

Explainer: Ensuring a Fair Multistakeholder Oversight Committee

Establishing a fair and representational committee of experts to oversee the actions of a data stewardship arrangement, and to supervise audit and report functions, involves a number of steps. It is best done at the beginning of a project, which means some of the planning results such as data audits, task descriptions, and funding sources may not be available. Often a preliminary risk assessment, done in the manner in which many governments do regulatory impact assessment, will help to identify members of the public who will be affected by the actions of the data steward. This in turn may influence oversight representation decisions.

The central problem this Explainer seeks to address is how to ensure representation of citizens, end users, individuals - however one wishes to term the data subjects - in situations where other stakeholders wish to exercise control over personal data or space. Customarily, citizens are represented in policy discussions in Canada in the following ways:

1. through government departments, whose mandate explicitly includes serving the public,
2. through representation by civil society organizations, such as consumer protection or rights organizations,
3. through academia, and
4. through selection of well known individuals, often those who formerly held positions in the above three categories.

There are different risks in each category, which we examine later.

One of the central problems civil society has encountered over many years of struggling to have a presence in policy-making before the fact rather than after is that even if they manage to get representation, they are unable to change outcomes. The reasons for this include the following:

1. Civil society actors are out-numbered, and are unable to influence consensus positions.
2. Representatives are not strong enough, either because politically they are prepared to go along with whatever the others are saying, or they are ill equipped to argue at the same level of fact and argument, or they are inexperienced in these kinds of multi-stakeholder fora.
3. Timing does not favor the civil society representatives, either because they were invited to participate at a later stage than industry representatives, or because they got documentation later, or have insufficient time to do necessary homework and prepare.
4. Information gaps, which impact all three of the above conditions, are a problem if the civil society actors are not accustomed to work in the particular details of the subject matter, or if they do not get equal access to all the material which may come up for discussion.
5. A lack of consensus within civil society itself undermines the ability of representatives to present a common position and gain support.
6. Financial support is always a problem for underfunded civil society organizations, individuals, and even academia. Corporate or government sponsorship of any of these choices of representatives can undermine the independence of those sitting on an oversight committee.

7. Conflicts of interest, particularly when a representative such as a Privacy Commissioner or Human Rights Commissioner is involved, may preclude those offices from participating in a multistakeholder policy development process, because of the potential for having to adjudicate a related matter. Sometimes consultants may be chosen who are hoping for further work with other stakeholders on the group, which may impact their willingness to be critical.
8. Continuity of representation is frequently not possible for civil society. A large corporation has no problem swapping out new representatives on a committee, whereas NGOs and academia may have trouble finding people with similar expertise and/or policy positions. If individuals (unassociated) are being replaced, the new individual selected may take entirely different positions on matters. While often it is acceptable to have such a diversity of views, it is a common vector of attack against civil liberties representatives; business competitors might be accepted as having different views, less so civil liberties defenders.
9. Public engagement is a key topic for a data governance group, and often civil society representatives are expected to present a common front or position during public presentations. This is difficult, if expectations have not been met. In an ideal governance committee, failure to reach and express consensus should be tolerated.

As can be seen from the reasons for failure to influence outcomes in favour of privacy and civil liberties, setting clear expectations of the parameters of participation for members of an oversight committee will be important. Some of the common tools to ensure that there is a fair opportunity for everyone to give their best advice in a timely manner follow.

1. Selection process must be fair, open, and accountable. Independent HR advisors could be sought to supervise the process.
2. Compensation, if there is any, should be reasonable but not so lucrative that individuals are joining for the wrong reasons.
3. Statements of interest should include why the individual wants to participate in the oversight group, and potential or actual conflicts of interest.
4. It would be advisable to have a lengthy drying out period following a term on the committee to prevent immediate hiring by one of the stakeholder groups.
5. Non-disclosure agreements must be as non-muzzling as possible. Individuals must be empowered to discuss disagreements with policy, and what their positions are.
6. Meetings should be as public as possible, and records and archives well maintained.
7. The voting structure of the oversight group needs to be very carefully examined to ensure that one group cannot dominate.