

Challenges in Decision-Making for Regulatory Bodies

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ONTARIO SECURITIES COMMISSION

For the 21st Annual Conference of Ontario Boards & Agencies: Essential
Skills For the Highly Effective Tribunal



Presentation Outline

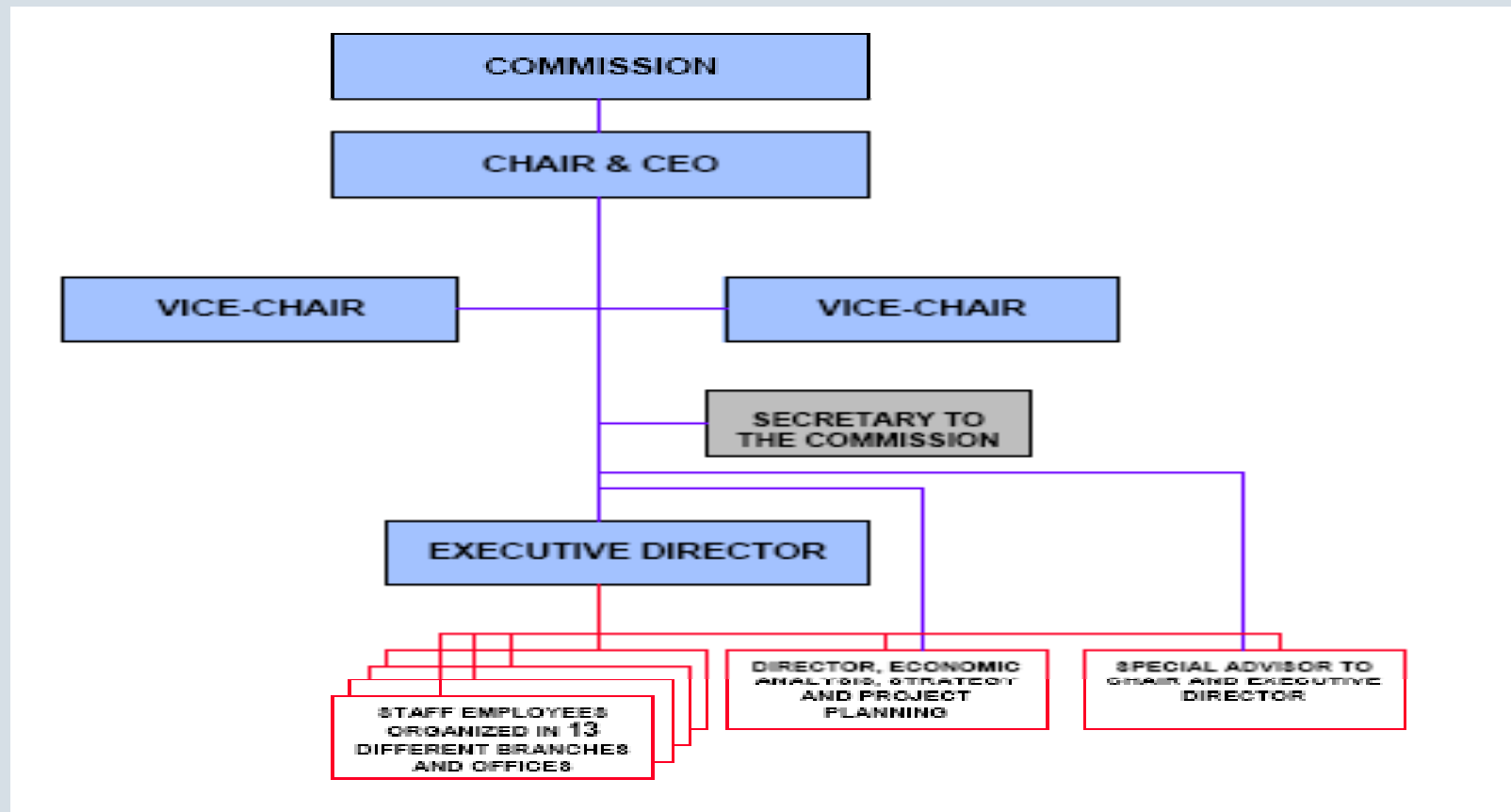
- **The OSC: An Overview**
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The OSC: An Overview

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The OSC: An Overview



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The OSC: An Overview

- **Mandate: s. 1.1**

The purposes of the Ontario *Securities Act* are:

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets.



The OSC: An Overview

■ Structure

- The Commission's regulatory responsibilities are exercised through:
 - the rule and policy-making function;
 - the enforcement function; and
 - the adjudicative function.



The OSC: An Overview

■ Structure

- The Commission consists of from 9-14 (currently 13) members, including the Chair & Vice-Chairs:
 - The Chair & Vice-Chairs are appointed for 5-year terms, which may be renewed once;
 - The Part-time Commissioners are generally appointed for a first term of 2 years, renewable for an additional 3 years (10 year legal maximum).

Adjudication at the OSC

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Adjudication at the OSC

- **Commission Hearing Panels**
 - Specialized expertise in the area of securities and/or administrative law.
 - Tribunal “court-like” powers include: the issuance of summons, the production and inspection of documents, the issuance of orders.
 - Hearings must ensure compliance with natural justice and procedural fairness.
 - Powers under the *Statutory Powers Procedure Act*.
 - Procedure set out in the *OSC’s Rules of Procedure*.



Adjudication at the OSC

■ An Integrated Agency:

- The Act gives the Commission regulatory, investigation/enforcement and adjudication functions.
- No member of the Commission who exercises a power or performs a duty of the Commission in relation to an investigation shall sit on a hearing that deals with the matter, except with the written consent of the parties.
- The Chair signs section 11 (investigation) orders but does not sit on adjudicative hearings and is not involved in the Commission's adjudicative role.
- Staff is a party to proceedings before the Commission.



Adjudication at the OSC

- There are ethical walls and obligations of strict confidentiality between Commissioners acting in an adjudicative capacity and members of Staff (including, in particular, the Chair and the Enforcement Branch).
- The Commission has adopted Guidelines for Members and Employees Engaging in Adjudication.



Adjudicative Guidelines

- **Guidelines for Members and Employees Engaging in Adjudication**
 - No member may participate in a hearing where to do so would give rise to a reasonable apprehension of bias.
 - Members must make each decision on a fair and impartial basis in accordance with the Guidelines, applicable law, principles of procedural fairness and requirements of natural justice.
 - Members should reach their decisions ... based on the relevant law, the evidence presented to them and the submissions made.



Adjudicative Guidelines

- **Guidelines for Members and Employees Engaging in Adjudication *(continued)*:**
 - The prospect of disapproval from any person, institution, or group, ... should not deter a Member from making the decision that he or she believes is fair and just.
 - Members should conduct their deliberations and make their decisions independently of other Members of the Commission who are not on the Panel.



Adjudicative Guidelines

- **The Guidelines also address:**
 - Communications with parties as part of the Adjudicative process.
 - Assignment of Commissioners to Panels by the Secretary of the Commission.
 - The role of Independent Adjudicative Personnel in the Office of the Secretary of the Commission.
 - The mandate of the Adjudicative Committee to oversee adjudicative practices and procedures.



Adjudicative Guidelines

■ Benefits

- Promotes sound adjudicative practices.
- Safeguards independence and impartiality of Commission hearing panels.
- Ensures transparency of practices and processes (Guidelines are publicly accessible on the OSC website).



An Illustration: *Re Norshield Asset Management (Canada)*

- Allegation that a reasonable apprehension of bias arose as a result of a public comment of the Chair.
- Commission Panel heard the allegations and concluded there was no reasonable apprehension of bias.
- Since *Brosseau*, steps have been taken by both the Legislature and the Commission to enhance safeguards which are designed to separate the Commission's adjudicative function from the Commission's enforcement function as well as the Chair.
- Some of these steps are reflected in the Commission's Adjudicative Guidelines.