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ONTARIO SECURITIES COMMISSION ORDER-IN-COUNCIL APPOINTMENT OF KEVAN COWAN *

Prepared for:

Standing Committee on Government Agencies

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INTRODUCTION

This paper was prepared for Members participating in the Committee's review of the Order-in-Council appointment of Kevan Cowan to the board of directors of the Ontario Securities Commission (OSC or "the Commission"). The paper describes the operations of the Commission, presents information about the appointee, and identifies possible lines of questioning.

OVERVIEW

Enabling Statute	Responsible Ministry
Securities Commission Act, 2021	Finance
Agency Type	**Most Recent Annual Report**
Regulatory	*Annual Report 2021*
Role of the Agency	
The Commission regulates the capital markets in Ontario in accordance with the *Securities Act*, the *Commodity Futures Act*, and certain provisions of the *Business Corporations Act*. The Commission's mandate is to • protect investors from unfair, improper or fraudulent practices; • foster fair, efficient and competitive capital markets and confidence in capital markets; • foster capital formation; and • contribute to the stability of the financial system and the reduction of systemic risk	
Board Membership	
Statutory No. of Members: 3 to 11 **No. Appointed by Cabinet**: All (on the recommendation of the Minister)	**Remuneration** Not addressed in statute
Term of Office: Not addressed in statute	
Position Requirements: Not addressed in statute	

(Note: The OSC is currently constituted under the Securities Act, which provides for the Order-in-Council appointment of members of the Commission ("commissioners"). When the Securities Commission Act, 2021 is proclaimed into force, appointments will be made to the Commission's board of directors. As it appears that the witness is being appointed as a "director," the table above reflects the Commission as it will be structured under the new legislation.)

ONTARIO SECURITIES COMMISSION

Role of the Commission

Created in the 1930s, the OSC is a self-funded regulatory agency responsible for regulating the capital markets of Ontario. The Commission operates independently from the government and is funded by fees charged to market participants. The OSC is accountable to the Minister of Finance.

As the capital markets regulator, the Commission is responsible for administering and enforcing the *Securities Act*, the *Commodity Futures Act*, and certain provisions of the *Business Corporations Act*.

As set out in the *Securities Act* and the *Commodity Futures Act*, the Commission's general mandate is to

- protect investors from unfair, improper or fraudulent practices;
- foster fair and efficient capital markets and confidence in capital markets;
- foster capital formation; and
- contribute to the stability of the financial system and the reduction of systemic risk.

The Commission carries out its mandate in three ways:

- ***Making rules*** — The Commission has authority under the *Securities Act* and the *Commodity Futures Act* to make rules for the purpose of maintaining the integrity of the capital markets and to prevent financial misconduct. Rules have the force of law and are developed in a public process that includes consultation with industry experts and members of the investing public. The Commission also works with other domestic and foreign regulators to reduce systemic risk and promote financial stability in Canadian and global markets.
- ***Monitoring compliance*** — The OSC monitors market participants for compliance with Ontario's securities law (i.e., the Acts and rules). Where an individual or firm is not complying with the law, the Commission may take a number of steps short of enforcement, including
    - providing clarification of rules and further guidance;
    - ordering a public company or investment fund to restate and refile its financial statements;
    - delivering warnings;
    - issuing a cease trade order on an issuer's securities;
    - imposing terms and conditions on a registered firm or individual to address solvency or integrity concerns; and
    - referring the matter to enforcement or other regulators for further action.
- ***Enforcement*** — The OSC investigates violations of securities law, such as misleading disclosure, fraudulent claims and promotions, abusive trading practices, and illegal insider trading. Depending on the circumstances, the Commission has two enforcement options:

- *Proceedings before the Commission* — The OSC can initiate enforcement proceedings before an administrative panel of Commissioners who act as independent adjudicators. Commissioners may impose sanctions, such as banning individuals from leadership roles in public companies and imposing financial penalties on firms and individuals. *(However, see the new Capital Markets Tribunal, discussed below under "Structure of the Commission.")*

- *Proceedings before the courts* — In cases where the Commission believes it is particularly important to "deter misconduct," it has authority to lay quasi-criminal charges against accused wrongdoers and to prosecute those charges through the courts. The courts can impose fines of up to $5 million and/or jail terms of up to 5 years less a day.

Structure of the Commission

Currently, the OSC is constituted under the *Securities Act* as a corporation without share capital, consisting of from nine to 16 members ("commissioners") appointed by the Lieutenant Governor in Council for terms of up to five years with the possibility of reappointment.

When the *Securities Commission Act, 2021* is proclaimed into force (no date has been set), the OSC will be continued as a corporation without share capital, and will be governed by a board of directors consisting of from three to 11 individuals appointed by the Lieutenant Governor in Council on the recommendation of the Minister. The board may also include the Commission's Chief Executive Officer, if the Commission's by-laws so provide.[1]

OSC commissioners currently perform both a regulatory and policy function (reviewing and making policies and rules), and an adjudicative function (presiding over administrative proceedings).

Under the *Securities Commission Act, 2021*, the adjudicative function will be moved to a separate division of the Commission known as the Capital Markets Tribunal. Composed of nine adjudicators appointed by the Lieutenant Governor in Council, the Tribunal will have jurisdiction to exercise the powers conferred on it under the *Securities Act* and the *Commodity Futures Act*, and to determine all legal questions in any proceeding before it under those Acts.

The new Act also provides that a Chief Adjudicator will be responsible for overseeing the Tribunal, and that the Chief Executive Officer of the Commission will be responsible for the administration and management of the OSC.

Recent Developments

In February 2020 the Minister of Finance appointed the Capital Markets Modernization Taskforce to review the status of Ontario's capital markets. The

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[1] In October 2021, the Ministry of Finance stated that the new Act would be proclaimed into force "in the coming months"—see Ontario's Regulatory Registry and link to Ministry of Finance, *Capital Markets – Consultation Commentary*, October 2021, p. 6.

Task Force released its final report in January 2021, containing more than 70 recommendations.

The report's first recommendation called for the introduction of new legislation—the *Capital Markets Act*—that would act as the "legislative vehicle" to implement its other recommendations. According to the Taskforce, its proposed changes "would fit better within a modern Act than within the current outdated legislation structure that is split between the *Securities Act* and the *Commodity Futures Act*."[2]

In October 2021, the government posted a draft *Capital Markets Act* (CMA) on the Ontario Regulatory Registry for public consultation. Key differences between the draft Act and current legislation included:

- *Rule-making* — According to the Taskforce, the OSC's current rule-making powers under the *Securities Act* are overly prescriptive (the Act contains an itemized list of each head of rule-making). The draft CMA would set out the fundamental provisions of capital markets law, and give the OSC general rule-making authority to address the details.[3]

- *Enforcement* — The CMA would expand the OSC's investigation powers. For example, more individuals and companies would be required to provide information to the OSC. The CMA would also increase the maximum penalty for an offence under the Act to $10 million (up from $5 million), and would create new prohibitions against making misleading statements about a public company.[4]

The draft CMA was posted for comment until January 21, 2022. As of time of writing, no bill containing a *Capital Markets Act* had been introduced in the Legislature.

In the spring of 2021, Bill 269 (the budget Act) enacted a number of amendments that had been recommended by the Capital Markets Modernization Taskforce. An amendment to the *Securities Act* added "to foster capital formation" to the list of the Act's purposes. The Bill also introduced the *Securities Commission Act, 2021*, which responded to the Taskforce's recommendation that the Commission's regulatory and adjudicative functions be separated. As noted earlier, the Act will establish the Capital Markets Tribunal as a separate division of the OSC, headed by a Chief Adjudicator.

THE WITNESS

The witness is nominated for appointment as a part-time director of the Ontario Securities Commission.

According to information provided by the Premier's office, the witness, of Toronto, is currently a member (part-time) of the Ontario Securities Commission. He is former Chief Executive Officer of the Capital Markets Authority

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[2] Capital Markets Modernization Task Force, *Final Report*, p. 16.
[3] Ministry of Finance, *Capital Markets – Consultation Commentary*, October 2021, p. 18.
[4] Ibid.

Implementation Organization, former President of TSX Markets, TMX Group and of TSX Venture Exchange, and former Lawyer and Partner with Smith Lyons. His community involvement has included serving as Board Chair of the Toronto Financial Services Alliance.

Possible Questions

1. *What has motivated the witness to seek this appointment?*

2. *What contribution does the witness hope to make to the Commission?*

3. *In the witness's opinion, what are the main challenges and issues facing the Commission?*

4. *In the witness's opinion, how can the Commission balance its statutory duties while ensuring that the regulatory environment is not overly burdensome?*

5. *In its 2021 final report (p. 4), the Capital Markets Modernization Taskforce states that "the COVID-19 pandemic has highlighted the need for a modernized capital markets to assist businesses in raising capital, particularly to deal with the short-term economic impacts of the pandemic." In the witness's view, how has the pandemic "highlighted the need" for modernized capital markets? What steps need to be taken to address this need?*

6. *When proclaimed into force, the Securities Commission Act, 2021, will establish a new Capital Markets Tribunal as a division of the OSC, to be headed by a Chief Adjudicator. In the witness's view, will this address the long-running perception of a potential conflict between the Commission's regulatory and policy functions, and its adjudicative functions?*

7. *In its 2021 Annual Report (pp. 26 and 27), the Commission states that one of its priorities is to implement "client focused reforms" to protect investors as financial markets evolve and become increasingly complex (for example, as new investment opportunities and products are introduced). Investor education and financial literacy activities that help provide investors the information they need to make informed financial decisions is one of the Commission's traditional activities in this respect. In the witness's view, what other investor protection measures might be taken?*