Knitting the fracture with corporatism in Canadian provincial government: the Ontario Securities Commission and the regulation of the Toronto Stock Exchange

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The Chairman: I have one last question on the Canada-U.S. difference. You describe your approach and compare it to Calpers' approach as being much more discreet.

Mr. Cedraschi: It is the Canadian way. I do not see Canadians starting proxy battles all over the place in the press. I see very little of that. I see a much more cooperative approach and that is the way it should be. We are all in the same boat. We want to improve the productivity of Canadian corporations. We have a common interest. This idea that somehow there is us and them is far overplayed. It can happen in a specific case like Canadian Tire but, in general, this is not the case. Mr. Barrett at the Bank of Montreal has exactly the same interests in mind as we have to make both the bank richer and Canada a more effective place to do business. (Tullio Cedraschi: Senate of Canada Proceedings of the Task Force on Corporate Governance Issue 4 - Evidence (Morning) Montreal, Tuesday, February 20, 1996)

Corporatism, once used to mediate conflict in labour relations and primary production, has emerged in the policy and regulatory networks around the Toronto Stock Exchange. It is a lop-sided corporatism which excludes representative participation by consumers. Corporatism as an explanatory theory once competed with models of pluralism. It is now obscured by new theories in regulatory studies. Corporatism repositions the financial service industries into the context of other competitive and adversarial economic activities regulated by the state. The broad commercially orientated and relationship-decision making of private order stock exchange regulation has been lifted into state and public order regulation through a combination of industry associations and state agencies. Corporatism emphasises in this arrangement the blurring of private and public policy and decision-making and conventional separations of power. It is marked by (1) participants who are willing and able to negotiate agreements and to pressure and persuade others to observe the terms; (2) rewards, advantages or incentives for participants; (3) recurring contexts and situations which brings the participants together, and, (4) distinctive political and legal cultures of the regulatory institutions needed to accommodate it. It draws attention to the broad standards and discretionary decision making which advantage individual major actors and disadvantages minor ones. It emphasises the decision-making by participants who take into account the economic importance of particular transactions and individual actors. The interests of minor actors including retail investors will not be protected, particularly in the absence of a strong and autonomous state regulator. There will be ongoing concern because of the poor fit with public order regulatory principles relating to impartial decision-making. Reactions to further scandal may require industry-based groups to implement policies against their interests.

This paper grew out of an interest in what gave people confidence to engage in stock market transactions given the elasticity of stock exchange rules and practices. In doing this it is also partly a reaction to the view of western observers of the development of securities markets in East Asia that corporatism is an Asian

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phenomenon related to Confucianism or Islam. Corporatism continues to occur in western economies and the example of the Toronto Stock Exchange illustrates this. The paper also grew out of an interest in the legal analysis associated with the Frankfurt School, the members of which strove to understand the intersection of public law and economic law which occurred in the monopolist cartels which had emerged in Germany in the late 19th century and continued into the Weimar Republic. Their experience is relevant in understanding the relationship between corporate forms of capitalism and democratic states, suggesting that economic growth and reform does not lead to democratic liberal societies. It is also relevant to understanding the way in which business has adopted some of the processes of government at the same time as government has adopted practices associated with business as well as the co-opting of government and business in support of each other.

1. Corporatism defined

The small number of the entrepreneurs gives them always a certain superiority … and even their organizations share in this advantage, because the small number of members makes it always possible for their deliberations to be kept secret, and because there is greater solidarity of interest … . Franz Neumann, The Rule of Law: Political Theory and the Modern Legal System in Modern Society (original title The Governance of the Rule of Law: An Investigation into the Practical Legal Theories, the Legal System, and the Social Background in the Competitive Society) (Leamingon Spa: Berg, 1986) 195

Corporatism as an explanation has become a victim of its own popularity. It never was a unified concept. It has come to be applied in more and more areas creating problems of definition. As it grew to explain everything it came to explain little. It is increasingly ill-defined and harder to prove.  

At its most general corporatism is a form of interest group mediation, a distinctive way in which interests groups are organised and interact with the state. Most definitions of it involve a cluster of concepts around that central point of the intermediation of conflicting claims and interests. One example is:

a mode of policy formulation, in which formally designated interest associations are incorporated within the process of authoritative decision making and implementation. As such, they are officially recognized by the state not merely as interest intermediaries but as co-responsible ‘parties’ in governance and societal guidance. Ostensibly private and autonomous associations are not just consulted and their pressures weighed. Rather they are negotiated with on a regular, predictable basis. Their consent becomes necessary for policies to be adopted; their collaboration becomes essential for policies to be implemented.

References:

2 Wiarda, above n 1, 88-89.
4 Alan Cawson, Corporatism and Political Theory (Oxford: Blackwell, 1986) 22, 25. Williamson, above n 3, 77. (The two factors that most clearly represent the nature of corporatist ideology are the socio-economic consensus and state licencing – consensual licenced corporatism.)
There is nothing new about mediation between government and business interests which are often involve ‘close and co-operative decision-making’.\textsuperscript{6} The arrangements about the Toronto Stock Exchange go beyond that in mediating conflicting, competitive and adversarial interests in the network of established bodies and processes. They are marked by the presence of interest groups which are officially recognized and which are seen as ‘co-responsible.’ They are negotiated with regularly. Their agreement is required for policies to be adopted. They implement the policies both through their own organisations and also provide the members of the Ontario Securities Commission. These bodies do not comprehensively represent all interests. There are no consumer, or retail investors’, representatives. Their exclusion does not mean that the arrangement is not corporatist. Corporatism explains why consumers are excluded. They are widespread and poorly organized. They lack effective representative bodies. They are not likely to be disruptive to the securities industry’s operation. It would be hard to include them in a corporatist process – where there is no need. As we see the problem for business in the present arrangements is that there may be a need to admit such representatives to legitimise the arrangements.

Corporatism also comes in varying strengths. In its strong form, exhibited in fascist states, the bodies involved in the mediation are no longer powers in their own right but their power is constituted by their new collective identity which is maintained by firm discipline.\textsuperscript{7} In its weakest form in liberal states it is less formal in merging the identities of member bodies and requires them only to be persuasive in dealing with their membership.\textsuperscript{8}

1.1 Distinguishing corporatism

Corporatism is distinguishable from other systems associated with one party states which have used organizations representing economic sectors to govern. Chinese and soviet monism can be differentiated as it fixed the number of organizations recognised by both the party and the state. The representative role within the party and the state are granted in exchange for controls over the selection of members.\textsuperscript{9} It is also distinguishable from syndicalism where the organizations with an agency role have generated themselves without a state licence. They tend to be voluntary and non-competitive, establishing their own values and resolving conflicts autonomously.\textsuperscript{10}

Corporatism as a practice, but also as a concept, in western states has also been affected by widespread deregulation and recreation of market forces. These changes have also increased the state’s problem in governing as it seeks to sustain economic

\textsuperscript{6} David Johnson, ‘The Canadian regulatory system and corporatism; empirical findings and analysis’ (1993) \textit{8 Canadian Journal of Law and Society} 95, at 106.

\textsuperscript{7} Otto Kahn Freund’ in ‘Postscript by Otto Kahn-Freund’ in Otto Kahn-Freund, Roy Lewis and Jon Clark (ed) \textit{Labour Law and Politics in the Weimar Republic} (Oxford: Basil Blackwood, 1981)195, at198. (By ‘corporatism’ I don’t mean just increased state intervention … [U]nder fascism , the ‘corporations’ on the two sides, the collective entities, are no longer organizations making their own decisions, forming their own will (as one says in German), representing a power in themselves: on the contrary, they become a part of a power that embraces them, and on which they depend.

\textsuperscript{8} Williamson, above n 3, 11

\textsuperscript{9} Phillip C Schmitter, ‘Still the century of corporatism?’ 97.

\textsuperscript{10} Ibid 98.
and social order in a predominately privately owned economic order. Older studies of corporatism in western states indicate that earlier forms of corporatism may continue under the surface of changed economic and legal relationships. So while market reforms have eroded many features of the Keynesian state’s relationship with business Keynesian expectations more favourable to corporatism continue about the state’s role. Governments are required to ensure economic growth, promote new industries, control inflation, and create at least sufficient employment to maintain consumer spending. A more concealed form of relationships and expectations, promoting a different order of corporatism, can still only be glimpsed in the continuing relationship between business and political parties. As deregulation of capital markets increased government relationships with interest groups around them increased in significance. Political stability and quest for office continues to require governments, and political parties, to attempt to rationalise processes of decision-making affecting these markets because of their important functions in national economies. As governments could do less directly themselves to control the economy it was even more important to have business interests consider policy choices and assist in their implementation and regulation. The licensing and policing of the groups own members has also increased in significance. Where parties are unstable, and parliamentary institutions are weakened by the executive government’s control of them, direct relationships between the bureaucracy and business are more important and may also create new sites for corporatist arrangements. This is seen in the consultative committees of the Ontario Securities Commission discussed below. Some forms of corporatism are inevitable in all large advanced economies where there are patterns of economic planning and social welfare programs and a corresponding need to rationalise and organise interest groups. But participants are still unlikely to identify their behaviour as corporatist because of its earlier association with one party states. Claims that one of corporatism’s distinguishing characteristics is participation in government and ‘enhancing democracy’ remains problematic because of this association.

Pluralism contrasts with corporatism. As with corporatism, pluralism has not been a static concept. In liberal pluralist models of business and the state interest groups are self-determined and autonomous. They are not limited in number nor specially licensed to play a representative role. They are competitive. They do not exercise a monopoly over membership. Pluralism has been more difficult to distinguish from corporatism since the 1980s. This is partly because pluralist analysis came to be

11 Williamson, above n 3, 9. Johnson, above n 6, at 102-104 gives a number of other definitions showing the same cluster of concepts.
12 The economic control of the state in World War II continued to affect the relationships in both Britain and Italy, for example, for decades after the war. Samuel Beer, ‘Pressure groups and parties in Britain’ (1956) 50 American Political Science Review 1-23; Modern British Politics (London: Faber, 1969), and, Joseph La Palombara, Interest Groups in Italian Politics (Princeton NJ: Princeton University Press, 1964).
13 Andrew Shonfield, Modern Capitalism (London: Oxford University Press, 1965)
14 This has been called ‘latent corporatism’, see Stein Rokkan ‘Norway: numerical democracy and corporate pluralism’ in Robert Dahl (ed) Political Oppositions in Western Democracies (New Have: Yale University Press, 1965)
15 Schmitter, above n 9.
16 Wiarda, above n 1, 21.
17 Ibid 13
18 For examples of the claims in Canadian literature see Johnson, above n 6, at 104-105.
19 Schmitter, above n 9, 64.
widely used in politics and social sciences resulting, as did the use of corporatism, in conceptual ambiguity. As the potential of pluralism expanded its meaning became vaguer and less useful in making distinctions. At some points it tended to converge with corporatism, as in ‘corporate pluralism’ and ‘meso corporatism.’ Which concept was the noun and which the verb was also ambiguous. In the 1980s in states where only some policymaking areas were characterised by strong interest group control the term ‘corporate pluralism’ might be used.\(^{20}\) If it was more widespread ‘corporatism’ may be the preferred noun. But there is no agreement on this. For those who chose to stress the corporatist aspect where it was marked in some regulatory and policy areas but not others ‘meso-corporatism’ could be used.\(^{21}\) ‘Neo corporatism’ or ‘societal’ or ‘open corporatism’ was used where interest groups were included more generally in decision making processes.\(^{22}\) Neo-corporatism models also permit groups to drop out.\(^{23}\)

The conceptual content of corporatism varied as patterns of economic regulation changed and a debate about its meaning progressed. In the 1970s it required two features. The first was organizations with hierarchies having an exclusive right to represent economic groups in society without members being able to opt in or out. They could be recognised by their semi-official status given to them by the state. The second feature was the repetition of consultations and decision making in the particular economic area in which organizations had privileged access to government prior to the settlement of policies or legislation. In those consultations advice was sought by the state as well as agreement with what the state ultimately proposed. It came to be recognised in concepts such as neo corporatism that corporatism could occur without these features overlapping.\(^{24}\) By then it was conceded that there were degrees of corporatism and there was no single definition and not necessarily one compulsory criteria.\(^{25}\)

The pattern of change around the Toronto Stock Exchange has produced a form of corporatism rather than pluralism. It may be an example of neo corporatism.\(^{26}\) It may also be an example of meso corporatism, that is, a sectoral form of corporatism for the financial markets and service industries. It is marked by:

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\(^{20}\) Andrew Cox, ‘Neo-corporatism versus the corporate state’ in Andrew Cox and Noel O’Sullivan (ed) \textit{The Corporate State: Corporatism and the State Tradition in Western Europe} (Aldershot: Edward Elgar, 1988) 27, at 2728, 41. Cox prefers the term ‘corporate state’.


\(^{22}\) These terms referred to the strengthening relationships between interest groups and the bureaucracy in Western European states. They derive from Martin O Heisler in Martin O Heisler (ed) \textit{Politics in Europe: Structures and Processes in Some Post Industrial Democracies} (New York: Mackay, 1974): Wiarda, above n 1, 21.

\(^{23}\) Ibid 160


\(^{25}\) Claus Offe, ‘The attribution of public status to interest groups: some observations on the West German case’ in Berger, above n 5, (‘Corporatist structures are so established as to generate a high degree of voluntary consent to authoritative decisions. In consequence corporatist structures are institutionally less formal than under the other two types.’ Writing of neo-corporatism).

\(^{26}\) Williamson, above n 3, 11.
(1) participants who are willing and able to negotiate agreements and to pressure and persuade others to observe the terms;

(2) rewards, advantages or incentives for participants;

(3) recurring contexts and situations which brings the participants together, and

(4) a political and legal culture in regulatory institutions which accommodates it.

2. The cyclical history of corporatism as an academic explanation


The use of corporatist analysis has been cyclical in politics and social sciences where it has been most widely used. Considered to be dying in the 1980s it was being used into the late 1990s. Its dissolution into generalisations and its messy overlapping with liberal-pluralism also lead to its usefulness being suspect. The complexity and disorder of markets also affects the decision-making processes relating to them making them difficult to fit with economic models. It has retained some currency in Latin American and European studies, and developing country studies in Asia and Africa, but writers in each of these regions are generally not aware of its use in the others. Wiarda, who points this out, also provides an example of how it is projected onto non-western economies as if it has no equivalent within them. He has recognised creeping corporatism in the US but in other of his writings corporatism seems to exist only in the European past or in developing economies.

Outside of labour and specific industry regulation, such as dairy farming, corporatism has not been widely used in western common law countries. The rise of neo-classical economics and law in North American law schools may partly explain this. It has in public interest theory its own explanation of how business interests skew policy and legislative choices to accommodate their interests. Corporatism has been associated with institutionalist economics in its insistence that between the market and the state there are large numbers of self-organised and semi-public collectivities.

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27 Grote and Schmitter, above n 24, at 279.
28 Wiarda, above n 1, 56.
29 Ibid 62.
30 Ibid 10-11, 13
31 Ibid 128-151. Wiarda points out Adam Smith acknowledged the need for monopolies in colonies, but for a limited period.
34 Posner
People associated with these base their expectations about future behaviour of themselves and others on them, including solutions these institutions commonly use to fix persistent disputes. Law and economics writers regard such practices as undesirable. Corporatist analysis may be less judgmental noting that individuals, government agencies and firms find that they are an acceptable way to resolve uncertainties where legal rules and principles may not.

Most English speaking states have been regarded as having only weak forms of corporatism, and Canada weaker than some others. In the 1980s, for example, corporatism or neo-corporatism was most commonly observed in the labour and welfare policies of the ‘post-industrial welfare state’. But within these jurisdictions there were continuing forms of corporatism in which producers – of whom the most common examples are often farmers and dairy farmers in particular – had sought to gain power over the market by increasing state regulation in the public interest. It was not always noticed in corporatist analysis, but it was in public interest analysis, that the dairy farmers were being joined by others including large commercial corporations. These corporations are perfectly made for a corporatist environment. They match the bureaucracy in structure. Their potential political role is enhanced by market and economic power. It has been easy for them to emerge as an interest groups with formidable power in bargaining with policy makers and regulators.

Canadian legal studies has seen little use of corporatism. In political science a claim was made in 1976 that the Canadian economy displayed corporatist characteristics and that ‘the most suggestive interpretative concept to apply to Canadian economic experience is corporatism’. That this view was widely rejected is important as the reasons for that attack may remain current:

… Canada possesses neither sufficiently hierarchical, distinct, limited, powerful, and centralised interest groups, especially labor organizations, nor a sufficiently collectivist political culture, nor a sufficiently centralized governmental policy-making system … .

The most a few critics would concede was that there were consultative procedures and, as a matter of only academic interest, some echoes of it in ‘Canada’s Tory-touched political culture’. Writing in 1993 Johnson observed that important

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35 Grote and Schmitter, above n 24, at 280-281.
36 Canadian business associations were said to be less organised than their British counterparts; W Coleman and W Grant, ‘Business associations in public policy: a comparison of organisational development in Britain and Canada’ (1984) 4 Journal of Public Policy 209-35.
37 Wiarda, above n 1, 120 See also Gerhard Lehmbuch and Philippe C Schmitter (eds) Patterns of Corporatist Policy Making (London; Sage 1982).
38 Cawson, above n 4, 33. For example, see Atkinson and Coleman, above n 33, 33-34. The Canadian Wheat Board, established in 1953 to support wheat farmers and continues to have a monopoly on the acquisition of wheat and barley in the western provinces for export. The Australian Wheat Board also has a similar monopoly after it was established in 1939. It still has a monopoly although it no longer exists as a board but was privatised and listed as a company on the ASX in 1999. Ingrained cartels on last legs’ Weekend Australian (30-31 July 2005) 41.
41 Johnson, above n 6, 100.
42 Ibid 100-102, summarising the literature on this.
developments had been missed through not using corporatist analysis. Twelve years later the absence of any further use of corporatist analysis suggests that he was wrong, that developments are being missed or that other explanations are being used. Political science analysis detected elements of corporatism in some more expected places: the regulation of the Atlantic fishery, the Québec occupation health and workers’ compensation scheme constituted by the Commission de la santé et de la sécurité du travail, and, also in the Ontario Labour Relations Board as well as Ontario’s marketing boards for eggs and apples. One of the more interesting illustration in business regulation and corporatism is Coleman’s 1990 account of the Canadian Payment Association, run by the Bank of Canada and a range of deposit-taking institutions in which ‘[b]anks and near banks are given equal roles in running an organization which defies easy classification.

Most Canadian legal analysis of business regulation has drawn on concepts from liberal pluralism considering the effects of interest groups, including provincial regionalism. A range of more recent explanations have drawn on developments in regulatory theory used in securities regulation including discussion of the benefits and disadvantages of self-regulation and state regulation. As in the United States the considerable strength of law and economic analysis in Canadian law schools has led to the regular use of neo-classical economic ideas including market forces and public choice theory. Related to these is capture theory where the regulator rather than the policy makers and legislators are captured. Others have drawn on rational choice or deterrence theories where regulatory styles and resources are significant as this affects the risk of detection and severity of likely penalties. Some have looked at business cultures and the fostering of values of responsible citizenship. Scandals involving those regulated, sometimes extending to the regulator, have been explained in terms of managerial incompetence with the occasional bad apple that no procedural system can deal with. Less theorized, more doctrinal and pragmatic work has sought to make legal rules and procedure more rational. This assumes that business will find it both easier to comply and more willing to accept penalties as legitimate where rules are reasonable, efficient and appear to be applied impartially.

3. The continuing relevance of corporatist theories

Corporatism as a system of ideas or as a description of political systems is directly concerned with the problématique of how a state can sustain an economic and social order within a predominately privately owned productive order.’ Peter Williamson, Varieties of Corporatism: A Conceptual Discussion (Cambridge: Cambridge University Press, 1985) 9

Both pluralism and corporatism deal with competitive interests seeking to influence the state and the policies and laws it adopts and enforces. The strength of corporatist analysis, at least for lawyers, is that it focuses on rules and rule making in relationships between the state and business. It deals with the incorporation of interest groups into the state. It directs our attention to the nature of the state which is often reduced to insignificance in interest group economic analysis. In many liberal-

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43 Ibid 96.
44 Ibid 107-112.
46 Wiarda, above n 1, 22
pluralist studies interest groups are represented as free and unfettered by the state with
good policy emerging from the struggle between contesting groups in which the
branches of government play a limited role as umpire. In spite of any erosion of
state power from internationalisation for citizens within western states, including even
Canada, the state remains strong. The powers gained in World War II by western
states over citizens have never been relinquished and shadow of the corporatism
stemming from the corporatism of that period of centralised state and modern
economic planning remains.

The Weimar republic, which Neumann observed, was a collectivist democracy of the
military, employers’ associations, trade unions, and between the federal and state
governments. Weber had already recognised the extent to which the state and its
bureaucracy had difficulties in formulating policies for business as business itself had
superior information which made the state bureaucracy dependent on business
because of the economic results of unforeseen consequences of poorly informed policy
choices. Weber had also observed the antiformal tendencies within law. Neumann
drew on both ideas in showing how the older formal rationalist legal order
had faded in the face of the capitalist cartels and their close relationship with the state.

Neumann believed that in the competitive capitalism of the 19th century legal norms
had been exactly determined, that is to say they were as formal and as rational as
possible, so that the judge had as little discretion as possible. In such a society, the
judge did not have recourse to legal standards of conduct such as good faith, good
morals, reasonableness, or public policy. The state itself, if it interfered at all, had to
make its interferences calculable, that is to say, it could not interfere retroactively, for
otherwise it would invalidate created expectations, Furthermore it could not intervene
by individual commands, because any individual intervention violated the principle of
equality prevailing between equal competitors.

In Weimar this legal system had been replaced as the nature of competition had
changed. Adam Smith had observed that there are two forms of competition,
competition in efficiency and restrictive competition. In the first ‘competitors in a free
market fight for existence or for economic improvement. In the second the fight is to
abolish the freedom of the market or to strengthen or complete the monopoly.’ The
function of law changed. The nature of the Rechtsstaat changes with the change in the
concept of law and the function of jurisdiction. Individual law ‘obtains decisive
importance’ as the state confronts a few monopolies. It deals with these individual

48 Beer, above n 12; Samuel Beer, British Politics in the Collectivist Age (New York: Knopf, 1965);
Modern British Politics (London: Faber, 1969). ( ‘In spite of the relaxation of control since the war,
there remains a system of ‘quasi-corporatism’ which leaves no important interest group without a
channel of influence and a real share in the making of decisions. The main substance of the system is
continual, day-to-day contacts between public bureaucrats in the government departments and private
bureaucrats in the offices of the great pressure groups.’)
49 Neumann, above n 32, 270-271.
50 Max Weber, G Roth and C Wittich (ed) Economy and Society (Berkeley: University of California
52 Neumann, above n 32, 256
53 Ibid 191-192.
facts instead of developing general norms. Legislation transfers jurisdiction to administrative branches of government from the courts:

Skeleton laws lay down only general rules and the decisive shaping of laws is left to the ministerial bureaucracy. ... This development produces an immense strengthening of the power of the executive. Legislative functions are transferred to it, while, at the same time the administrative sphere continues to expand. ... At the same time, however, bureaucracy emancipated itself from parliamentary control. The judge now has to apply to an increasing extent individualised instructions from the legislator and laws drafted by the executive government. At the same time the monopoly economy destroys the rational character of law altogether. Legal institutes, for example, 'faith and trust', 'good manners', 'whole economy', 'public welfare', and innumerable other general clauses, become the central feature of the application of law, which is therefore naturally transformed into administrative action.

While the conditions have changed there is still a need in the modern state to ensure economic peace, political stability and rationale use of economic resources in the community. This continues to make it desirable to bring capital into closer association with the state and integrate it. It confirms the usefulness to the state of having capital regulate, license and police their own members and the advantages of using these corporate groups to help implement government social programs.

Even though Weber had studied stock exchanges Neumann and others did not discuss how broad discretions and courts of honour had marked the regulation of exchange trading, including trading in company shares. There had been little legal rational formality. Until recently these regulatory mechanisms remained outside state regulation and also control by the courts. The powers of the Toronto Stock Exchange shows a strong family resemblance to the autonomy of the London Stock Exchange. It was never quite as free as that exchange had been. The Toronto Stock Exchange had a transplanted autonomy which had not grown beside state institutions. As in England deference to it was eroded by the growth of legal positivism in the 19th century and positivism’s support for the enlarged reach of the official legal system. The arbitration of disputes by members, to the exclusion of courts, was struck down in the absence of legislative authority. The power to expel member was required to be exercised in good faith. But the respect for its autonomy was only diminished. Justifications for the respect of domestic tribunals continued to given although ultimately conflicts of interest of tribunal members were to be recognised as no longer an acceptable hazard. Its autonomy was, and is, enhanced by the expense of litigation.
The same unethical practices, justified as ‘customs’, which marked the London Stock Exchange, were seen by late 19th century courts as evidence of the continuation of a public corruption which the rising professional middle class had opposed and begun to eradicate after the 1850s. In these cases judges intervened. But as in England there continued to be an ambiguity about whether other customs and rules bound brokers’ clients and not just because the Privy Council was the final court of appeal. The ambiguity was in the test used of whether a custom of the stock exchange was sufficiently contrary to ethical behaviour to be excluded from the terms of the implied terms of contract. As in England courts would no longer accept rules and customs which ‘involved a violation of he law of the land’. By the 1970s the autonomy of the exchanges were coming to an end because of the perception of their narrow self-interest.

Ending the autonomy of stock exchanges from state regulation created other problems. The exchange based systems had worked in the context of a network of economic relationships which had generally benefited the person with the greatest bargaining power, which was often no more than the most wealth. This had been unpredictable but the connexions and relationships in the exchanges had given it some predictability. Exchange participants were bound to accept such decision-making and were not able to appeal against it. The courts had generally been prevented from adjudicating on such disputes and had generally declined to second-guess economic decision making. When the state took over increasing regulation of the exchanges it has had to grow within the new official institutions the equivalents of the networks of economic power which gave predictability in the older system. The principals and discretions and commercial considerations are so wide that they are not sufficient to give that predictability. To do this the state needed to have people from the industry devise and administer policies, to make the law and regulate. The present law and

62 Sutherland v Cox (1884) 6 OR 505 (CP); affirmed (1887) 15 OAR 541 (CA); affirmed (1887) Cass Sc 10 (SCC). (Galt CJ: ‘The principal discussion appears to have been on what may be called the custom of ‘The Stock Exchange’ in dealings between brokers and their clients. The evidence is of a most startling character, and briefly amounts to this, that if a man in the position of the plaintiff being of opinion that any named stock is likely to increase in price, instructs a broker to purchase stock on his account, the broker is at liberty to be himself the seller and nominal pledge of the stock, and to charge a commission as if a real sale had been made, although at the time the broker may not be the owner of a single share. It follows that the broker is not only buyer and seller, but places his interest in direct opposition to that of his employer, for if the price rises the broker is the loser and if it falls the broker is the gainer. Such a mode of dealing is directly opposed to the law which regulates the transactions between broker and employer, even supposing the broker to be the factual owner of the stock. But the case is far worse, if, in a case like the present, the broker is what is termed ‘short’ on the stock, namely undertakes to sell what he does not possess. The so called-custom is said to be that the broker fulfils his obligations, if he is prepared to deliver the stock at any time to his client; but such is not the law of the land, and, if there was no other objection it has this fatal defect, it substitutes the personal liability of perhaps an insolvent broker for the real security of the stock.’)

63 Forget v Baxter [1900] AC 467 (PC). The case reversed the decision in (1898) 7 Que QB 530 which had affirmed (1897) 13 Que SC 104 which had reversed (1897) 13 Que SC 104. See also Clarke v Baillie (1910) 20 OLR 611 (CA) affirming (1909) 19 OLR 545 (Div Ct), which was affirmed in (1910) 45 SCR 50 with leave to appeal to the Privy Council refused: (1911) 45 SCR vii.

64 Re Heron & Co; ex parte Robertson (1933) 15 CBR 39; [1933] OR 693; [1933] 4 DLR 43 (HC).

policy making and regulatory web in which the Toronto Stock Exchange is enmeshed is seen in Table 1.

4. Canadian stock exchange corporatism

We are a Canadian pension plan suing Canadian company in a US court. That tells you something about our faith in Canadian courts. We get better justice in US courts. (Claude Lamoureux, President and Chief Executive of the Ontario Teachers Pension Plan Board)

4.1 Canadian corporate capitalism: controlling shareholders with a US overlay

Canadian corporate capitalism does not fit easily into the dispersed shareholder found model of Anglo-American companies. In many there may be no separation of ownership and control. In 1989 Millard wrote:

Few major Canadian public industrial companies are widely held, a substantial majority are controlled by either a single shareholder or a small group of shareholders holding in excess of 50 per cent of the voting shares. The capacity for conflicts of interests on the part of the directors is apparent and to some extent is acknowledge in certain Canadian corporate statutes. These require the presence of at least two directors on the board of public corporations who are ‘independent’ to the extent that they cannot be officers or employees of the corporation or its affiliates.  

This gave a Canadian twist to the issue of the duties of nominee directors to the shareholder appointing them. The courts in the early 1990s held that this duty included the obligation to tell the appointing shareholder that the shareholder’s ‘requested course of action is wrong’ and that they were personally liable if they obeyed an unlawful direction.

Some observers concluded that the differences in shareholding patterns between the US and Canada produced no difference in the behaviour of boards.

In Canada control has been in most cases firmly in the hands of the major shareholder: in the United States in the hands of the senior management. Whether this has been good or bad as measured in the rate of return for the public shareholder, is an open question. What is not debatable is that boards, always with some major exceptions, while having the legal power to govern corporations in fact have not done so. … [Directors’ duties are] little more than the advisory duty of peers fulfilling their legal obligations to declare dividends and doing the other mechanical things required of them by law.

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68 Ibid, 191 citing *PWA Corp v Gemini Group* (1993) 8 BLR (2d) 221, at 226. The article makes no reference to links established through the overlapping board appointments in Canada.

One of the consequences of the close shareholding—the absence of the separation of ownership and control—is that removing directors of Canadian companies was not difficult:

A witness who appeared before us said that it is quite easy to remove the directors really if you think about it, in corporate Canada - Canada Inc., as you say. In many companies, two or three shareholders can get together and kick out the board.\textsuperscript{70}

Where there are dispersed shareholders it may be because the company is only nominally a Canadian company listed on the TSE. It may have significant United States shareholders and the primary regulation it is subject to may be that of the SEC and the NYSE or NASDAQ.\textsuperscript{71} An example of this is Canadian National Railways which is listed on the NYSE as well as the TSE. It has significant United States assets. In 1998 78 per cent of its shares were owned by United States investors.\textsuperscript{72} In this context it is possible to see the TSE as a second board as almost all of the large corporations in terms of capitalisation, one-third of the listed companies, are listed on US exchanges and must comply with US law and policies, including disclosure. The adoption by the SEC of Regulation FD requiring greater disclosure produced a significant effect on the number of announcements from listed companies with in Canada. There were up to 21 per cent more compared with the number before the regulation was adopted.\textsuperscript{73}

The cross-border economic links also foster other links: ‘[a]s Canadian securities laws evolve, a good deal of American practice and precedent has been absorbed.’\textsuperscript{74} It is difficult because of these ties in some areas for Canada to take a different approach to the United States.\textsuperscript{75} Also, while the United Kingdom had begun to legislate in respect of the securities industry before the US, the US legislation had rapidly become more sophisticated than that of the United Kingdom or any other Commonwealth country.\textsuperscript{76} As well US case law was also adopted. It was thought that BarChris and Van Gorken would be followed by Canadian regulators and courts even if the likely effect would be ‘the observance of greater formalism on the part of corporate boards … in …

\textsuperscript{70} Senate of Canada, (Proceedings of the Task Force on Corporate Governance Issue 4 - Evidence (Morning) Montreal, Tuesday, February 20, 1996).
\textsuperscript{71} Lorne Switzer, ‘The benefits and costs of listing Canadian shares on US markets’ in Laza Sarna (ed) Essays on Law and Business Practice, Corporate Structure, Finance and Operations, Vol 4 (Toronto: Carswell, 1986) 241, 242 and 247. This is an established practice. By 1984 101 of the 1485 companies listed on the TSE were also listed on the NYSE, AMEX or NASDAQ. These companies had higher performance in terms of higher appreciation and higher dividends, but the costs of listing, reporting and audit were higher.
\textsuperscript{73} ‘Many Canadian companies observe Reg FD’ (2001) 6 Investor Relations Business (8) (16 April 2001).
\textsuperscript{74} Frank Iacobucci, The Definition of Security for Purposes of a Securities Act (Ottawa: Corporate Research Department, Department of Consumer and Corporate Affairs, April, 1978) 5; Millard, above n 57, 58; La Rochelle, Simmonds, and Pépin, above n 55, 232-235.
\textsuperscript{75} Ibid 5 (‘it is inconceivable that Canada could have a definition of security which radically departs from that of the United States.’)
\textsuperscript{76} Ibid 7.
Canada.’ 77 In the event the US rebuttable presumption of negligence was not used by Canadian courts which preferred to use statutory statements of the duty of care of directors ‘to elucidate the standard of care’. 78 In the 1970s it was already recognised that the Canadian concern with the substance of the transaction rather than the formality was one of two fundamental differences between the Canadian and the USA approaches to security regulation. Canadian legislative policy and case law was also distinguished by its concern with the protection of the ‘public interest’. 79

Both the OSC as well as well as self-regulatory agencies retain the criteria of public interest, to be considered when exercising their regulatory powers, but it is claimed that it used to scapegoat people who are unprotected by other interests within the system of regulation. 80

4.2 Continuing protection of the controlling shareholder

There has been considerable respect shown for the power of the controlling shareholders. Already by 1989 there were recommendations that audit committees be composed entirely of independent directors. 81 But the TSE report on corporate governance deferred to the power of significant shareholders by acknowledging that they should be able to elect individuals associated with them as directors but still have them counted as ‘unrelated’ directors. 82 It did not seek to deal with some issues important in maintaining the power of significant shareholders including restricted shares, poison pills and confidential voting. 83 It did, however, make proposals for greater disclosure of who were ‘unrelated directors’. At the same time it added the concept of ‘significant shareholder’ and stated that ‘a significant shareholder should not be constrained in implementing its strategy for the corporation.’ 84 In a notice to listed companies the TSE later expressed concern that the term was being used too conservatively by including within its meaning shareholders with less than 50 per cent of the voting rights. 85

‘Unrelated director’ came to mean something more than an ‘outside’ director and also something different from an ‘independent’ director or the ‘affiliated’ director used in financial institutions legislation. An original member of the TSE Committee observed of this result: ‘the necessary vagueness of the definition of an unrelated director makes its application challenging.’ It became a question for the board to judge and

77 Millard, above n 57, 58, 80.
78 Pepall and Basu, above n 58, 191.
79 Iacobucci, above n 74, 142-143.
80 Raizel Robin, ‘Is is all going too far?’ Canadian Business (14 October 2003) 13. (suggesting that Refco Futures (Canada) Ltd was overkill by the IDA and the OSC).
81 Canadian Institute of Chartered Accountants, Commission to Study the Public Expectations of Audit (1 June 1988): Millard, above n 57, 33-34.
84 Ibid 49-50.
boards could differ. Subsequently the TSE was to make it clear that ‘inside director’ was a narrow and technical concept:

A director need not be designated as an “inside director” of a listed company solely by virtue of being an officer or employee of the parent company of the listed company.

All that was required was disclosure of why it had not been complied with. CHUM Ltd, for example, had on its board its president, executive vice president and chief operating office, vice president (finance), secretary and its treasurer as well as the president of two subsidiaries, CHUM Radio Group and CHUM Television. It gave as its reason that the knowledge and insights of these directors had produced successful results and was ‘the key to corporate governance of the corporation.’

Minority rights were erratically protected. In common law provinces the exception to the rule in *Foss v Harbottle* was used until legislative provisions were made for derivative actions by shareholders in the company’s name. In Quebec the only provision was Article 33 of the *Code of Civil Procedure* which gave the Superior Court jurisdiction over companies. Under that provision a procedure like the *Foss v Harbottle* exception was created.

4.3 Corporate finance as subsidised agriculture: government and pension funds

Government assistance to the securities and financial services industries can be seen most clearly in its promotion of pension funds and the taxation benefits given to them. Much of this pension fund money ends up invested in securities. The pension fund sector of the securities industry has been very effective in its lobbying of the federal government. In turn the federal government has been concerned to minimise any liability for old age pensions. Investment in pension funds are rewarded with generous taxation treatment. In 2003 some public sector pension funds were given tax breaks to accumulate assets up to 25 per cent more than required to meet pension claims in order to permit them to weather periods of low returns. Most funds are only permitted to have 10 per cent more. Tax sheltered income trusts also boomed in 2002-2003 with 116 listed on the TSE, representing a market capitalisation of $52.6 billion or 5 per cent of the value of all listed shares.

The TSE has not always won against competing interests in the securities and financial services industries in the decisions made by the federal government. The federal government in 2005 finally lifted the 30 per cent cap on the foreign investment of RRSP funds as a result of lobbying by the Pension Investment Association of Canada. The cap was initially

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86 Ibid 59-60.
88 Ibid 60.
90 For example, see Atkinson and Coleman, above n 33, 33-34.
imposed in 1971 at 10 per cent to force investment in Canadian capital markets.\textsuperscript{95} It is claimed that it cost pension funds between $1.5 and $3 billion per year when the cap was at 30 per cent.\textsuperscript{96}

This promotion of investment in securities represents a potential future threat to the autonomy of business association involved in the corporatism centred on the Toronto Stock Exchange. The requirement to make pension fund contributions as well as the government income foregone in promoting pension funds has made the securities industry more public by exposing more Canadians to the risks of the market and the regulatory system. This democratisation of share ownership has also made it more political. Even if there were to be no more corporate scandals there may be considerable criticism of the securities industry. In 2002 Canada’s 100 largest defined benefits retirement plans already faced a shortfall of $20 billion.\textsuperscript{97} The government is also exposed through its Pension Benefits Guarantee Fund if corporate pension funds become insolvent. Ironically this threat looped back into the share market to affect its performance and economic growth in 2003 when it became clear that some companies were in difficulties because of their exposure to pension obligations.\textsuperscript{98} Regulations have been made to make it more difficult for beneficiaries to sue pension plan sponsors for shortfalls in defined contribution pensions removing recourse to the courts.\textsuperscript{99} Future scandals which affect the value of securities will place more pressure on governments and government agencies to act. Government agencies are likely to also try to conscript their business associates to assist. These associations may find that their voluntary codes to minimise risk and procedures to address grievances are required by legislation. It would be difficult for them to argue that this was too onerous or unworkable if it is what they have already agreed to do but have not done very well.

Examples of these industry associates are seen in the directors of the Toronto Stock Exchange but more so in the members representing industry groups on the Ontario Securities Commission. They serve four functions over a range of areas: identifying problems, consulting and drafting on bills, lobbying, exerting pressure, and implementing decisions. They blur the line between private and public agencies. They represent the interest of a number of industry groups and serve as intermediaries between the group and the government and its agencies. They sit, and have seats assigned to them, on these government agencies and perform deliberative functions helping to hammer out government policies. They have regulative functions especially the setting of professional standards and the regulation and policing of own members. They also perform implementation functions, helping to carry out the programs they design.\textsuperscript{100}

5. The Toronto Stock Exchange

Modern society does, indeed, exist in a large measure through contractual relations, and not only in the economic sphere. Powerful social groups unite, make their interests appear as the only

\textsuperscript{95} Katherine Macklern, ‘A surprise RRSP gift’ Macleans (7 March 2005) 33. 
\textsuperscript{96} Jeff Sandford, ‘A world of opportunity’ Canadian Business (14 March 2005) 50. It had been at 20% until 2001 and previously it had been 10%. 
\textsuperscript{97} Kevin Press, ‘Balancing act’ (2003) 27 Benefits Canada (3) 58. 
\textsuperscript{98} Caroline Cakebread, ‘Perspective on US pension funds’ (2003) 27 Benefits Canada (2) 11. 
\textsuperscript{100} Wiarda, above n 1, 121

The Toronto Stock Exchange and TSX Venture Exchange are the result of an agreement at the end of the 1990s to amalgamate the stock exchanges in Vancouver, Calgary, Winnipeg, Montreal and Toronto.\(^{101}\) The resulting amalgamated exchange was demutualised and listed as a for-profit company on itself. The TSX Venture Exchange is Calgary-based. This is not the only reason it favours lower taxes and less regulation.\(^{102}\) Its parent holds similar views on regulation.\(^{103}\) The TSE is third largest exchange in North America by total market capitalization of their combined issuers.\(^{104}\) It is significant in mining finance with over 50 per cent of globally listed mining companies listed on it.\(^{105}\)

As indicated the largest companies listed on the TSE are also interlisted on US exchanges. During the 1990s the number of Canadian companies listed on US exchanges doubled.\(^{106}\) The TSE was able to increase the value of the interlisted stock traded on it from $434.7 billion to $533 billion in 2004 but its share of trading in interlisted stock fell from 60 per cent in 2003 to 47 per cent in the same year primarily because of US investor interest in interlisted stock. The TSE has started US dollar trading to get US orders.\(^{107}\) In 2004 the TSE Group earned $98.4 on revenue of $295.6 million.\(^{108}\) Its competitors are not only in the US with the London Stock Exchange actively promoting listing of Canadian companies in London.\(^{109}\)

On its demutualisation and float as a for profit listed company in 2000 the TSE created Toronto Stock Exchange Regulatory Services (Market Regulatory Services (MRS)) to regulate trading on the exchange to avoid conflicts of interests between its for profit and regulatory roles.\(^{110}\) It had earlier shifted some other regulatory functions to the Dealers Association of Canada.\(^{111}\) How successful they are as exchange regulators remains open to question. There is evidence of widespread insider trading with share trading increasing before material announcements. As well over 50 per cent of listed companies engaging in share buy-backs fail to disclose these buy-backs to the OSC.\(^{112}\)

\(^{101}\) Placing stock in change’ Maclean’s (29 March 1999) 58.
\(^{102}\) Linda Hohol, ‘Taking risk is a good thing’ Maclean’s (2 December 2002) 38.
\(^{105}\) 17 and 31.
\(^{108}\) 21.
\(^{112}\) Brian F Smith, ‘Do insiders play by the rules?’(2003) 29 Canadian Public Policy (2) 125
The directors of the TSE represent part of the intersecting web of Canadian securities and financial industries. They do not decide day-to-day regulatory issues but they do set the broad policies to be followed and the relationships with other regulatory agencies. The membership of the board of the Toronto Stock Exchange in April 2005 is set out in Table 2. 113

There is no independent director in the sense that all the directors have been or are involved in activities relating to listed companies and securities on the TSE. None represents retail investors. Eight appear to be senior managers or directors of companies listed on the exchange and one, Mulvihill, is the chair of a company with securities listed on the TSE.

All of the directors have the capacity to play representative roles for sectors of the securities industry. The chair, Fox, and Tripp were senior managers of the investment and securities arms of two national banks which were permitted to enter these fields with the deregulation of the financial industry in 1987. 114 The scale of the banks’ operations results in them being active in all areas of that industry. Brown, McCreery and Mulvihill represent funds management. 115 Cedraschi has similar interests, but represents the pension fund of a single listed company, Canadian National, which manages assets greater than many fund management firms. Garneau represents the life insurance industry. Hagg represents the investment banking industry. Jaako represents the similar interests of venture capital investors, which are more significant to the companies associated with the second board, the TSX Venture Exchange. His company has assisted in preparing them for listing. The interests of the large corporate accounting and legal firms are represented by Lanthier and Martel.

The firms from which the directors were drawn were in turn represented on industry associations. Three came from companies which are members of the Investment Dealers Association, two belonged to regional dealers’ associations, one was the chair of the national life and health insurance association, another had been active in the derivatives industry. Garneau was a member of the board, as an ‘industry director’, of the Financial Services Ombudsnetwork.

There is a pattern of the directors being associated with public agencies, often in significant consultative roles. Seven had, or have had, such positions. The chair, Fox, and Mulvihill were members of the OSC’s Chair’s Investment Advisory Group. Mulvihill served on two other OSC advisory committees relating to investment funds and trading in corporate shares. Jaako served on a new technology committee of the British Columbia Securities Commission. Their association with the TSE and, in the case of Jaako, a provincial government appointed governor of the Vancouver Stock Exchange, appears to enhance their usefulness in these roles. It may be the reason for their appointment. However, as indicated, they also have a capacity to represent sectors of the securities

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113 Where no other source is shown the source for the information it is to be found in Table 2.
114 T Fennell and A Walmsley, ‘Deregulating Canadian securities industry’ Maclean’s (1 June 1987) 38.
115 Mulvihill, the chair of Mulvihill Capital Management Inc, is not shown as being involved in a ‘participating organisation’ but he is a member of the Ontario Securities Commission’s Equity Trading Committee, the members of which are nominated by firms active in institutional equity trading operations.
and financial services industries. Martel, now a partner in a national law firm, was between 1995 and 1999 the chief executive of the Quebec Securities Commission. This also involved him in the Canadian Securities Administrators as well as IOSCO’s Technical Committee. From the early 1980s he had held senior positions in legal, financial and related legislative policy areas of the Quebec civil service. Garneau has been a director of the Bank of Canada and Lanthier was a member. Garneau also serves on the board of a Quebec crown corporation. Cedraschi was a member of the Joint Committee on Corporate Governance and of the Accounting Standards Oversight Council. He resigned in 2001 on being appointed a director of the TSE.

There is some doubling up of representation. There are two members of the TSE board on the OSC’s Chair’s Investment Advisory Group. The function of this group is to ‘offer an opportunity for senior executives to input directly to the chair on high level policy topics’. It also permits the chair to gain informal feedback on other issues. One was Fox, the chair of the board of the TSE. The other was Mulvihill. They are listed as representatives of the CIBC and Mulvihill Capital Management Incorporated rather than the TSE. The CIBC was doubly represented on this committee which may indicate that Fox was there as chair of the TSE, after all. Fox was the head of CIBC’s World Market’s Division which housed the CIBC’s investment arm, CIBC Wood Gundy. Thomas C MacMillan, the other CIBC representative, was the president and CEO of CIBC Mellon, a joint venture between CIBC and Mellon Financial Corporation. It was a custody, trust and transfer firm with 1 400 employees and $717 billion under its management.

The TSE was represented on two of these consultative committees of the OSC by employees. Elenor Fitz was shown as a member of the Continuous Disclosure Committee and Frans Manns as an observer on the Mining Technical. Advisory and Monitoring Committee. Both involve regulatory issues of direct concern to the TSE and begin to cross into the merging of public and private regulation. In particular the mining committee provided advice to the Council of Securities Administrators on technical issues relating to the mining industry. It was established as a result of the Final Report in 1999 of the TSE/OSC Mining Standards Task Force.

6. Ontario Securities Commission

The reluctance of legislatures, cabinets and courts to review the decision of securities commissions has had the anomalous result that the principle securities commissions, in a system of responsible government, are more free of review than is the SEC, an independent regulatory agency. (James Baillie, “Securities regulation in the ‘Seventies’” in J Ziegel, Studies in Canadian Company Law (Toronto: Butterworths, 1973) 342 at 353.

6.1 Membership of the Ontario Securities Commission

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118 Ontario Securities Commission, above n 115.
The Ontario Securities Commission could be an example of volunteerism by the business community. It is also an example of the conscription of business people to government service. In April 2005 there were 12 members of the OSC. The chair and two vice chairs were full-time in their positions. The remaining 9 members were part-time and engaged in various activities regulated by the OSC. Only one member of the OSC, Jenns, a vice chair, had a background in government regulation before being appointed to the OSC. She had been with the OSC as a lawyer for a period of 20 years and had served as its general counsel. All the others were drawn from commercial and professional backgrounds. They appear to have been appointed because of their experience and expertise. The board of the TSE, particularly because of the presence of two directors or former directors of the Bank of Canada and the former chief executive of the Quebec Securities Commission, had a greater proportion of members with a background in public service than the OSC. As with the TSE no member appeared to represent retail investors or came from a retail investment background. Also missing, unlike the board of the TSE, were representatives of corporate or industrial pension funds.

There was a disproportionate number of technical experts, particularly lawyers. Five members were drawn from law firms. The chair and the other vice chair had been recruited from major national law firms concentrating on corporate and financial transactions. One part-time member, Wigle, was a partner of provincial law firm active in securities and corporate transactions and litigation. Shirriff and Morphy are from other national law firm practicing in the same areas. Only one part-time member, Davis, had been a practicing accountant. He had been the chief operating partner of a national accounting firm.

Amongst the remaining members were people experienced in corporate and financial transactions all with a background which connected them with one or other of the national banks. McLeod was a financial analyst and regulatory consultant but had had a previous career as an investment banker with investment firms as well as the investment division of a national bank. Perry, a financial advisor, had a previous career similar to Perry’s but with the investment divisions of two national banks. One, Thakrar, was a personal and commercial banker on sabbatical from a national bank after 30 years of service and engaged in philanthropic activities in Canada and abroad.

Hands had been appointed because of his mutual fund experience as no one had such experience since Glorianne Stromberg had resigned from the OSC. He came with an established reputation for protecting the interests of institutional investors. When the Schneider family agreed to sell control of the hog processor Schneider Corporation in early 1998 to a US company that offered less money than a hostile bidder, Maple Leaf Foods Inc, Hand’s firm, Mackenzie Financial Corporation, took action.

Where no other source is disclosed the reference to the source is to be found in Table 3.


Susan Heinrich, ‘Proxy voting by mutual funds becomes issue as industry grows. No law requires firms to disclose their voting policies’ Mutual Fund News (May 17, 1999).
Only one part-time member, Bates, was an academic. Prior to that appointment he had been the CEO of national broking firms.

As noted none of the members appears to have been appointed to represent the interests of retail investors or small shareholders. Thakrar, claimed to be able to put a consumer view on securities transactions and also claimed to be in favour of regulations controlling conduct in the industry rather than a principles based approach but he does not appear to appreciate the difference between these two different approaches to regulation.¹²²

Four of the part-time members were directors of listed companies. Three were directors of private companies. Five had been involved in industry representative bodies or activities. One, the chair, was serving on another government body, the Canadian Securities Regulators, the national grouping of provincial and territorial securities regulators. He was also on the Canadian Public Accountability Board, perhaps the most corporatist of the regulatory institutions sponsored both by the Chartered Accountants and Canadian Securities Regulators to provide national oversight of accounting and audit practices and standards.

The heavy representation of people drawn from the corporate and securities industries and their professional advisers from the legal and accounting professions means that the regulatory power is being exercised by a group very different from the public servants who exercise other forms of bureaucratic and regulatory power. The OSC seems not so much to have been captured by the sector it regulates as much as handed over to, and run by, them.

6.2 The consultative committees and functions of the OSC

The consultative committees established by the OSC to discuss policy and procedural matters with industry groups also evidences the existence of corporatism: ‘recurring contexts and situations which brings the participants together’. The OSC describes it as:

We believe that effective communications with the stakeholders who are affected by our actions is an essential part of the regulatory process, and helps us ensure we achieve the appropriate balance between protecting investors and fostering efficient capital markets.¹²³

It states that consultative committees may be established:

- to seek a broad range of ideas and expertise as we develop new policy initiatives;
- to understand how a specific, recently implemented policy is affecting capital market participants; and


¹²³ Ontario Securities Commission, above n 115.
to improve our understanding of the concerns and issues faced by a particular stakeholder group on an ongoing basis.¹²⁴

This fits with what Weber had observed:

Only the expert knowledge of private economic interest groups in the field of ‘business’ is superior to the expert knowledge of the bureaucracy. This is so because the exact knowledge of facts in their field is of direct significance for economic survival … For this reason alone authorities are held in narrow bounds when they seek to influence economic life in the capitalist epoch, and very frequently their measures take an unforeseen or unintended course or are made largely illusory by the superior knowledge of the interest groups.¹²⁵

The following 16 committees were active in April 2005:

- Bond Market Transparency Committee;
- Chair's Investment Dealers Advisory Group;
- Commodity Futures Advisory Board;
- Continuous Disclosure Advisory Committee;
- Fair Dealing Advisory Group;
- Fund Governance Advisory Committee;
- IC/PM Advisers Industry Committee on Trade Reporting and Electronic Audit Trail Standards (TREATS);
- Institutional Equity Traders;
- Investment Funds Council;
- Mining Technical Advisory and Monitoring Committee;
- NI 54-101 Advisory Committee;
- Regulatory Burden Task Force;
- Securities Advisory Committee;
- Senior Securities Legal Advisory Group;
- Small Business Advisory Committee;
- Registration Advisory Committee.¹²⁶

Of significance in the regulation of the TSE is the Chair's Investment Industry Advisory Group. This:

> provides an opportunity for senior executives in the investment industry to offer input directly to the Chair of the Commission on high-level policy topics. It also offers the Chair a forum for seeking informal feedback on topical issues. The group, whose members represent a cross section of dealers, mutual fund companies and institutional investors, meets on a quarterly basis.¹²⁷

It has two members of the TSE board on it, the chair, Hill, and also Mulvhill although they are listed as belonging to particular businesses and not the stock exchange.

### 7. Legitimacy and the consequences of corporatism

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¹²⁴ Ibid.
¹²⁶ Ibid.
¹²⁷ Ibid.
The separation of powers is therefore the organisational element of competitive capitalism and, apart from its political significance, creates competences, clear delimitations between the various activities of the state, and therefore guarantees the rationality of law and its administration. Franz Neumann, *The Rule of Law: Political Theory and the Modern Legal System in Modern Society* (original title *The Governance of the Rule of Law: An Investigation into the Practical Legal Theories, the Legal System, and the Social Background in the Competitive Society*) (Leamingon Spa: Berg, 1986) 3256

Twenty years ago Atkinson and Coleman called for strong state agencies with a high degree of autonomy from interest groups in Canada. The tide has been against such a move particularly in respect of the Toronto Stock Exchange and its regulation. The structure of its primary regulator, the OSC does not fit well into the traditional political and legal cultures of Ontario and Canada. The Westminster system of government was given in the 1970s as a reason for not creating an independent regulatory agency along the lines of the SEC because of the absence in it of the separation between the legislature and the executive governments. But by then the OSC was already lifting broad discretionary powers associated with stock exchange regulation into its practices, straining older understandings of ministerial accountability and the distinction between what is public and what is private. By 1976 the OSC was also up front in acknowledging the involvement of the Toronto Stock Exchange, the Investment Dealers Association of Canada and the Canadian Bankers Association in the drafting of Bill 75. It released a new draft, Bill 98, announcing at the same time that the responsible minister, the Minister for Consumer and Commercial Relations, had not had an opportunity to consider the revisions. Thirty years later people may be used to its powers exercised by business people as well as its distance from the responsible minister. At the same time, because of the wider exposure to the share-market and the reliance by citizens on it for their pensions, there is the possibility of the legitimacy of the arrangements being called into question.

There is no absence of issues which may focus attention on the potential for conflicts of interests where industry sets the terms of its regulation as well as acts as regulator. No one was charged over the Bre-X Mineral Ltd fiasco in which both the OSC and the TSE have been subject to criticism for their roles; the TSE has failed to monitor compliance by listed companies with its own corporate governance guidelines; pension fund traders at the Royal Bank of Canada have manipulated share prices;

128 Atkinson and Coleman, above n 33, 27-30
129 Claus Offe, ‘The attribution of public status to interest groups: some observations on the West German case’ in Berger,, above n 5, 136-7 (degrees of corporatism and it is not just singular, compulsory or monopolistic).
130 J Baillie, Securities regulation in the 1970s’ in J Ziegel (ed) Studies in Canadian Company Law (Vol II 341 at 351. The Ontario Royal Commission inquiry into Civil Rights Report (JC McGruerNo 1 at 45 found that to place such agencies outside ministerial accountability was ‘a departure from our constitutional principles.’
131 See Gray E Taylor, “Comment on the mandate and operation of the Ontario Securities Commission” (1978) 36 University of Toronto Faculty of Law Review 1
and, extensive market-timing in the mutual funds industry was partly justified by the
those involved because of the failure of the OSC to give adequate guidance.\textsuperscript{136} Latent
problems in self-regulatory systems noted below may operate as triggers producing a
reaction against the present corporatist arrangements which may lead to a more
intensive and less voluntary form of corporatism or may lead more to direct
government regulation of the industry.

Not all of the interest in minimal regulation or non-intervention comes from business
alone. Provincial governments apart from Ontario are also willing to run with policies
which minimise regulation. The British Columbia government in the 1970s believed
that the regulation of its securities market from Ontario and Quebec was undesirable.
It had a resource based economy with mining its second largest good producing sector
after timber. The bulk of the trading in securities on the Vancouver Stock Exchange
and the Vancouver Curb Exchange was in junior mining company stock. The
government was anxious to promote trading in these volatile securities. It saw that the
governments of Ontario and Quebec were willing to ‘clamp down’ on them as they
had established industrial based economies: ‘[a]t this stage, they are affluent enough
not to care if these junior mining companies disappear.’\textsuperscript{137} The British Columbian
government acknowledged that there was a difference between the industry’s views
and that of the investing public but its conclusions supported the position of the
industry: \textsuperscript{138} even if the return to investors was negative as ‘the return to the
community may be greater and speculators may regard the game as worthwhile.’\textsuperscript{139}

And part of the attraction of minimising regulation may be from the political culture
of Canada and the need to define Canadian political institutions in ways which
distinguish them from the US. Canada, particularly because of the operation of bucket
shops and boiler rooms from Toronto into the US, was exposed to US-style regulation
ahead of other jurisdictions. The background to most provincial securities regulation
is in United States regulation and the \textit{Securities Act} 1933 (USA) and the \textit{Securities
Exchange Act} 1934 and these statutory provisions and regulatory policies rather than
the common law.\textsuperscript{140} Now the leading 200 Canadian companies are effectively
regulated by US law because they are interlisted on US exchanges. The Canadian
difference seems to be defined as not being coercive state regulation. It is
distinguished by rhetoric of co-operation between business and government,
significant measures of self-regulation, deference to business values and voluntary
codes representing principles. Ironically it may be an inherited British approach
shared with the US. There has been a tendency to emphasis some British derived
policies, including more reliance on disclosure and self-help by participants.\textsuperscript{141}
Canadian accounting standards, for example, were also more like guidelines involving

\begin{itemize}
\item \textsuperscript{136} Jeff Sandford, ‘Fund praising’ \textit{Canadian Business} (11 October 2004) 14.
\item \textsuperscript{137} British Columbia, Corporate Affairs Division, Ministry of Consumer and Corporate Affairs,
\textit{Revision of Securities Regulation in British Columbia: A Discussion Paper} (Victoria: Corporate Affairs
Division, Ministry of Consumer and Corporate Affairs, 3 October 1975) 8, 12-15.
\item \textsuperscript{138} Ibid 8 (‘The industry itself frequently complains that the existing system is too expensive and slow.
On the other hand, the public is still of the opinion that there are too many abuses and that the industry
is not regulated effectively enough.’)
\item \textsuperscript{139} Ibid 14.
\item \textsuperscript{140} Millard, above n 57, 2.
\item \textsuperscript{141} La Rochelle, Simmonds, and Pépin, above n 55, 232.
\end{itemize}
greater managerial discretion and greater emphasis on the professional judgment of the auditor.\textsuperscript{142}

These can be seen in the corporate governance debate within Canada. The Dey report, which was based on the model of the British Cadbury report, led only to the TSE requiring disclosure of reasons for not following guidelines within the code. Both before and after the Sarbanes Oxley legislation in the US the Canadian corporate sector has successfully resisted similar legislation in Ontario arguing that it is too restrictive, too expensive and un-Canadian. The chair of the Toronto-based Canadian Imperial Bank of Commerce, Etherington, represented a wide-spread position of Canadian companies when he said of Sarbanes-Oxley that ‘if you think any of this is going to guarantee better businesses, that is just not true’. The bank was being forced to spend $60 million on compliance costs which was $10 million more than it had originally budgeted for. It still got a sympathetic hearing, at least in Canada, although some of these costs were part of a $80 million settlement with US regulators for its part in Enron.\textsuperscript{143} There was support in Canada for self-interested claims that Canadian exchanges should avoid harmful US-style exchange regulation.\textsuperscript{144} This was successful. There appears to be less sympathy amongst the policy and law makers and regulators for Canadian investors who point out that they are unable to recover losses because the company in which they invested is not listed in the US.\textsuperscript{145} This tends to affect smaller and retail investors. Larger Canadian shareholders have economic power to draw on in negotiating satisfactory outcomes for themselves.

The reaction to the conflicts of interests of securities analysts was similar with a view that a voluntary system of labelling reports would be better than more regulation.\textsuperscript{146} Again it was retail investors who were most adversely affected. When the inevitable scandal occurred the response was more guidelines and a claim that ‘analyst independence is a near impossible area to regulate.’\textsuperscript{147} Major institutional investors – who have a conflict of interest between protecting their own interests and those of their investors who may benefit from greater regulation – have also been vocal in claiming that their collective intervention through the market and voting is more effective than further regulation.\textsuperscript{148} This is true for their management but not for their own members or other retail investors. In early 2005 it emerged that possibly half of

\textsuperscript{142} Switzer, above n 71, 246 citing R Bloon, ‘The impact of cultural differences between Canada and the United States in Canadian accounting’, a paper presented at the European Institute for Advanced Studies in Management Workshop, Amsterdam, 5-7 June, 1985.)


\textsuperscript{144} Jack Mintz, ‘Corporate governance, our way’ \textit{Canadian Business} (16 September 2002) 17.

\textsuperscript{145} Al Rosen, ‘...’ \textit{Canadian Business} (16 April 2001) 12.

\textsuperscript{146} Arthur Johnson, ‘This stuff is incredible’ \textit{Canadian Business} (29 October 1999) 6.


pension fund trustees leave these institutional managers to decide how shareholder votes are cast.\textsuperscript{149}

The same soft approach as Cadbury and Dey can be seen in other areas related to trading in securities and disclosure. Proposals by a review committee to tighten the regulation of mutual funds to bring them more in line with US practice to control conflicts of interests between the fund managers and investors were ignored by the Canadian Securities Administrators, the umbrella group of provincial and territorial regulators. It preferred the solution of removing the bans on self-dealing and related-party transactions in favour of a review committee with the power to recommend fund managers act in the best interest of the unit holders.\textsuperscript{150} This was in an industry that has a poor and established reputation for sharp and undisclosed practices including self-interested dealing and soft dollar commissions.\textsuperscript{151} It has constantly resisted further disclosure and reform. In 2003 the mutual fund industry lobbied to prevent forced disclosure to new investors of funds performance against market benchmarks.\textsuperscript{152}

The OSC also has failed in the past to do much to remedy defective self-regulation where it harms retail investors, Self-regulatory systems have been created with built in defects which benefited industry members, particularly firms rather than individuals employed by them. Neither the Investment Dealers Association nor the Mutual Fund Dealers Association had the power to order firms employing dealers who churned clients’ accounts or otherwise cheated them to pay restitution to the clients. The chief operating officer of the MFDAS said ‘It was felt that [restitution] was better left to civil remedies.’\textsuperscript{153} The creation of effective self-regulation for analysts has also been a troubled and unsuccessful venture.\textsuperscript{154}

\textsuperscript{149} Joel Kranc, ‘Proxy problem’ (2005) 29 Benefits Canada (1) (discussing a study done by the Vancouver- based Shareholder Association for Research and Education). There are also proposals that mutual funds be forced to disclose how they have exercised their proxies, particularly on board membership and remuneration: Jeff Sanford, ‘How votesth ye, funds?’ Canadian Business (19 July 2004 – 2 August 2004) 11.

\textsuperscript{150} John Gray, ‘It’s not mutual’ Canadian Business (13 September 2004) 27.


Table 1: The regulatory framework of the Toronto Stock Exchange

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<th>PRIVATE</th>
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<tbody>
<tr>
<td>Ontario Legislature and its committees</td>
<td>Canadian Securities Regulators (13 provincial and territory regulators)</td>
<td></td>
<td>Financial Services Ombuds Network (FSON) Ombudsman for Banking Services and Investments (OBSI)</td>
<td>Toronto Stock Exchange (TSE)/Toronto Venture Exchange (TSXV)</td>
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<tr>
<td>Ontario Cabinet and Minister</td>
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<td></td>
<td>Investment Dealers Association – power to grant investment dealer registration</td>
<td>Canadian Security Traders Association, Inc</td>
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<tr>
<td>Ontario Court of Justice Superior Court of Justice Ontario Small Claims Court</td>
<td><strong>Ontario Securities Commission</strong> + 12 provincial and territory regulators</td>
<td>Canadian Public Accountability Board – Chartered Accountants and Canadian Securities Regulators</td>
<td>Market Regulation Services (MRS)</td>
<td>Mutual Funds Dealers Association</td>
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<td>Ontario Provincial Police – Commercial Crime + other provincial and territory police forces Local Police - Fraud</td>
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<td>Pension Investment Association of Canada</td>
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27
### Table 2: Board of Toronto Stock Exchange

<table>
<thead>
<tr>
<th>Person</th>
<th>Corporate position</th>
<th>Corporate role</th>
<th>Industry affiliations</th>
<th>Government affiliations</th>
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<tr>
<td>Chair: 1. Wayne C Fox</td>
<td>Vice Chair and Risk Officer, Treasury, Balance Sheet and Risk Management, Canadian Imperial Bank of Commerce, Managing Director and deputy chair, CIBC World Markets Inc, a participating organisation</td>
<td>CIBC is a major Canadian bank, moved into the investment market in 1988 when it purchased the broking firm Wood Gundy Inc, in 1997 it purchased the US broking firm Oppenheimer &amp; Co Inc. CIBC has 37 000 employees and assets of $278.8 billion.</td>
<td>CIBC is a member of the IDA. Its officers are members of the governing committee of the Canadian Securities Traders Association.</td>
<td>Fox is a member, of the OSC’s Chair’s Investment Advisory Group.</td>
</tr>
<tr>
<td>2. Ian S Brown</td>
<td>Senior Managing Director, Raymond James Ltd, a wholly owned subsidiary of Raymond James Financial Inc, listed on the NYSE</td>
<td>The parent company has US$160 billion under administration, Canadian subsidiary has C$7.9 billion under administration</td>
<td>Member of the IDA. Raymond James staff/office holders in the Association des Arbitragistes Institutionnel de Montreal and the Vancouver Equity Traders Association.</td>
<td></td>
</tr>
<tr>
<td>3. Tullio Cedraschi</td>
<td>President and CEO CN Investment Division, part of Canadian National Railway Company (CN), since 1977 (xxx)</td>
<td>CN Investment Division manages the Canadian National Railways Pension Trust Funds, some C$11 Billion supporting 50 000 retirees.</td>
<td>CN Investment Division has members on the boards of the Association des Arbitragistes Institutionnel de Montréal (Montreal Institutional Equity Traders Association), the Institutional Equity Traders Association (Toronto) and the Vancouver Equity Traders Association. Cedraschi is a director of Western Oil Sands Inc (hived off from BHP Ltd it provides mining, financial and management expertise in the Athabasca Oil Sands Project), Helix Investments (Canada) Ltd, Freehold Resources Ltd (trust units in mining resources listed on the TSE) and a</td>
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160 Raymond James Ltd, ‘Corporate profile and history’ http://raymondjames.ca/eda/display.do?contentid=bc5b2a9c3526f400VgnVCMServer28a8a8c0RCRD (18 April 2005).
161 Ibid.
| 4. Raymond Garneau | Chairman of the board, Industrial Alliance, Insurance and Financial Services Inc, a participating organization. | It is the fifth largest life and health insurance company in Canada managing assets worth $28.5 billion for 1.7 million people holding insurance or RRPS. | Chair of board of Canadian Life and Health Insurance Association, 1994. This association represents almost all life and health insurance companies which manage 66% of pension plans. Member of the board and former chair, Laval University. Official Administrator, Québec Telephone, 1991. Chair of the board and former CEO General Trusco, 1989 and 1991-1993. Member of the board, Phillips Cables, 1992. | Member of the board of directors, Bank of Canada, 1996. President, Conseil d'administration, La société du 400e anniversaire de Québec. |

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5. John A Hagg  
Principal, Tristone Capital Inc – participating organisation TSE.  
Founded in 2000 Tristone Capital Inc is a multi-service investment bank based in Calgary and Houston with a focus on the energy sector.  
Hagg was the founder, chair and CEO of Northstar Energy Corporation, a petroleum company, which subsequently merged with Devon Energy Corporation which acquired Anderson Exploration Ltd. He is the director of a number of private and public companies.

6. Harry Jaako  
Co-founder, co-CEO and a director of Discovery Capital Corporation, listed on the TSX Venture Exchange.  
Discovery Capital Corporation invests, and advises on venture capital investment, in technology companies, a number of which are listed on the TSX or the TSX Venture Exchange.  
Jaako was appointed as a Public Governor of the Vancouver Stock Exchange by the government of British Columbia in 1998 and became an independent director when it became the TSX Venture Exchange in 1999. He is also a director of Vigil Health Solutions, Tirsys and a number of other private and listed companies.

7. J Spencer Lanthier  
Retired as chair and CEO KPMG Canada, 1999.  
KPMG Canada is one of the four major Canadian accounting and audit firms.  
Member of the KPMG International Executive Committee and Board. A FCA of the Institute of Chartered Accountants of Ontario awarded its Award of Outstanding Merit in 2001. He is a member of a number of boards of public companies Board of Directors of Gerdau AmeriSteel Inc., Ellis-Dom Inc., Emergis Inc., Interpace Polymer Group Inc., Toerst corroporation, Zarlink Semiconductor Inc.

8. Jean Martel  
Senior Partner Lavery, de Billy.  
Lavery, de Billy is a major Quebec law firm (165 lawyers) specialising in financial services and securities law.  
He is a director of unspecified Canadian companies.

From 1981 to 1988, head of the Department of Legal Services in the Quebec Finance Department working on loans and securities.
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<td>9. Owen McCreery</td>
<td>Consultant and Corporate Director, former President of Beutel Goodman &amp; Company</td>
<td>Beutel Goodman &amp; Company is an investment advisor to mutual funds, institutional investors and high net worth individuals. It manages over $10.6 billion in Canadian, international and United States equities and fixed income assets.</td>
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<tr>
<td>10. John P Mulvihill</td>
<td>Chair, Mulvihill Capital Management Inc which he purchased in 1995.</td>
<td>Mulvihill Capital Management Inc manages and advises on corporate pension plans, personal investments and specialty investments. It manages assets valued at $4 billion.</td>
<td>Mulvihill was previously chair of a similar company, CT Investment Counsel Inc and had been an analyst and portfolio manager with Crown Life Insurance Co.</td>
</tr>
<tr>
<td>11. Eric C Tripp</td>
<td>Vice-Chair, BMO Nesbitt Burns and Head Equity Division</td>
<td>BMO Nesbitt Burns is the investment and corporate banking practice of the BMO Financial Group. It offers corporate, institutional and government clients services in respect of capital raising, structured finance, mergers and acquisitions, treasury and risk management services, research and institutional investment. It operates in the US under the name of Harris Nesbitt focusing on selected sectors in the middle market.</td>
<td>BMO (Bank of Montreal) Financial Group is a major Canadian bank. It has assets of $265 billion and 37,000 employees. It is listed on the TSE. Tripp has been chair of the Canadian Derivatives Products Clearing Corporation and was a board member of the Toronto Futures Exchange.</td>
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187 Ibid.
188 Ibid.

for Quebec and its crown corporations. From 1988 to 1994 Assistant Deputy Minister of Finance in charge of policy and legislative developments for financial institutions, market intermediation, labour sponsored investment fund corporations. From 1995 to 1999 Chief Executive Officer of Quebec Securities Commission, involved in the Canadian Securities Administrators and IOSCO’s Technical Committee.181
### Table 3: Members of the Ontario Securities Commission

<table>
<thead>
<tr>
<th>Person</th>
<th>Corporate position</th>
<th>Corporate role</th>
<th>Industry affiliations</th>
<th>Government affiliations</th>
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<tr>
<td>3. Susan Wolburgh Jenna, full time vice chair.</td>
<td>Lawyer at OSC for previous 20 years including a period as general counsel.</td>
<td></td>
<td>Member of the Board of the Institute of Corporate Directors, chair of CSA committee which drafted disclosure standards in 2001. Endorses IDA governance course.</td>
<td>In 2000 member of committee chaired by Purdy Crawford QC, a director of listed companies, to review Ontario’s securities law for the Ontario government. Is said to be a member of ‘international committees’.</td>
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198 Ibid.
205 Ibid.
206 Ibid.
207 Ibid.
212 IDA, ‘Susan Wolburgh Jenna, General Counsel and Directors International Affairs, Ontario Securities Commission Directors’ Education Program’ <http://www.icdcollege.ca/> (21 April 2005). (‘As a student my expectations have been exceeded. The quality of instructors has been superb. The program strikes an appropriate balance between formal presentation, interactive dialogue and application of preparatory reading and in-class teaching to case studies in a simulated boardroom environment.’)
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<td>5. Robert W Davis FCA, part time, since 1999</td>
<td>Former Chief Operating Partner of the accounting firm Peat Marwick Mitchell, now absorbed by KPMG. KPMG Canada is one of the four major Canadian accounting and audit firms. Currently president of Camiton Inc.</td>
</tr>
<tr>
<td>5. Harold P Hands, part-time until 2005</td>
<td>Previously legal officer at Mackenzie Financial Corporation from 1987 until his retirement in 2001. Mackenzie Financial Corporation was taken over by Investors Group Inc in 2001. Previously Hands had worked for Toronto law firm, Day, Wilson, Campbell. He left to join MacKenzies who were a client as a result of his expertise in mutual funds. Previously a former Chair of the Investment Funds Institute of Canada. Hands chaired the Committee's Final Report of the Code of Ethics Committee on Personal Investing which members were required to comply with from 31 December 1998.</td>
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</table>

212 Ministry of Finance, Ontario, Five Year Review Committee Final Report – Reviewing the Securities Act (Ontario) (21 March 2003) It recommended one securities regulator for Canada and the further study of giving greater powers to self regulatory organisations.


216 Ibid.


218 Ibid.

219 Ibid.


221 Ibid.


227 Ibid.

228 Ibid.

229 Ibid.

6. David L Knight FCA, part-time, until 2007. Chair and vice-chair KPMG LLP for over 10 years until 2000, and also role with KPMG International. Fellow of Institute of Chartered Accountants in Ontario in 1985, chaired committees and task forces which dealt with a wide range of matters including professional standards-setting, risk management, partnership governance, the use of computer technology in auditing and quality review of professional work. During his period with KPMG International Knight worked with the International Accounting Standards and International Standards on Auditing both in developing the standards and lobbying for their acceptance.

7. M Theresa (Terry) McLeod, part-time until 2005. A chartered financial analyst, McLeod is president of McLeod Capital Corporation. McLeod Capital Corporation is a financial and regulatory consulting firm. McLeod was formerly an investment banker with Pitfield, Mackay, Ross & Company, Merrill Lynch Canada Inc. and ScotiaMcLeod Inc. Director, Tembec Inc, a timber and paper company, listed on the TSE with assets of about $4 billion. Director B Split Corp, a retail investment product which splits the capital gain on shares in BCE Inc from the dividends. It has now been delisted from the TSE. Director of Split Telco Corp, a similar managed financial product from ScotiaMcLeod Inc. Director, EPCOR Director, Ontario Superbuild Corporation which administers the Ontario Superbuild program – a provincial government program investing in Ontario infrastructure with private sector partnership.

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236 Ibid.
237 Ibid.
238 Ibid.
Utilities Inc., an energy and energy related assets company with $4.5 billion of assets. Its single common stock shareholder is the City of Edmonton. Its preferred shares are listed on the TSE. It won the 2004 National Award in Governance from the Conference Board of Canada and Spencer Stuart.

| 8. H Lorne Morphy, part-time | Morphy is litigation counsel at Davies Ward Phillips and Vineberg, previously at Torys. The firm employs 220 lawyers in offices in Toronto, Montréal, New York, concentrating on corporate, commercial and financial matters. It has a ‘cross practice and sector team’ for corporate governance in its practice areas. Fellow of the American College of Trial Lawyers in 1982 and is an honorary overseas member of the Commercial Bar Association (England and Wales). |
| 10. Suresh Thakrar, part-time, until 2006 | Corporate banker, former vice-president of Royal Bank of Canada Financial Group, vice-president in personal and commercial banking. RBC Financial Group is a major Canadian multifunctional bank. Thakrar over 30 years held a number of senior positions across various areas of Bank. Currently on a sabbatical and engaged in a number of philanthropic... |

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247 Ibid.
253 Ibid.
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<tr>
<th>11. Wendell S Wigle QC, part-time, until 2006.</th>
<th>Wigle is senior litigation counsel at Hughes Amys LLP.</th>
<th>Wigle was President of the Advocates’ Society (1977-78) and the Medico-Legal Society of Toronto (1984-85). He is a member of the Canadian Bar Association; the American Bar Association; Defense Research Institute; the Private Court; Ontario Province Committee (2000-2002); the American College of Trial Lawyers; and a Fellow of the International Academy of Trial Lawyers (1982-1989). The Advocates’ Society of Ontario supports lawyers engaged in advocacy, and apart from conferring hierarchical status it provides specialist continuing legal education.</th>
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<tr>
<td>25 Hughes Amys LLP is provincial law firm specialising in insurance and commercial litigation, mediation and arbitration with offices in Toronto and Hamilton.</td>
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<td>12. Carol Perry, part-time.</td>
<td>Perry is managing partner at MaxxCap Corporate Finance Inc. MaxxCap Corporate Finance Inc is a financial advisory services firm.</td>
<td>Perry was a vice president and director of two of Canada’s leading investment dealers which are divisions of Canadian banks, RBC Dominion Securities (which had absorbed Richardson Greenshields) and CIBC Wood Gundy Securities. She was a director of BankWorks Trading Inc, banking and financial services technology consultants. She is a director of DALSA, a</td>
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256 See previous note.
257 ICB, ‘About us’ <http://www.icb.org/english/about_us.asp> (19 April 2005). This appears to be a mainly education role but it offers programs in mutual funds compliance training.
260 Advocates’ Society, ‘About the society’ http://www.advocates.ca/about/history.html 19 April 2005
262 Ibid.
263 Ibid.
microchip and electronics company listed on the TSE and a recent past director of the Independent Electricity System Operator which manages the market for electricity between generators and utilities in Ontario. She was a director of Irwin Toys Limited which went into bankruptcy protection and was then liquidated in 2003. She serves on the Education and Certification Committee of the Institute of Corporate Directors which runs the Corporate Governance College, in partnership with the Rotman School of Management, University of Toronto with the program now offered through business schools in Montreal, Calgary and Vancouver. She is Chair of the Board of Directors at St. Joseph's Health Centre.

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273 Perry is not named as a member of the board in April 2005; St Joseph’s Health Centre, ‘Board Members’ <http://www.icd.ca/contact/boardMembers.aspx> (23 April 2005); Institute of Corporate Directors, ‘Certification for the ICD.D Designation’ <http://www.icd.ca/about/certification.aspx> (21 April 2005).