Power without Responsibility or Responsibility without Power? Recent Developments in the Jurisdiction of the Ontario Securities Commission

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RECENT DEVELOPMENTS

Power Without Responsibility or Responsibility Without Power?
Recent Developments in the Jurisdiction of the Ontario Securities Commission

Mary G. Condon*

1. INTRODUCTION

In its present legislative form and in its administration, the Ontario Securities Act has taken onto itself powers which this Commission believes were never intended . . . To correct this it believes that legislation should be enacted which will clearly define and limit the powers of the administrative authority to requirements under such legislation, and that these should not be deviated from for any reason of policy or otherwise.

These sentiments could plausibly have been expressed by some of those making submissions to the 1994 Ontario Task Force on Securities Regulation, or indeed by the plaintiffs in the Ainsley case, which preceded the Task Force deliberations. Yet they are of considerably earlier origin, being extracted from the Ontario Royal Commission on Mining,1 released in 1944, the acknowledged inspiration for the first comprehensive piece of securities legislation in this province,2 passed in 1945. Thus, the first point to be made about the current controversy surrounding the legality of the Ontario Securities Commission’s (OSC) powers is that it is by no means a new phenomenon, but has accompanied the agency from its inception. It is likewise ironic that the issue which sparked a political rethinking of the OSC’s jurisdiction in 1944 was virtually the same one that prompted recent judicial and political examination of this issue, that of the regulation of professionals in the retail, speculative segment of the securities market. Even in an era of globalization, transnationals and international competitiveness, some regulatory issues are constant.

With this historical context in mind, this commentary will outline the trajectory of the current jurisdictional debate surrounding the OSC.

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2 Securities Act 1945, c. 22.
The first public instalment was, as has been mentioned, the decision by Mr. Justice Blair of the Ontario General Division in Ainsley. The uproar which followed the decision prompted the provincial government to establish a Task Force to examine a number of issues connected with the legislative framework for the activities of the OSC, "with particular attention to the policy-making role" of the agency. The Task Force circulated an Interim Report for public comment in February 1994, and aided by that response, issued its Final Report some four months later. Nor has publication of the Final Report precluded further political and judicial developments. The Ainsley case has been appealed, and other cases have been launched on related issues. However, the emphasis here is on Mr. Justice Blair's decision in Ainsley and the report of the Task Force that it generated.

2. AINSLEY FINANCIAL CORPORATION V. ONTARIO SECURITIES COMMISSION

The litigation in Ainsley was prompted by the OSC's publication of its Policy 1.10, concerning the marketing and sale of "penny stocks", which are essentially low-value stock of junior issuers in the over-the-counter market. The policy purported to provide guidance to dealers in penny stocks concerning the adoption of "appropriate business practices" in their interactions with potential investors. The genesis of the policy lay in the OSC's concerns about the lack of awareness on the part of investors about the risks involved in purchasing these shares, as a result of the sales practices employed. Losses sustained by investors for these reasons were having "a significant adverse effect on the fairness and integrity of the capital markets in Ontario".

In furtherance of the objective of promoting better business practices by these dealers, the policy required that (i) dealers make an assessment of the suitability of an investment for the client, (ii) clients be furnished with documents comprising a "risk disclosure statement" and a "suitability statement" to give them an understanding of the risks they were incurring in investing in these instruments, (iii) the compensation payable to securities dealers be disclosed, (iv) where applicable, disclosure be made of the fact that a securities dealer is acting as principal in a transaction, (v) trading practices employed by self-regulatory organizations (SROs) be adopted, (vi) sales-oriented literature should conform to standards established in the policy. It is crucial to understand that the policy was addressed to only one category of registrant, i.e., so-called "securities dealers". It was issued pursuant to section 27 of the statute which vests in the OSC the power to "suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where in its opinion such action is in the public interest", after giving the registrant an opportunity to be heard. In putting forward the carrying the right to purchase such a security, including a partnership unit, a common share, a preferred share and a warrant or right to purchase such a security. However, the definition does not include a security:

2. The members of the Task Force were: Ronald Daniels (Chair), Associate Professor, Faculty of Law, University of Toronto; Elizabeth Atcheson, Director, Policy Branch, Financial Institutions, Ministry of Finance; Shane Kelkford, Partner, Howard and Ryan; Leslie Milrod, Director, Office of the General Counsel, Ontario Securities Commission.
5. The first draft of this policy was published by the OSC on August 11, 1992, and the final draft on March 26, 1993.
6. More specifically, a "penny stock" was defined in the policy as follows: "... a 'penny stock' is an equity security of an issuer and a security convertible into or

...
policy, the Commission also invoked “its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario”.11

The OSC’s rationale for making the policy applicable only to the securities dealer category of registrant was that other registrants who were members of the Toronto Stock Exchange (TSE) or Investment Dealers Association (IDA) were already subject to the more fine-grained compliance and disciplinary rules of those organizations. While the Act and the regulations require registrants to “deal fairly, honestly and in good faith”12 with their clients, the Commission was concerned that securities dealers “were not complying with these obligations”.13 Moreover, while there were at the time of the decision approximately 64 securities dealers registered in the province, only the plaintiffs in Ainsley “were engaged predominantly in the business of dealing in the trading of penny stocks” and therefore it was they who were “primarily affected” by the introduction of the policy. The plaintiffs argued that the effect of the policy on them would either be to drive them out of business or into the arms of one of the SROs, and therefore presumably subject them to SRO rules. In making this point, the plaintiffs were obviously aware that there is, in Ontario securities policy, a historical preference for the regulation of securities market participants to be accomplished with the assistance of strong self-regulatory organizations.

The main ground of argument relied upon by the plaintiffs to support their contention that Policy 1.10 was invalid was that the OSC lacked the jurisdiction to issue the policy. While Mr. Justice Blair accepted the evidence adduced by the OSC concerning “abusive and unfair sales practices” in the marketing of penny stocks, obtained as a result of a “comprehensive review” of the industry,14 he agreed with the plaintiffs’ argument that the Commission was acting outside the scope of its statutory mandate when it issued Policy 1.10. The judge addressed in turn the two legal bases on which the OSC had sought to erect its policy: (1) a general public interest jurisdiction or (2) the discretion provided to the OSC in connection with the registration power in section 27 of the Act.

11 Policy 1.10 at 2.
12 See R.R.O. 1990, s. 197(1).
13 Policy 1.10 at 2.
14 Ainsley at 291-292. This evidence was later described by the Task Force (at 37) as “a very extensive and thoughtful record”.

(a) Public Interest Jurisdiction

An analysis of the provisions of the Securities Act and its regulations turned up no “general jurisdiction to regulate the securities industry in the public interest”,15 only a series of discrete powers to act in the public interest with respect to, for example, exemptions from the positive regulatory requirements of the Act or orders that trading in a specific security cease.16 None of these provisions would support a general policy-making power.

The OSC argued that the authority of the Supreme Court decision in Capital Cities Communications,17 which upheld the validity of a CRTC policy statement absent an explicit policy-making power in the Broadcasting Act, should be determinative of the issue in the present case.18 However, Mr. Justice Blair distinguished Capital Cities on three grounds: (i) the Securities Act contained no broad mandating section such as that contained in the Broadcasting Act which gave the CRTC power to “regulate and supervise all aspects of the Canadian broadcasting system” (ii) the policy in question in Ainsley was not a guideline but a “mandatory requirement of a regulatory nature” (iii) the CRTC policy statement had been promulgated after “extensive hearings involving the interested parties”, in contrast to the situation at bar.

Of these three distinguishing criteria, Mr. Justice Blair singled out the mandatory nature of the policy for more elaborate consideration. He reiterated that a close reading of the text of Policy 1.10, as well as evidence concerning “the approach of the Commission staff towards its implementation”, made clear that the OSC viewed the policy not as a “mere guideline”, to indicate how it might exercise its discretion, but rather as “mandatory and regulatory in nature”. In other words, the OSC was usurping the regulation-making power granted in the statute to the Lieutenant Governor in Council by creating a series of new “appropriate practices” to be followed by securities dealers. Not only did the policy elucidate when section 27, the discipline section, would be triggered but it also had the effect of providing specific new grounds for mobilizing section 27, if the terms of the policy were not complied

15 Ainsley at 292.
16 O.S.A ss. 74, 104(2)(c) and 127.
18 The OSC had relied on the authority of Capital Cities in its own decision in American Diversified Realty (1991), 14 O.S.C.B. 551 at 592-593, where a similar challenge was made to its jurisdiction to issue policy statements.
with. This theme of the distinction between flexible policy and mandatory regulation is likewise at the core of the recommendations of the Task Force in its Interim and Final Reports.

The analysis by Mr. Justice Blair leaves open the question of what the court's response would have been if the document had not been framed in such preemptory language.19 Had Policy 1.10 been framed as providing only "guidelines" to good practice for dealers, it is likely that the OSC would still have used adherence to the requirements outlined in the policy as reasons to refuse or grant registration in individual cases, given the "ample justification" for its assessment of the need for such discipline to be imposed on penny stock dealers. This might have solved the jurisdictional problem, while leaving the regulatory objective intact. In other words, the effect of the Ainsley decision is to focus on the importance of the form for achieving regulatory goals (mandatory regulation as opposed to flexible policy) at the expense of debate about the substance of those goals.20

However, the position taken by Mr. Justice Blair seems to have been that even this strategy would not necessarily have been successful. In his judgment, "(e)ven if the Policy is not mandatory in its nature . . . but simply issued "as a guide" which is "intended to inform interested parties that the Commission will be guided by [it] in exercising its public interest jurisdiction under subsection 27(1) of the Act", it still constitutes regulation, or is tantamount thereto, in my view".21 Leaving aside the issue of how to define instruments that are "tantamount to regulation", this proposition seems to leave very little room at all for the existence of policy statements as a legitimate tool of regulation. The articulation by Mr. Justice Blair here of a circumscribed role for the OSC seems to hark back to an earlier era in the history of judicial attitudes to Regulatory agencies, when their activities were viewed with considerable suspicion.

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19 See the comment by the Task Force (at 16) that "(B)ased on our reading of the Supreme Court decision in Capital Cities . . ., we believe that the absence of specific statutory authorization for policy statements is not fatal to the legitimate use [my emphasis] of this instrument by the Commission".
20 I am not necessarily arguing here that such a debate was one that should have been entered into by Mr. Justice Blair, since that would be subject to the principles of judicial review, but only that jurisdictional issues can be used to forestall substantive debate about the adequacy of regulatory goals and strategies for achieving those goals. This point is elaborated below.
21 Ainsley at 297.
22 Mr. Justice Blair pointed out (at 296-297) that contrary to the terms of s. 27, no hearing was held prior to the introduction of Policy 1.10. He went on to note that "one of the complaints of the plaintiffs" was that "they were not consulted in any meaningful way", whereas others (i.e., their competitors) were consulted, and as a result of that consultation, were exempted from the dictates of the policy. However, when draft Policy 1.10 was released, Ainsley Financial Corporation, as well as the Securities Dealers Association, the Toronto Stock Exchange and the Investment Dealers Association, all provided a response to the Commission. The plaintiffs were presumably referring to some earlier opportunity provided to the TSE and the IDA to give input concerning the terms of the policy.
23 See above at pp. 227-228.
power was subjected to certain procedural requirements, in particular, that of prior notice to registrants. Presumably however, had the OSC exercised its powers under section 105, the provisions would have had to conform both to the parliamentary rules concerning their approval and the obligation to afford registrants the "opportunity to be heard". Mr. Justice Blair did not deal extensively with the implications of the existence of section 105 for the arguments made in the case, but contented himself with remarking that the OSC "has apparently chosen not to follow this route in paving the way for the introduction of the policy".  

In conclusion, underlying the Ainsley decision is a circumscribed view of the utility of policy-making by administrative agencies and of the appropriate kind of regulatory decision-making. It is a view that underrates the significance of the expertise developed by an agency in dealing with regulatory problems over time, and in fact seems to actively discourage them from making use of that expertise. The seriousness of the issues raised by the case, of course, lie in the fact that the absence of a jurisdiction on which to base a policy-making power has implications for Securities Commission policy far outside the securities dealer or registration area. It was this general concern about the uncertain status of OSC policy statements which prompted the provincial government to establish the Task Force on Securities Regulation, to whose deliberations we now turn.

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3. ONTARIO TASK FORCE ON SECURITIES REGULATION: FINAL REPORT

As mentioned above, the Task Force continued the theme identified in Ainsley of the importance of the distinction in administrative law doctrine between policies and regulations or rules, as they are designated in American administrative law. The major recommendations of the Task Force can therefore be considered under three heads: (i) a grant to the OSC of a legally sanctioned power to make policy statements (ii) the establishment of a rule-making power for the agency with various procedural prerequisites (iii) the revision of the Securities Act to incorporate a "purposes and principles" section such as exists in other jurisdictions, notably Quebec. Let us address each of these issues in turn.

(a) Policy-Making

The recommendations of the Task Force under this head began by enumerating several advantages to be gained by the use of policy statements in the context of securities regulation. These include consistency and predictability for constituents, comprehensiveness in the treatment of issues, the opportunity for constituents to inform policy development, the opportunity for flexibility of application on the basis of infringement of policy objectives or public interest concerns (since they "do not have the force of law"), guidance as to the appropriateness of enforcement action, national and international regulatory coordination. Yet, according to the Task Force, these advantages, in particular that of flexibility of application on the basis of contextual judgments, have been diminished by the agency's tendency to treat its policy statements as mandatory and as "equivalent to legislation", without engaging in the "procedures and substantive constraints appropriate for law-making". This means, in the case of legislation and regulations, "direct oversight by representatives of the elected branch of government". The solution to this regulatory overreaching favoured by the Task Force was to provide explicit statutory authority for the agency to develop and implement

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25 Mr. Justice Blair's comments here also demonstrate the confusion that can be generated from what appear to be overlapping regulatory powers granted to two bodies. The Lieutenant Governor has been granted powers to regulate in areas concerning the furnishing of information to the public by registrants, regulation of trading in the OTC market, the prescribing of documents and forms to be filed under the Act, and matters respecting the content and distribution of material distributed with respect to securities. Mr. Justice Blair argued that because of this, the Lieutenant Governor already "occupied the field" with respect to the matters covered in Policy 1.10, therefore the OSC would not even have had jurisdiction to introduce them as regulations. This is despite the fact that s. 105 of the Regulations gives the Commission power to prescribe conditions of registration in lieu of conditions already prescribed in various sections, including s. 114, which refers to the requirement that "every registered dealer . . . shall establish procedures for dealing with its clients that conform with prudent business practice and that enable it to service its clients adequately . . . ."

26 The Task Force received 34 submissions from individuals and organizations to its first request for comments, and 27 in response to the publication of the Interim Report. A summary of those responses is very usefully presented in Appendices IV and VII of the Final Report.

27 See the first round submission by Mr. James Baillie to the Task Force, quoted in the Final Report at 14.

28 Final Report at 16.
Definition of Policies: Since the Task Force went on to recommend a power for the OSC to make mandatory rules, it was necessary to provide some indication of the distinction between the respective roles of policies and rules. The Report therefore provides a definition of a policy statement, to be included in a revised statute. It is a statement (a) of the principles or factors influencing an exercise of discretionary authority by the OSC, (b) outlining the interpretation or application by the OSC of statutory provisions, regulations or rules, and (c) of regulatory practice in the performance of statutory duties and responsibilities. This articulation of the role of policies allows us to see their importance in filling the gap created by a political commitment to the value of experience and expertise in regulating aspects of economic and social activity. Policies are necessary to proactively structure individual exercises of discretion based on interpretations of the public interest on the one hand, and to elaborate and render more specific the general provisions of statutes and regulations on the other. Interestingly, the Task Force recognized that even the rules to be created by the OSC could not be sufficiently precise to be determinative in all novel, borderline or unforeseen circumstances. It is notable too that the Task Force was prepared to countenance a broader and more proactive role for policies in the regulation of securities markets than that expressed by Mr. Justice Blair in Ainsley, when faced with the context at issue there.

Further insight into the Task Force's view of the contribution of policies to the regulatory enterprise is provided in its recommendations for a "full review" to be undertaken by the OSC of its existing policies, to determine whether or not they are "proper policy statements" (i.e. non-mandatory), whether they should be redrafted to become proper policies, or be elevated to the status of rules. Policies should contain "general statements of principle or practice, and should not include mandatory and comprehensive codes of conduct". However, policies can address "fairly specific issues". The former articulation of the appropriate content of policies seems to leave insufficient room for them to fulfil the functions assigned to them by the Task Force. If a policy is to be useful in structuring discretion concerning exercises of a "public interest" mandate, or providing interpretations of broad statutory provisions, it is hard to see how it can itself be general or vague. It is presumably possible for a policy to be specific while avoiding being mandatory.

Notice and Comment Requirements: Finally, the expectation that policy statements "will continue to play an enduring and important role in the securities law regime" is evidenced by the contrast between the Interim and Final Reports' position on a notice and comment process for policy-making. The Interim Report had suggested that there was a less urgent need for a formal notice and comment process for policies if these statements, which would previously have been mandatory, would now be recast as rules. The Task Force had even expressed a concern that such "costly and cumbersome" procedural obligations on the agency would act as a disincentive to the "expeditious articulation of policy". However, as a result of the negative response it received to this aspect of its recommendations, revolving around the need for "public deliberation and debate" to provide safeguards against the abuse of policy-making power, the Final Report recommended that a notice and comment obligation for policies be adopted in a revised statute. This process would nevertheless be "relaxed in certain material respects" from the one recommended for rules. It is to be hoped that this relaxation will ultimately be sufficient to avoid the problem of "regulatory gridlock" which characterizes the policy-making of some American regulatory agencies.

(b) Rule-Making

Given the arguments mobilized in the Report against "mandatory" policy statements, which were, in the main, that they do not ensure "proper deliberation, debate, and accountability", the decision by the Task Force to plump for a rule-making power for the OSC rather than

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29 Final Report at 17.
30 For details of the proposed transitional arrangements for policies, which would have significant resource implications for the OSC, see the Final Report at 40-43.
31 Elsewhere in the Report, it is argued that the content of policies is to be formulated "pursuant to the purposes and principles of the Act", which are recommended to be specified therein.
32 The relaxation here revolved around a shorter public comment period and an absence of Cabinet involvement.
revitalized regulation-making by Cabinet is interesting. The position adopted here, in contrast to that taken with respect to policy statements, is that the "intensity of the demand for Cabinet time" along with "the technical nature of securities regulation" militates against enhanced involvement by a democratically-elected body. On the contrary, the need for a "high degree of specialized expertise by persons familiar not only with the framework and philosophy of securities regulation, but also market practice" prompted the Task Force to recommend the conferment of a rule-making power on the OSC, which rules would have the same force and effect as Cabinet regulations. This recommendation had garnered "widespread public support", including from the OSC itself, during the Task Force's deliberations.

Revision of Section 143: The mechanism for achieving the grant of rule-making power had generated some controversy in the responses to the Interim Report where it was first outlined. The resolution proffered by the Final Report was to redraft section 143(1) of the Securities Act in a detailed fashion so as to enumerate all of the areas where the OSC would be empowered to make rules, subject to an open-ended "basket provision", providing for rule-making "respecting any other matter authorized by or required to implement any provision of this Act". This approach was asserted to enhance "market certainty" by providing "precise support for all existing subordinate instruments except for those few policy statements or subject matters which . . . are characterised as controversial".

Exclusions from the Rule-Making Power: The singling out of several policy statements as controversial warrants further attention. In these areas, enumerated in Appendix 1, Part II of the Final Report, the decision is left to the legislature as to whether they should be subject to OSC rule-making powers. And what are these areas? They are (i) the power to prescribe additional requirements in respect of market participants, including requirements concerning disclosure of information by them to the public, membership in an SRO, and requirements with respect to take-over bids and related party transactions, (ii) the regulation of defensive tactics in response to take-over bids, (iii) the regulation of related party transactions. It is with respect to these specific exclusions from recommendations for a rule-making power for the OSC that we see the close connection between debate about the jurisdictional adequacy of OSC actions and debate about the appropriateness of the substantive regulatory goals of the agency and its interpretation of the public interest. The first of these controversial areas refers to matters that include the impugned Policy 1.10 itself, while the third refers to OSC Policy 9.1, which is singled out for specific attention several times in the course of the Task Force's Final Report.

The sources of the controversy about these particular exercises of regulatory power are not well defined by the Task Force. It was initially generated, apparently, by "some in the Ontario capital markets", which presumably includes a number of those individuals and organizations making submissions to the Task Force itself. The grounds for the controversy have to do with "the appropriate relationship of securities and corporate law", and specifically a concern that securities regulators are intervening in matters more properly the realm of corporate law and the courts. While this may be a valid issue for debate in connection with Policy 9.1 and defensive tactics, it is hard to see how it applies to Policy 1.10, since the OSC has long had regulatory responsibility for the activities of securities market participants. The Task Force may well be right that the legitimacy of these aspects of OSC activity should be decided upon by the legislature, in accordance with democratic principles. How-

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33 See Final Report at 15, 32, 39. OSC Policy 9.1 creates an extensive set of procedural requirements to be adhered to by issuers who wish to engage in "related party" or "going private" transactions, or insider or issuer bids, all of which terms are defined in the policy. The requirements imposed with respect to the transaction or bid consist of three separate aspects, subject to the possibility of an exemption: (i) disclosure of information, (ii) valuation, and (iii) majority of the minority approval. A fourth procedure, the establishment of an independent committee of the board to review the transaction or bid, is recommended.

34 Final Report at 1-63.
ever, an important first step might be an acknowledgment that the emergence of calls for democratic re-evaluation in these areas may not be unconnected to the unhappiness of specific regulatory constituencies with substantive regulation imposed on them by an active administrative agency. If this is the case, the question of the appropriateness of definitions of the public interest expressed in policies such as 1.10 or 9.1 should be squarely and publicly addressed on its merits, rather than being framed more narrowly as an issue of jurisdictional competence to make policies.

Role of Cabinet: A key component of the rule-making provisions recommended by the Task Force is the right of Cabinet disapproval or amendment, within 60 days of adoption of the rule by the Commission. Here the Task Force favoured arguments that such a process ensured agency accountability over countervailing claims that it would undermine the independence of the OSC from “partisan political influence”. The Report envisages that Cabinet would consider only those rules “referred by the Minister” for its attention, and that the “disapproval process would be invoked only sparingly”. More frequent disapproval risked provoking the disaffection of regulatory constituencies from active participation in OSC deliberations. Conversely, of course, the right of Cabinet amendment of OSC rules may give regulatory constituents a further avenue of influence over the ultimate content of OSC rules.

Notice and Comment Process: Legislative provision for an elaborated notice and comment process was considered by the Task Force to be the most effective safeguard against the regulatory hubris that might otherwise result from the grant of rule-making power. “Informed involvement by stakeholders” was seen as crucial to the maintenance of “accountability and transparency” in the rule-making process. The mechanics of this process that were favoured by the Task Force are outlined in the Report. A key initiative involved the responsibility to

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be assumed by the OSC in the notice and comment process, though the Report stopped short of requiring mandatory public hearings.

(c) Statutory Provision for Purposes and Principles

The final significant — and long overdue — legislative innovation proposed by the Task Force is the enactment of a “purposes and principles” section in the statute. For some decades now, the dual purposes of investor protection and maintaining fair and efficient markets have been cited, by both the OSC and commentators, as the prevailing motivators of regulatory activity. This occurs in spite of there being no definitive statutory recognition of their validity. The proposal of the Task Force fills this void. Accordingly, it recommends that the purposes to be legislatively enshrined are: (a) to provide protection to investors from unfair, improper, or fraudulent practices and (b) to foster fair and efficient capital markets and confidence in such markets so as to enhance and facilitate capital formation. For the Task Force, the renewed importance of an explicit statement of purposes lies partly in its role in informing any further policy-making by the OSC.

Acknowledging the looseness of this statement of purposes, the Task Force goes on to enunciate certain “fundamental principles” that should be used “to direct and structure the OSC’s interpretation of the Act’s purposes”. Collectively, the effect of these principles is to articulate the range of regulatory strategies necessary to achieve the stated purposes, while acknowledging that, in any given context, these purposes may have to be “balanced” against each other. Thus the principles indicate that the primary regulatory strategies are the “timely, accurate and efficient disclosure of information”, the prevention of fraud, and the assessment of the “fitness” of market participants, along with “timely, open and efficient” enforcement of the Act’s provisions. The historical commitment in the Ontario scheme of securities regulation to the role of SROs is also explicitly reinforced, as are the needs to coor-

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39 See the discussion of the need for an OSC “supporting statement” at 37 and a “summary of comments” at 38.
40 The Report at 40 also proposed the possibility of a waiver of the notice and comment process in “matters of urgency”.
41 Of course, both commentators and decision-makers give differing weights at different times to these diverse objectives.
42 Final Report at 17.
4. CONCLUDING COMMENTS

The interesting issue is not how well bureaucracies are controlled, but rather the balance between expertise and accountability in different policy areas and the limits or constraints on each.43

Clearly, the policy-making powers of the OSC have needed for some time to be put on a firmer legal footing. Equally clearly, the result of a grant of rule-making power to the OSC would be to expand significantly its powers to regulate issuers and members of SROs, subject to the safeguards of Cabinet disapproval and the notice and comment process. The interesting lessons of Ainsley and the Task Force Final Report revolve around their respective visions of the regulatory enterprise and the scope to be given to the agency to satisfy regulatory objectives. In the view of this observer, the Task Force strikes a more appropriate "balance between expertise and accountability" in its recognition that policies will continue to be necessary for effective and responsive regulation of the securities industry, and that the OSC should have the power to promulgate mandatory rules.

Yet there are several worrying features of the Task Force's approach. An administrative lawyer might worry about the clarity of the distinction between matters to be the subject of a policy instrument and those to be the subject of rules. She might also worry about whether sufficient guidance is provided to the OSC concerning the point at which rule-making should be instituted, and about the risk that the imposition of extensive procedural requirements will present serious resource difficulties for an already stretched agency. More generally, the Final Report contains various references to the important role of the "public" and the "responsible citizen" in providing input to the regulatory process. As a recommendation for the future this is indeed a laudable proposal, in that it may assist in democratizing this arena of economic life. As a description of what happens at present however, it is somewhat disingenuous to suggest that those without an ongoing, direct and professional interest in influencing regulatory outcomes currently play any significant role in making policy submissions to the agency or commenting on draft documents. Thus when the Task Force refers44 to a lack of "public appreciation" for the rationale of Policy 1.10, it may be blurring the distinction between those with an immediate and direct stake in the content of the policy and those without such an interest.

The point being made here is that there is a need to acknowledge the role of interested constituencies in framing regulatory agendas and influencing the course and content of regulatory debate. One interpretation of the genesis of the current concern about the OSC's jurisdiction is that the plaintiffs in Ainsley were using the jurisdictional argument about lack of policy-making authority as a stalling strategy to prevent the application of an onerous policy to their professional endeavours. This turned out to be successful despite the fact that there was evidence of considerable regulatory justification for the policy. Neither can it be doubted that there were other strategies available to the OSC to achieve its objectives. The same result could well have been accomplished by means of the powers granted in section 105 of the Regulations, or more dramatically, by recommending to the legislature that it force the creation of an SRO for that segment of the industry. There is historical precedent for such a strategy. In the 1940s, the then Chair of the OSC, McIntague, claimed a central role in the passage of the Act to provide for the establishment of the Broker Dealers Association,45 a self-regulatory organization for the predecessors of the penny stock dealers.46

To reiterate, by focusing on the OSC's competence to use various regulatory instruments, we risk losing sight of the fact that the debate may, in essence, be about substantive interpretations of the public interest, and who is to have the power to make those interpretations. Jurisdictional confrontations may be, in some cases, only one move in a bigger game of the politics of regulation, which is about the ongoing

44 Final Report at 37.
45 S.O. 1947, c. 8.
efforts of regulatory constituents to have their interests met in the administrative process and their particular interpretations of concepts such as the "public interest" validated by the agency.

At the moment, the OSC has been accorded the status of expert decision-maker and policy-maker in the securities arena. In this position, it is expected to respond to emerging problems with a view to achieving legislative objectives. There is precedent for the agency to develop policy which is not contemplated in the legislative framework. In 1968, the OSC introduced, by means of policy statement, a scheme for requiring the "timely disclosure" of "material and significant information" by issuers regulated under the Securities Act. This concept of timely disclosure is now a staple of the legislative framework. My point here is not that there is no need for adequate legal authority for administrative action, but rather that it is in the nature of regulatory innovation to sometimes outstrip legislative oversight. Before legitimate regulatory objectives are conclusively derailed by the strategic mobilization of jurisdictional devices, we need to give due weight to the expertise side of the expertise/accountability balance, and we should be clear-eyed about the sources from which challenges to substantive regulatory objectives come.

RECENT DEVELOPMENTS

The "Good Banking Code of Practice" of the United Kingdom

Dennis Rosenthal*

1. INTRODUCTION

In January 1987 the Government, together with the Bank of England, commissioned the Review Committee under the Chairmanship of Professor Robert Jack to conduct an assessment of the existing legislative framework for banking services. The Committee's finding was that whilst the legislative framework had stood the test of time there were a number of areas where banking practice could be improved. The recommendations included that banks should promulgate a Code of Banking Practice on standards of best practice and that, if considered necessary, the Government should in due course enact enabling legislation to support a statutory Code of Banking Practice.1

The Government fully endorsed the Committee's recommendation for a non-statutory statement of best practice covering all the areas referred to in the Review Committee's Report.2 The Government specified, in particular, that customers should be given information in clear and simple language about the terms of their contract with their banker and the rights and obligations that are to apply on both sides; should be told of their right to privacy which the law already affords and the very limited circumstances in which any information about their personal finances may be passed on; how to lodge a complaint if it proves necessary; how such complaints should be dealt with and how matters may be referred to the relevant ombudsman; what banking charges may be levied and in what circumstances; and that they should be given a simple explanation of the timing of the cheque clearing cycle and when they might normally expect a cheque to be cleared.

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