



December 2021

## **FINANCIAL SERVICES TRIBUNAL CONFLICT OF INTEREST GUIDELINES**

### **PART I – CONFLICT OF INTEREST GUIDELINES FOR TRIBUNAL MEMBERS AS PUBLIC SERVANTS GENERALLY**

1. All members of the Financial Services Tribunal are considered to be public servants and as such, are subject to the provisions of the *Public Service of Ontario Act*, 2006 (“the PSOA”).
2. The PSOA establishes conflict of interest rules and ethical standards which apply to all public servants.
3. *Ontario Regulation 381/07* (“Reg. 381/07”), made under the PSOA sets out rules for public servants who work in a ministry and former public servants who worked in a ministry with respect to prohibited conduct generally and provides rules regarding public servant dealings with the private sector. Reg. 381/07 also applies to public bodies, including the Tribunal, where the Conflict of Interest Commissioner has not approved and published separate conflict of interest rules.
4. Tribunal members must familiarize themselves with Reg. 381/07.

### **PART II – CONFLICT OF INTEREST GUIDELINES FOR TRIBUNAL MEMBERS CARRYING OUT TRIBUNAL RESPONSIBILITIES**

5. The provisions of Reg. 381/07 are taken into account in these guidelines, which address the Tribunal’s specific regulatory mandate and conflict identification and resolution procedures.
6. If a provision in these guidelines is inconsistent with a provision of Reg. 381/07, the provision of Reg. 381/07 shall prevail.
7. A provision of the guidelines is inconsistent with a provision of Reg 381/07 where a provision in the guidelines establishes a degree of ethical conduct that is lower than is established by Reg. 381/07. An inconsistency does not arise where a provision in these guidelines exceeds the degree of ethical conduct established by Reg. 381/07.

#### **Purpose of PART II Guidelines**

8. 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.

9. 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.

### **Background**

10. In its 2001 and 2003 decisions in *Ocean Port*<sup>1</sup> and *Bell Canada*,<sup>2</sup> 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.<sup>3</sup>

11. The *Financial Services Tribunal Act, 2017* (the "Act") requires that, to the extent practicable, those appointed as adjudicators of the Tribunal shall have experience and expertise in the regulated sectors. The Chair, in assigning Members to a panel, is required to take into consideration the experience and expertise of each Member which will enable the panel to decide the issues raised in the particular matter before it.

12. 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.

13. The legislators should 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 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

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

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

<sup>3</sup> *Id.*, particularly para 21

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.

14. 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**

15. 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.

16. For the purposes of section 15, 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 entity<sup>4</sup> 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.

17. For the purposes of section 15 but subject to section 16, 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 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 Financial Services Regulatory Authority 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;
- (b) 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

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<sup>4</sup> 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.

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.

- (c) 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;
- (d) 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
- (e) 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.

18. Nothing in sections 15 and 16 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 perceives the reasonable possibility of having a conflict of interest.

### **Disclosure Obligations**

19. In addition to the disclosure requirements set out in Reg. 381/07, Rule 11, every Tribunal Member shall disclose 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.

20. The disclosure requirements in subsection 19(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 1/100<sup>th</sup> 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.

### **Processes for Dealing with Potential Conflicts of Interest**

21. Before Members are assigned to a panel to hear a particular case, the Registrar of the Tribunal should provide each Member with 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.

22. 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.

23. 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 22 of these guidelines.

24. 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 affected) 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).

25. 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.

### **Contravention**

26. Employees and Members 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 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.

### **Confidentiality**

27. Information disclosed under the guidelines to the 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.