



The Advocates' Society La Société des plaideurs

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VIA EMAIL: CMM.Taskforce@ontario.ca

Walied Soliman
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Dear Mr. Soliman:

RE: Consultation – Modernizing Ontario’s Capital Markets

The Advocates’ Society has reviewed the discussion paper entitled *Capital Markets Modernization Taskforce Consultation Report*, dated July 2020 (the “Report”). The Advocates’ Society is pleased to offer the following comments in response to the Taskforce’s call for submissions.

The Advocates’ Society (the “Society”), established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The mandate of the Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society struck a Task Force composed of advocates with expertise in the practice of securities law and who represent clients in regulatory proceedings. The Task Force has reviewed the Report and discussed the proposals contained therein. The Society’s feedback on the Report’s proposals is set out below. In accordance with its mandate, the Society has not commented on the substantive areas that are being considered for reform, and has confined its submissions to the Taskforce’s recommendations regarding diversity, and specific proposals found in Part 2.1 (Improving Regulatory Structure) and Part 2.6 (Modernizing Enforcement and Enhancing Investor Protection) of the Report.

Enhancing Diversity¹

The Society agrees that diversity should be promoted within the Ontario Securities Commission (“OSC”) and throughout the boards of directors of capital markets participants. There is no doubt that social change in this area is difficult and slow. Institutions like the OSC should be encouraged to take initiatives like this to advance the interests of persons and communities who have not historically been welcomed in capital markets.

¹ See Section 1.1 of the Report, proposal 1, and particularly proposal 19.

Proposal 2. Separate regulatory and adjudicative functions at the OSC

The proposal to separate the regulatory and adjudicative functions of the OSC represents a critical step toward protecting the judicial function of the OSC. We agree with the Taskforce that as long as the adjudicative branch operates within the same organizational structure as the other branches of the OSC responsible for regulating businesses, developing rules, and enforcement, there is a risk of a blurring of responsibilities that can undermine the integrity and perceived fairness of the adjudicative function. The independent adjudication of enforcement matters fosters respect for the enforcement function by market participants and public confidence in the outcomes of those proceedings. Decisions that are as important as those made by the OSC should be impressed with these hallmarks of fairness.

The Report asks whether there are specific regulatory and rule-making functions that should not be transferred to an adjudicative body. In our view, the adjudicative body should be independent of any processes for substantive rule-making and regulation. Like the courts, it should only develop rules specific to practices before it. Substantive rule-making should take place outside an adjudicative tribunal.

A separate administrative tribunal will also be able to provide effective oversight of the investigation and enforcement branches of the OSC. This oversight would provide market participants who are subject to investigations and/or enforcement proceedings with opportunities to assert their interests in an independent forum. This will make efforts to enhance the rights of persons affected by investigation (see Proposal 39) more effective, increasing the perceived fairness of the process and confidence in outcomes. It is important to recognize that the introduction of this kind of oversight does not mean there are problems with investigations or enforcement today. Instead, the shift to an independent adjudicative tribunal that would oversee enforcement and apply securities laws is consistent with promoting objectivity and impartiality in proceedings that can entail significant monetary and professional sanctions for market participants.

Proposal 34. Consider automatically reciprocating the non-financial elements of orders and settlements from other Canadian securities regulators and granting the OSC a streamlined power to make reciprocation orders in response to criminal court, foreign regulator, SRO, and exchange orders

The Society generally supports the automatic reciprocation of orders that arise from other Canadian jurisdictions where securities laws are similar to those in Ontario. However, challenges arise with the automatic reciprocal enforcement of a foreign order. Foreign securities laws can differ greatly from those in Canada. The Canadian regime may not easily compare to those in other countries where the main objectives for securities regulation vary from transparency to innovation to growth. An individual who is found liable or chooses to settle with a foreign regulator may do so without admitting guilt, without contesting the proceedings, or simply because they have no interest in participating in that particular market. In such instances, the automatic enforcement of a foreign order may go too far. In instances involving foreign orders, the Society proposes that market participants be given an opportunity to be heard before an order is automatically reciprocated.

Proposal 39. Greater rights for persons or companies directly affected by an OSC investigation or examination; and Proposal 42. Ensure proportionality for responses to OSC investigations

The Society supports measures allowing for the adjudication of disagreements and disputes arising in the course of the OSC's investigations and examinations, including the proposed role of an OSC adjudicator. This will help to ensure due process for those who are subject to summons (including targets and third

parties to the investigation) and may also serve to reduce the burden (time and costs) of complying with such summons. The Society believes that the guiding principle for the adjudication of such disputes should be proportionality. Commenting on the specific mandate and powers of the adjudicator is beyond the Society's mandate.

Proposal 43. Clarify that requiring production of privileged documentation is not allowed

Solicitor-client and other forms of privilege are of fundamental importance to parties' access to legal advice and the proper administration of justice. The Society strongly supports clarifying in the *Securities Act*, to the extent necessary, that the OSC cannot require the production of privileged documents during its investigations or examinations.

The Society does not object to requiring the production of a privilege log where the assertion of privilege is challenged. We note, however, that the requirement for "immediate" production of a privilege log could be unduly burdensome on parties, and recommend that a reasonable timeframe be specified.

Proposal 45. Promote prompt resolution of OSC enforcement matters by ensuring the confidentiality of dialogue between OSC Staff and parties under investigation, and protecting such investigated parties from liability for admissions made to the OSC in settlements and from liability for disclosing privacy-protected information to the OSC in the context of an investigation

The Society supports measures that ensure the confidentiality of dialogue between OSC Staff and parties under investigation, as well as measures that protect parties from liability for disclosing privacy-protected information to the OSC. Such measures are consistent with the nature of the investigatory process, and the privileges attendant on settlement communications and compelled pre-hearing disclosure in the law generally.

The members of the Society's Task Force were not able to reach a consensus on whether it is desirable in substance to protect parties who settle with the OSC from civil liability for their actions. This is a matter on which there are competing policies and views. The Society notes only that admissions that are made but are not subsequently admissible (and thus are not truly admissions) would appear to be inconsistent with basic legal principles as to the proper administration of justice. In appropriate circumstances, a "no contest" resolution allows resolution on the basis of facts without admission, and may be less problematic. Beyond that comment, the substantive issues and regulatory concerns attendant on this proposal are beyond the Society's mandate.

Thank you for the opportunity to make these submissions. The Society would be pleased to review and provide comments on any draft amendments to securities legislation resulting from the Capital Markets Modernization Taskforce's proposals in the above areas.

Yours sincerely,



Guy Pratte
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

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