



April 4, 2006

FINANCIAL SERVICES TRIBUNAL

CONFLICT OF INTEREST GUIDELINES

Purpose

The purpose of these guidelines is to outline the appropriate processes for uncovering and dealing with potential conflicts of interest that might disqualify a Member of the Tribunal from sitting on a panel to hear a particular case that has come before the Tribunal for adjudication and to indicate some of the circumstances that should be taken into account in deciding whether there is a conflict of interest. The guidelines are meant to provide assistance, in this regard:

- to the individual Members in their determination of whether they should sit on a particular panel,
- to the Chair of the Tribunal (or his or her delegate) in assigning Members to a particular panel,
- to panels in dealing with questions of whether one of their members should continue to sit as a panel member, and
- to the Registrar in collecting information relevant to the identification of potential conflicts of interest on the part of Members.

The Members of the Tribunal are also governed by Conflict of Interest Guidelines applicable generally to members of the Financial Services Commission of Ontario (the "Commission"), members of the Tribunal and employees of the Commission that address conflicts of interest that might be seen to compromise the ability of Members to serve the Tribunal generally in an independent and unbiased manner. The latter Guidelines are appended as Appendix A to these guidelines.

Background

In its 2001 and 2003 decisions in *Ocean Port*¹ and *Bell Canada*,² the Supreme Court of Canada has confirmed that the required standards for the elements of procedural fairness such as independence and impartiality vary from administrative tribunal to administrative tribunal and that the requirements that apply to a particular tribunal will depend upon the nature and the function of that particular tribunal.³

The *Financial Services Commission of Ontario Act, 1997* (the "Act") makes the Chair and Vice-Chairs of the Financial Services Commission of Ontario, *ex officio* the Chair and Vice-Chairs respectively of the Tribunal. It requires that, to the extent practicable, those appointed as other Members of the Tribunal shall have experience and expertise in the regulated sectors and it then obligates the Chair in assigning Members to a panel to take into consideration the requirements for experience and expertise to enable the panel to decide the issues raised in the particular matter before it.

The Members of the Tribunal including the Chair and the Vice Chairs have always been appointed, from the inception of the Tribunal, on a part-time basis. Reliance on part-time members was also the tradition of the Tribunal's principal predecessor, the Pension Commission of Ontario. The caseload of the Tribunal has never been such as to justify the appointment of one or more of the Members on a full-time basis.

These arrangements and structures are not fully compatible with the notion that a Tribunal member should be disqualified, for reasons of conflict, from hearing a case in all the circumstances in which a judge would be so disqualified. This may be seen first from the role of the occupants of the positions of Chair and Vice-Chairs of the Tribunal as the Chair and Vice-Chairs, as well, of the Commission. The Commission also includes, as one of its members, the chief executive officer of the Commission - the Superintendent of Financial Services (the "Superintendent") - who is invariably the responding party in the appeals and requests for hearings that come before the Tribunal. In adopting the Act, the legislators must, therefore, be taken to have recognised that the conflicts of interest to which the Chair and Vice Chairs of the Tribunal would be subject, by virtue of their serving the same roles with the Commission, should be tolerated, even though they would not be permitted under traditional common law principles of procedural fairness.

The legislators should also be taken to have recognised that certain conflicts of interest on the part of a Member that would normally be considered, under common law principles, as grounds for disqualification from hearing a particular case should be tolerated given the direction of the Act to take account of relevant experience and expertise in appointing Members to the Tribunal and in assigning Members to Tribunal panels together with the practical need to rely on Members who serve the Tribunal on a part-time basis. The likelihood of conflict-of-interest concerns arising in respect of pension matters that come before the Tribunal is particularly high. It is well known that

¹ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

² *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884.

³ *Id.*, particularly para 21.

experts in the legal and actuarial aspects of pensions are, to a large extent, to be found within a relatively small group of practising lawyers, actuaries and pension consultants who often belong to firms with a broad client base. The pension experience and expertise of the Tribunal is provided, to a significant extent, by Members who are drawn from this group. If they were subject to the strict conflict-of-interest principles traditionally applied to judges, the ability of the Tribunal to utilize this expertise and experience would be seriously limited.

It is in these circumstances, and in reliance on the Supreme Court of Canada's recognition of the need for practical variations in the standards of procedural fairness applicable to particular administrative tribunals, that the following guidelines relating to conflicts of interest have been adopted.

Circumstances Relevant to a Conflict of Interest Determination

1. A Member should not adjudicate in any case in which the Member has a conflict of interest in the sense that the circumstances would give rise to a reasonable apprehension of bias, on the part of the Member, in the mind of a reasonable and informed person.
2. For the purposes of section 1, the following circumstances would normally be indicative of a conflict of interest on the part of a Member, in respect of a particular proceeding before the Tribunal:
 - (a) the Member or an entity⁴ of which the Member is a partner, director, officer or employee is a party to the proceeding;
 - (b) the Member or an entity of which the Member is a partner, director, officer or employee represents a party in connection with the proceeding or is, or has been, engaged on behalf of a party in the preparation of a report or an opinion that is relevant to the factual context or issues in the proceeding; or
 - (c) the Member or an entity of which the Member is a partner, director, officer or employee was engaged, as a legal, actuarial or other representative or advisor, in connection with the specific matter that is the subject of the proceeding.
3. For the purposes of section 1 but subject to section 2, the following circumstances should **not**, of themselves, be considered to be indicative of a conflict of interest, on the part of a Member, in respect of a particular proceeding before the Tribunal:
 - (a) the Member is the Chair or a Vice Chair and also serves as Chair or Vice Chair of the Commission and the Superintendent, who is a member and chief executive officer of the Commission, is also a party to the proceeding;

⁴ For the purposes of these guidelines, an "entity" includes a body corporate, trust, partnership, fund, and an unincorporated association or organization (including a labour union) and "an entity of which the Member is a partner, director, officer or employee" includes an entity that is controlled by an entity of which the Member is a partner, director, officer or employee.

- (b) the Member or an entity of which the Member is, or was, a partner, director, officer or employee previously provided advice to a person other than a party to the proceeding or made submissions to the Superintendent on behalf of any such person in respect of matters that presented any of the same issues as those issues that have arisen or may arise in the proceeding;
 - (c) a party to the proceeding is a client or former client of an entity of which the Member is, or was, a partner, director, officer or employee but the Member has not been personally involved in providing services to that client and the nature of the relationship with that client is such that it would not give rise to a reasonable apprehension of bias.
 - (d) a party to the proceeding was a client of the Member or an entity of which the Member is or was a partner, director, officer or employee but that client relationship ended at least one year before the commencement of the proceeding before the Tribunal;
 - (e) a party to the proceeding is a client of an entity of which the Member was a partner, director, officer or employee but the Member has terminated his or her relationship with the entity at least one year previously and has ceased to receive income from the entity other than by way of retirement income, capital pay-out or termination payment or by way of fees that are not related directly to services provided to individual clients; or
 - (f) the Member has published a book or an article in a magazine, journal or newspaper, given a lecture or participated in a public presentation, or in the preparation of a report, in which an opinion is expressed concerning an issue or issues that may arise in the proceeding.
4. Nothing in sections 1 and 2 should be taken to interfere with the entitlement of a Member to refuse an assignment to a case or to withdraw from a case, on the basis that he or she has a conflict of interest.

Processes for Dealing with Potential Conflicts of Interest

- 5. Before any Members are assigned to a panel to hear a particular case, the Registrar of the Tribunal should provide each Member with some basic information as to the circumstances of the case, the parties and their respective counsel or other representatives, and should ask each Member to report back, based on the information provided, as to whether he or she has a conflict of interest in respect of that case.
- 6. A Member may, at any time, consult with the Chair as to whether the Member should serve as a member of a panel, as a pre-hearing conference chair or as a settlement conference chair in a particular case having regard to circumstances that might give rise to a conflict of interest on the part of the Member.
- 7. If the Chair has a conflict of interest in a particular case, he or she should delegate to a Vice Chair who does not have a conflict of interest in respect of that case or, if

there is no such non-conflicted Vice Chair, to a Member who does not have a conflict of interest in respect of that case, the authority or responsibility to do the following;

- (a) assign Members to a panel to hear the case;
 - (b) appoint a Member to chair that panel;
 - (c) appoint a Member to serve as chair of a pre-hearing conference in the case; and
 - (d) serve, in place of the Chair, for the purposes of any consultation pursuant to section 6 of these guidelines.
8. Where, after having been assigned to a panel to hear a particular case, a Member becomes aware of any circumstance or circumstances that might give rise to a conflict of interest on the part of the Member, he or she should;
- (a) with or without prior consultation with the Chair, make and act upon a decision as to whether he or she should withdraw from the case; or
 - (b) advise the other members of the panel of the potential conflict of interest, leaving it to the full panel (including the Member) to decide;
 - (i) whether it is advisable and feasible to alert the parties to the relevant circumstance or circumstances and invite representations as to whether the Member should withdraw from the case; and
 - (ii) whether, in any event, the Member should withdraw from the case (having regard, among other relevant considerations, to these guidelines).
9. If a party to a proceeding in a case should apply to have a Member, who has been assigned to the panel in that case, withdraw from the case, that application should be heard, on notice to the other parties, by the full panel (including the Member) and the decision of the panel as to whether the Member should withdraw from the case (having regard, among other relevant considerations, to the provisions of these guidelines) will be final, provided that the Member shall always be entitled to withdraw from the case even if the panel should decide that the Member need not withdraw.

APPENDIX A

Financial Services Commission of Ontario

CONFLICT OF INTEREST GUIDELINES

**MADE UNDER SECTION 9 OF
THE *FINANCIAL SERVICES COMMISSION
OF ONTARIO ACT, 1997*
FOR
MEMBERS OF THE FINANCIAL SERVICES
COMMISSION OF ONTARIO,
MEMBERS OF THE FINANCIAL SERVICES TRIBUNAL AND
EMPLOYEES OF THE FINANCIAL SERVICES
COMMISSION OF ONTARIO**

A. Introduction

1. The Financial Services Commission of Ontario (Commission) is the agency responsible for the regulation of the regulated sectors as identified and defined in the *Financial Services Commission of Ontario Act, 1997* (Act).
2. The Act provides that the Commission shall establish conflict of interest guidelines with which members of the Commission (FSCO Board), the members of the Financial Services Tribunal (FST) and the employees of the Commission shall comply.
3. The Act further stipulates that a copy of these guidelines is to be delivered to the Minister of Finance (Minister).
4. These guidelines, as they apply to employees, are in addition to, and do not detract from, any statutory provisions and government policies relating to conflict of interest that apply generally to Ontario public servants.
5. These guidelines, as they apply to the Chair and Vice-Chairs of the FSCO Board and the FST and to the members of the FST, all of whom are appointed by Order of the Lieutenant Governor in Council under the Act (appointees), are in addition to, and do not detract from, any government policy relating to conflict of interest that applies to appointees of agencies, boards and commissions and, to the Conflict of Interest Guidelines established by the FST for its members.

B. Rule

6. Employees and appointees must not act in a manner that might result in their private interests or the private interests of members of their immediate family (a spouse, child, parent or sibling), friends or business

associates being incompatible with or in conflict with their work responsibilities as either public servants or appointees, as the case may be.

C. Disclosure Obligations

7. (1) Employees and appointees shall disclose fully any actual or apparent conflict of interest that may arise as a result of any direct or indirect beneficial interest that they may have in any entity within a regulated sector including, but not limited to:
 - a) holding any direct or indirect equity interest, other than as a participating policyholder, in any insurer, agent, adjuster or broker doing business in Ontario;
 - b) holding any direct or indirect equity interest in any corporation governed by the *Loan and Trust Corporations Act*;
 - c) serving as a member of the board of directors (or other comparable supervisory body), or as an officer, of any entity or licensee governed by the *Insurance Act*, the *Loan and Trust Corporations Act*, the *Co-operative Corporations Act*, the *Credit Unions and Caisses Populaires Act, 1994* or the *Mortgage Brokers Act* or any successor legislation;
 - d) engaging in the management of a business within a regulated sector;
 - e) holding any direct or indirect equity interest in a mortgage brokerage business carried on in Ontario; and
 - f) engaging in the supervision, management or administration of a pension plan or pension fund with members in Ontario.
- (2) The disclosure requirements in subsection 7(1) (a) and (b) do not apply where the circumstances that might give rise to an actual or apparent conflict of interest result from:
 - a) investments in a mutual or segregated fund; or
 - b) investments held by the appointee and spouse of the appointee which:
 - i) comprise less than 1/100th of one per cent of the outstanding equity interest of any entity listed on a Canadian or foreign securities exchange; or

- ii) are investments in a corporation carrying on business within a regulated sector directly, or indirectly through a controlled subsidiary, provided that the value of the business within the sector constitutes less than 5% of the value of the shares or other equity interest of the corporation.
- (3) Notwithstanding subsection 7(1), an appointee need not make disclosure under these Guidelines in the circumstances described in clauses (d) or (f) but shall be governed by the FST's Conflict of Interest Guidelines that apply in respect of those circumstances.
- 8. Anyone having questions about any aspect of these guidelines or any government conflict of interest policy, or doubts about the application of either, should speak to the Superintendent of Financial Services (Superintendent), if they are an employee, or the Chair of the FSCO and FST (Chair), if they are an appointee.
- 9. The disclosure referred to in subsection 7(1) shall be made, whenever possible, in anticipation of any circumstances that might give rise to an actual or apparent conflict of interest and, otherwise, as soon as possible after such circumstances arise or come to the attention of the employee or appointee.
- 10. The obligation under section 7 to disclose an actual or apparent conflict of interest is ongoing. Employees and appointees have a duty to keep all potential conflict of interest situations under review and make further disclosures as necessary.
- 11.(1) Employees shall, without delay, disclose any actual or apparent conflict of interest to the Superintendent following the disclosure process that was announced to employees on June 22, 1998 and which is posted on the Commission's intranet site. If an employee is uncertain about the existence of an actual or apparent conflict of interest, the employee shall disclose the circumstances to the Superintendent and seek directions from the Superintendent.
- (2) If the Superintendent determines that a conflict exists, the Superintendent will provide the employee with directions, that may include terms and conditions, regarding the course of action required to deal with the conflict. If the Superintendent determines that a conflict does not exist, the Superintendent will so advise the employee.
- 12.(1) Appointees shall, without delay, disclose any actual or apparent conflict of interest to the Chair. If an appointee is uncertain about the existence of an actual or apparent conflict of interest, the

appointee shall disclose the circumstances to the Chair and seek directions from the Chair.

- (2) If the Chair determines that a conflict exists, the Chair will provide the appointee with directions, that may include terms and conditions, regarding the course of action required to deal with the conflict. If the Chair determines that a conflict does not exist, the Chair will so advise the appointee.

13. The Chair shall, without delay, disclose an actual or apparent conflict of interest to the Minister. The Chair shall also report to the Minister any actual or apparent conflict of interest to which the Chair has determined an appointee is subject and that has not been resolved to the satisfaction of the Chair.

14. The Superintendent shall, without delay, disclose an actual or apparent conflict of interest to the Secretary of Cabinet.

D. Contravention

15. Employees and appointees are reminded that contravention of any government conflict of interest policy and of these guidelines or non-compliance with terms, conditions or directions in a decision of the Superintendent, Chair, Minister or Secretary of Cabinet, as the case may be, may be cause for disciplinary action up to and including termination of their employment or appointment.

E. Confidentiality

16. Information disclosed under the guidelines to either the Superintendent or Chair is treated in strictest confidence and will not be revealed to any person except:

- a) by the affected employee or appointee or with his or her consent;
- b) in connection with a legal proceeding relating to any government conflict of interest policy;
- c) in a criminal proceeding, as required by law; or
- d) in the case of disclosure by an appointee, to the Minister.

(Approved by the FSCO Commission on June 20, 2006.)