



The Advocates' Society La Société des plaideurs

January 12, 2022

VIA EMAIL: CMA.Consultation@ontario.ca

Shameez Rabdi, Director
Capital Markets Act Consultation
Capital Markets and Agency Transformation Branch
Ministry of Finance
Frost Building North
95 Grosvenor Street, 4th Floor
Toronto, ON M7A 1Z1

Dear Mr. Rabdi:

RE: Consultation – Capital Markets Act

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association that represents approximately 5,500 members throughout Canada, including approximately 4,500 in Ontario. The Society's mandate includes, among other things, making submissions on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society's membership includes many advocates with significant expertise in securities law and who frequently represent clients in regulatory proceedings before the Ontario Securities Commission as well as before other securities regulators across Canada. As such, the Society has been following the Ontario government's work to modernize the regulation of capital markets in Ontario with interest. In this regard, on September 7, 2020, the Society provided a submission to the Capital Markets Modernization Taskforce in response to its Consultation Report published in July 2020. That submission is attached hereto for your convenient reference.

The Society further welcomed the Ministry of Finance's publication of the *Capital Markets Act – Consultation Draft*, dated October 12, 2021, for stakeholder consultation (the "Consultation Draft"). The Society re-convened members of its Task Force who considered the Capital Markets Modernization Taskforce's Consultation Report, as well as other members of the Society with expertise in this area of law, to review and discuss the Consultation Draft and the associated consultation commentary. The Society is pleased to offer comments, as set out further below, on three sections of the Consultation Draft: sections 69, 146 and 254.

Section 69 – Enhancing Diversity

Section 69(a) of the Consultation Draft will require reporting issuers to comply with such conditions, restrictions and requirements as may be prescribed relating to the diversity of directors and officers of reporting issuers and other issuers within prescribed classes. The Society strongly supports initiatives which promote diversity, including the use of this provision to advance the interests of persons and

communities who have not historically been represented in capital markets. In particular, the Society further supports measures to increase the representation of equity-seeking groups among directors and officers of capital market participants. As noted by the Capital Markets Modernization Taskforce in its Final Report, “[i]n the past number of years, the idea of diversity has expanded beyond gender diversity” (p. 12). The Society supports the creation of rules under s. 69(a) to require capital markets participants to disclose information about their inclusion of individuals from various equity-seeking groups in their leadership (including, but not limited to, women, Black, Indigenous, and People of Colour, persons with disabilities, and LGBTQ2S+ individuals).

The Society encourages the Ministry of Finance to introduce language in s. 69(a) that defines diversity and requires reporting issuers to introduce measures to promote diversity. Currently, National Instrument 58-101 (Disclosure of Corporate Governance Practices), and the associated Corporate Governance Disclosure Form, requires an issuer to disclose information about their policies, measures, and progress regarding the representation of women on the board and in executive officer positions, or to explain why it does not have these policies. More should be done with the proposed legislation to promote the representation of all equity-seeking groups. If this is not specifically provided for in the proposed legislation, the Commission should introduce its own requirements to strengthen Ontario’s capital markets through the promotion of the values that respect diversity.

Section 146 – Greater Rights for Persons or Companies Directly Affected by a Review or Investigation

Section 146(5) provides that a person who fails or refuses to comply with an order or summons risks being liable for contempt, on application to the court.

The Society is of the view that there should be a process that allows the Capital Markets Tribunal to adjudicate disagreements and disputes that arise between the Commission and persons or companies required to produce information during a review or investigation. The guiding principle for such adjudication should be proportionality. The Society believes that allowing for the adjudication of disputes during a review or investigation would help ensure due process for those subject to a summons or an order, including targets and third parties, and may reduce the burden (time and costs) of complying with such orders. This should assist with the ensuring the public interest in production of records and the interests of those being required to make production are appropriately balanced without having to resort to considerations of seeking contempt orders.

It is not clear to the Society whether s. 137 of the Consultation Draft (“Review of the Chief Regulator’s decision”) is intended to allow a person who is affected by an order or summons issued in the course of a review or investigation to apply to the Capital Markets Tribunal for a hearing and review of the order or summons. If so, the Society recommends that the legislation be clarified to this effect. If not, the Society recommends that an adjudication process for disputes that arise in the course of reviews or investigations be provided for in the legislation.

Section 254 – Clarify that Requiring Production of Any Type of Privileged Information Is Not Allowed

Section 254 of the Consultation Draft states that “Nothing in this Act is to be construed to affect the privilege that exists between a lawyer and the lawyer’s client in relation to information or records that are subject to that privilege”. While the Society appreciates and supports the inclusion of a provision protecting privileged information, we are concerned that this provision refers only to the privilege that exists between a lawyer and the lawyer’s client. The Society recommends clarifying this section so that

information and records subject to any privilege recognized by law are also protected. All types of privilege are fundamental to a party's ability to access legal advice and to the proper administration of justice.

It is worth noting that disputes about whether information or documents qualify as privileged, and thus should not be disclosed to the Commission, are excellent examples of the types of disputes that would benefit from a forum for resolution, as suggested in relation to s. 146 above.

Thank you for the opportunity to review and provide feedback on the draft *Capital Markets Act* in advance of its potential introduction in the Legislative Assembly of Ontario. We would be pleased to discuss our comments on the Consultation Draft with you further should you have any questions.

Yours sincerely,



Deborah E. Palter
President

Attachments:

1. The Advocates' Society's Letter to Capital Markets Modernization Taskforce, dated September 7, 2020

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

The Advocates' Society's Task Force:

Daniel E.H. Bach, *Siskinds LLP*
Sean K. Boyle, *Blake, Cassels & Graydon LLP* (chair)
David D. Conklin, *Goodmans LLP*
Lara Jackson, *Cassels Brock & Blackwell LLP*
Benjamin Kates, *Law Society of Ontario* (in his personal capacity)
Ken McEwan, Q.C., *McEwan Partners LLP*
Peter J. Osborne, *Lenczner Slaght*
Cynthia Spry, *Babin Bessner Spry LLP*
Kent V. Williams, *Cunningham, Swan, Carty, Little & Bonham LLP*



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September 7, 2020

VIA EMAIL: CMM.Taskforce@ontario.ca

Walied Soliman
Taskforce Chair, Capital Markets Modernization Taskforce
Norton Rose Fulbright Canada LLP
222 Bay Street, Suite 3000
P.O. Box 53
Toronto, ON M5K 1E7

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.

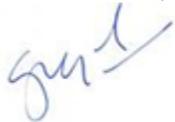
Proposal 45. Promote prompt resolution of OSC enforcement matters by ensuring the confidentiality of dialogue between OSC Staff and parties under investigation, and protecting such investigated parties from liability for admissions made to the OSC in settlements and from liability for disclosing privacy-protected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

A handwritten signature in blue ink, appearing to read "Guy Pratte", is written over a light blue horizontal line.

Guy Pratte
President

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

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