Minister's reason to be skeptical of proposals for legislative change made by the OSC, given its incentive to propose changes that expand its turf and resources.

One could respond that limiting the advisory committee's mandate to legislation will not prevent it from impinging on regulatory matters, as the committee could get around this limitation by proposing that matters currently addressed through regulation instead be addressed through legislation. While an advisory committee theoretically could do this, there are at least a few reasons to expect that it would not, and that if it did, its recommendations would be rejected. There appears to be a broad and long-standing consensus that technical matters are better addressed by securities regulators through rulemaking than by politicians through legislative amendments.[150] Advisory committee members that disregard this consensus put their credibility at risk. Politicians also likely would have little appetite for taking on more responsibility for keeping securities law up to date. In this light, the potential for ambiguity around what constitutes a matter for legislative reform and what constitutes a matter for regulatory reform could prove to be an asset rather than a liability, insofar as it provides a fail-safe against regulatory overreach. If the OSC is using its rulemaking or other powers improperly, an advisory committee could recommend legislative change to constrain these powers.

One could argue that a more limited mandate will make advisory committee membership less attractive, in turn making it more difficult to recruit high-quality candidates. A change in mandate certainly could change the pool of individuals who would be a good fit for committee membership. The work of keeping legislation up to date could prove of greater interest to lawyers than to other professionals more interested in the policy questions raised by rulemakings. That securities regulators' enforcement and investigative powers (as well as securities law's civil liability regimes) are defined by statute,

148. See 2000–2003 Final Report, *supra* note 60 at 87.

149. See *supra* note 41 at 3229.

150. See e.g. *ibid* at 3225–26; 2000–2003 Final Report, *supra* note 60 at 70, 76.

while issues relevant to transactional lawyers and non-legal professionals typically relate in large part to regulation, may make committee membership more attractive to litigators relative to others.[151] But the recommendations of the 2000–2003 and 2020 Advisory Committees suggest that securities legislation raises enough high-stakes issues for committee membership to remain of interest to ambitious, experienced professionals. These recommendations included the establishment of a new secondary market liability scheme,[152] hiving off the OSC's adjudicative functions into a new tribunal,[153] changes to the OSC's powers to impose sanctions on market players,[154] and changes to the purposes and objectives of securities regulation.[155]

It may be worth asking, however, whether it is likely that securities legislation will need enough of an overhaul every four years that it makes sense to appoint an advisory committee to review it—especially if the new Capital Markets Act were to reflect a more principles-based approach to regulation, in which legislative rules are both fewer in number and less prone to require updating.[156] Talented would-be committee members may refuse an appointment on the basis that not enough has changed for them to be able to make the kind of recommendations that would give them their desired reputational boost. Worse, they might accept and then feel the need to generate superfluous recommendations to create the desired appearance of boldness and impact. In response, one could, as was recommended in the most recent legislative review of the *Copyright Act*,[157] make mandatory reviews less frequent, while leaving the Minister with discretion to appoint a committee on a shorter interval if circumstances require.

B. Procedural Guardrails

An advisory committee process that allows enough space for deliberation to ensure recommendations are capable of withstanding scrutiny, while at the same

151. See e.g. *Securities Act*, *supra* note 5, Parts XXII-XXIII.1 (rules on enforcement and liability), s 143 (open-ended grant of rulemaking authority to the OSC over policy matters).

152. See 2000–2003 Final Report, *supra* note 60 at 130–33.

153. See 2020 Consultation Report, *supra* note 11 at 20–22.

154. See *ibid* at 34–44; 2000–2003 Final Report, *supra* note 60 at 2–3, 205–54.

155. See 2020 Final Report, *supra* note 12 at 18.

156. See Ford, *supra* note 3 at 278. Note that even under a principles-based approach to securities regulation, the matters referred to in the text accompanying *supra* notes 152–154 likely would still be addressed through legislation. See Ford, *supra* note 3 at 269.

157. See House of Commons, "Statutory Review of the Copyright Act: Report of the Standing

time imposing constraints aimed at focusing the committee on those issues it views as most important, should reduce the risk that poorly thought out or superfluous recommendations will find their way into an advisory committee's final report. The following procedural guardrails are aimed at achieving this objective.

First, written stakeholder comments should be required to be made publicly available. This would make it easier to detect whether an advisory committee ignored reasoned stakeholder objections to push through politically attractive or attention-grabbing recommendations, and whether the committee picked favourites among different industry constituencies.[158] Making such activities more transparent magnifies their reputational risk, in turn reducing the likelihood that committee members will engage in them. Second, consultations should be required to be left open for a minimum period that properly reflects the importance and breadth of the issues at stake. Currently, the OSC is required to keep consultations on its proposed rules open for ninety days;[159] this may be an appropriate minimum period for consultation on the committee's proposed recommendations.

It also may be worth requiring a committee to engage in at least two public rounds of consultation—an initial round in which stakeholders suggest ideas for reform for the committee's consideration, and a second round in which the committee presents proposed recommendations for stakeholder feedback.[160] This approach, adopted by the 2000–2003 Committee as well as the Daniels task force,[161] gives stakeholders a chance to observe and engage with one another's proposals, increasing the likelihood that the committee's final recommendations will be capable of withstanding scrutiny.[162]

Committee on Industry, Science and Technology" by Dan Ruimy (Chair), Sessional Paper, 42-1 (June 2019) at 24.

158. See Woolley, *supra* note 32 at 180; Mark Seidenfeld, "A Civic Republican Justification for the Bureaucratic State" (1992) 105:7 Harv L Rev 1511 at 1562; Anand & Green, *supra* note 4 at 413–14.

159. See *Securities Act*, *supra* note 5, s 143.2(4). While other jurisdictions impose shorter minimum periods (in recognition that minor rule changes will not require a lengthy consultation), the breadth of the issues raised in an advisory committee process (even with the more limited mandate contemplated here) would seem to justify adopting Ontario's longer minimum period as a benchmark.

160. The first round of consultations could be left open for a shorter period than the second, given that the stakes at this early stage are more limited.

161. See 2000–2003 Issues List, *supra* note 55; Daniels Report, *supra* note 41 at 3273–75.

162. See Woolley, *supra* note 32 at 181.

Finally, to ensure advisory committees complete their work within a reasonable time, the legislation could set a deadline for delivery of a final report. When coupled with minimum standards for the committee's deliberative process, a deadline could force the committee to be more sparing in its recommendations.[163] Because any deadline fixed by statute will be to some extent arbitrary, it would seem worthwhile to give the Minister(s) overseeing the committee the discretion to extend this deadline if the committee so requests.

These guardrails are far from guaranteed to work. Just as past Ministers have ignored their obligation to appoint an advisory committee, an advisory committee could ignore its deadline for delivering a report without penalty (especially in the absence of any political preference as to the time of delivery of the report). And minimum consultation periods and transparency requirements do not in themselves prevent an advisory committee from undertaking a kangaroo consultation in which recommendations are effectively agreed on before the consultation begins. If running such a process does not give rise to the kind of reputational and implementation risks predicted in Part III.B, this accountability mechanism will fail. These guardrails nonetheless seem like they at least would be worth a try.

C. Selection Criteria?

Another option could be to require the selection of advisory committee members with a different set of incentives. For example, the statute could require that the advisory committee be chaired by a current or former judge, or that some or all advisory committee members must have a minimum number of years of professional experience that all but guarantees they will be close to retirement and thus less likely to aspire to a leadership position at a securities regulator. Or the statute could provide that advisory committee members are barred from appointment to such a leadership position for some minimum period. In concept, these options would result in the appointment of advisory committee members less likely to feel beholden to politicians.

That the potential problems with these requirements are so easy to spot, however, suggests they may do more harm than good. For example, they might make it more difficult to attract individuals with the deep expertise in securities law and policy necessary to serve competently on an advisory committee. Those reaching the end of their careers may be more reluctant to undertake advisory committee work than individuals who are still building their careers.

163. As noted in Part I.C, the 2000–2003 Committee suggested that such a timeline could be feasible if the advisory committee's mandate were hemmed in to make its workload more manageable. See 2000–2003 Final Report, *supra* note 60 at 87.

It may also prove difficult to find people who have a strong interest in shaping securities law but no interest in serving at a securities regulator. Judges' expertise in common law adjudication may not be easily transferable to what is at its heart a policymaking role. In addition, even if qualified individuals meeting the requirements described above could be found, their lack of any incentive to keep politicians' preferences in mind could lead them to craft recommendations that are discarded as unaligned with broader governmental priorities.

Conclusion

Ontario adopted the advisory committee process in response to a legislative and regulatory failure that threatened to topple much of Ontario's then-existing body of securities law. This process gives the Minister access to advice from experts who, unlike the government's in-house experts at the OSC, would appear to have no interest in torquing their advice to expand bureaucratic power. But these third-party experts bring their own set of incentives to the table. Advisory committee members may stand to further their careers by making more recommendations rather than fewer and bold recommendations rather than incremental ones. Committee members may stand to gain even more by favouring recommendations they believe the Minister will view as politically attractive, both because it enhances the likelihood the recommendations will be implemented and because it may place committee members in line for senior posts at the OSC.

Third-party experts operating in other contexts may have similar incentives. To the extent this is true, it suggests that it would be a mistake to reflexively defer to the choices these experts make. Care should be taken in drafting their mandates, in the hope of ensuring their work responds to real problems of regulatory renewal rather than merely displacing initiatives that otherwise would be undertaken by the government's in-house experts. Care also should be taken in developing guardrails around third-party experts' deliberative processes, in the hope of ensuring these experts' recommendations reflect reasoned consideration rather than the pull of private interests.

The advisory committee process can play an important, ongoing role in keeping securities legislation up to date. It just needs refining.