

**Ontario Bar Association**  
**Joint Submission**  
**of the**  
**Pension and Benefits Law Section**  
**and the**  
**Administrative Law Section**  
**Regarding the Draft**  
**Financial Services Tribunal**  
**Members' Code of Professional and Ethical Responsibilities**

**TABLE OF CONTENTS**

Introduction..... 1

General Comments..... 1

Preface..... 1

Application of Code..... 2

Member’s Oath of Office..... 2

Hearing Responsibilities ..... 2

Preamble ..... 3

Conflict of Interest Provisions ..... 4

Procedure to be Followed when Potential Conflict of Interest Concerns Arise ..... 6

Disclosure Obligations..... 7

Responsibilities to the Tribunal Chair ..... 8

Responsibilities to the Tribunal ..... 8

Responsibilities to the Tribunal Registrar..... 9

Responsibilities Following the Expiration of an Appointment..... 9

List of Authors ..... 10

## **Introduction**

We are pleased to provide our submission on behalf of the Pension and Benefits Law Section and the Administrative Law Section of the Ontario Bar Association (“OBA”). The OBA has more than 15,000 members.

Our Pension and Benefits Law Section has more than 275 members representing various stakeholders within the pension and benefits industry. These stakeholders include pension and benefit plan administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The Administrative Law Section has approximately 500 members representing a significant cross-section of the Ontario's administrative justice community and a spectrum of interests concerning Agencies, Boards, Commissions and Tribunals throughout Ontario.

In early 2005, the Financial Services Tribunal (“FST”) provided the OBA Pension and Benefits Section with a draft “Members’ Code of Professional and Ethical Responsibilities” (the “Draft Code”) for review and comment.

## **General Comments**

We appreciate this opportunity to provide our comments.

We support the main principles of the Draft Code, but we would prefer that the content of the Draft Code be more comparable to that of the “Code of Professional and Ethical Responsibilities for Members of Adjudicative Tribunals” established by the Society of Ontario Adjudicators and Regulators (the “SOAR Code”). The SOAR Code was established to apply to tribunals such as the FST and it was developed after at least two years of consultation. Throughout this submission, we make reference to specific provisions of the SOAR Code that we feel would be more appropriate or more concise.

We also have some general concerns with the structure of the Draft Code, such as the fact that a “Preamble” appears in the middle of the document. We recommend that the Draft Code be reorganized. We would prefer to see the document organized to correspond more closely with the organization of the SOAR Code.

On a more substantive note, we have significant concerns with respect to provisions of the Draft Code that would require a member to participate on a panel despite his or her individual judgement to the contrary. If these mandatory provisions remain in the Draft Code, members of the legal profession may be dissuaded from joining the FST over concerns that their obligations to the FST could run contrary to law society guidelines.

## **Preface**

We have some concerns as to whether the Preface should form part of the Draft Code. The Preface is merely a statement of intention and we would hope that the Draft Code would be able to stand on its own. We would recommend replacing the Preamble with an Article

similar to the first sentence of Section 2 of the SOAR Code, to reflect the fact that the Draft Code aims to maintain the integrity, competence, and effectiveness of the FST as a whole.

Paragraph 4 of the Preface suggests that the Draft Code, in its final form, was adopted following completion of an extensive consultative process involving the pension “community”. We are not aware that the consultative process has been extensive and we would welcome further details concerning the consultative process. We recommend that the Draft Code also be circulated to pensioner groups and labour groups and that it have a broad consultation process. The SOAR Code was subject to a consultation process over a two year period, but we were given only a few months to review the Draft Code. We would welcome the opportunity to participate in any discussions or further consultations on the Draft Code.

In addition to relating to the pension “community”, the Draft Code should also relate to matters before the FST concerning other industries regulated by the FST, such as the insurance industry. We recommend that these other industries also be consulted in this process.

### **Application of Code**

We recommend the addition of a paragraph similar to Section 5 of the SOAR Code, to ensure that the Draft Code “may be amended from time to time to reflect the developing experience of the tribunal.”

### **Member’s Oath of Office**

It would be appropriate to have the members “sign” their oath of office to provide confirmation and a record of the oath.

### **Hearing Responsibilities**

Article 6 appears to address two separate issues: timing of hearings and fairness of hearings. Article 7 also addresses two separate issues: respect for the parties and findings of fact. It would be appropriate to separate these issues in both of these Articles into separate Articles.

Article 7 provides that FST members should “strive to fully understand the evidence and arguments from each party’s perspective and shall be open to persuasion by superior arguments”. We would prefer a more concise statement, such as that found in Section 50 of the SOAR Code, to provide that “an adjudicator shall make each decision on the merits and justice of the case, based on the law and on the evidence.”

Article 8 concerning adjudicative decisions could be more concise. We recommend the language found in Section 51 of the SOAR Code. However, we also suggest that the issues applicable to part-time members be addressed specifically, perhaps in a separate section.

We recommend that Sections 52 and 53 of the SOAR Code replace Articles 9 and 10 of the Draft Code, concerning previous decisions and standards, with any necessary

modifications. We believe that Section 52 of the SOAR Code is important to ensure the rendering of decisions without “undue delay”.

We recommend removing the phrase “during the hearing, which in the ordinary course may be made by the panel chair, are in fact” in Article 12 (and inserting the word “be”), concerning procedures and evidence. We do not see a reason to preclude pre-hearing matters from the application of Article 12.

Article 13, concerning decision-making, is similar to Sections 65 and 66 of the SOAR Code, except that the SOAR Code includes a requirement of being timely. We believe the element of timeliness should be included.

With respect to Articles 14 and 15, we question whether an FST member should share only “relevant” information with the panel in private. We do not see any harm in an FST member disclosing information to all the parties and submit that it should be for the parties to decide what is relevant.

### **Preamble**

The preamble should directly address the unique challenges faced by the FST owing to its structure and its limited resources.

Although it is beyond the scope of this response, we wish to observe that some of the problems experienced by the FST could be overcome by:

- (1) having a full-time FST Chair and/or Vice-Chair;
- (2) narrowing its mandate (for example, creating a separate tribunal focused on pension matters); and
- (3) allocating greater resources to the FST.

While the draft preamble notes that there is a lack of full-time members on the FST, it should also make reference to the fact that part-time members receive nominal compensation and that minimal resources are made available to them. These considerations impact both upon the ability of members to structure their professional obligations in a manner so as to avoid conflicts of interest and their access to tools to help them determine whether they are in a conflict situation and how best to deal with it.

The aim of the draft conflict of interest provisions seems to be twofold:

- (ii) to clarify circumstances when conflicts exist and do not exist; and
- (iii) to compel FST members to sit on panels despite conflicts of interest.

While it is true that the FST should not be asked to meet the standards applicable to other tribunals because of its special circumstances, a significant proportion of current members of the FST are lawyers or actuaries. Therefore, the conflict of interest provisions

applicable to FST members cannot be wholly inconsistent with conflict of interest guidelines applicable to the practice of law or actuarial practice standards. In particular, lawyers would not be able to serve on the FST if FST guidelines relating to conflict of interest compelled them to act in a manner contrary to their professional obligations under the *Rules of Professional Conduct*. Other professionals who are members of the FST, such as actuaries, may also be subject to rules of professional conduct.

Further, it must also be noted that when conflict of interest allegations are brought against a member of the FST, it is the reputation of the individual member, not just the FST, which is impugned. This factor could also dissuade legal professionals from serving on the FST if the conflict of interest provisions were enacted in their current form.

The draft preamble states that the FST's constituent statute clearly "assigns a high priority to the adjudication of issues within the Tribunal's jurisdiction by people who are particularly expert in the subject matter from which the issues arise." This is an overstatement of the provisions of the enabling legislation, which merely provide that to the extent practicable, members who sit on the FST should be expert in the subject matter from which the issues arise. While the FST hears a variety of cases, the expertise of its members lies chiefly in the pension realm. Further, while the inclusion of experts on the FST is undoubtedly desirable, it should not be seen as a goal that is worthy of sacrificing the reputation and integrity of the FST and its constituent members.

While "practical variations in the standards of procedural fairness" must certainly be allowed for in relation to the FST, any variations in conflict of interest guidelines must also be practical in the sense that they allow legal professionals to serve on the FST without putting themselves in conflict with their full-time professional obligations. Such variations must also be sensitive to the integrity of the first-level decision. The FST should consider current rates of appeal from its decisions to determine if its structure and practices relating to conflict of interest are creating more inefficiency than they are purporting to resolve.

### **Conflict of Interest Provisions**

As noted in Article 16 of the Draft Code, the responsibility of FST members is not only to avoid being in a conflict of interest position, but also to avoid being put in a situation where there is an *appearance* of a conflict of interest. This principle should better inform the other Articles relating to conflict of interest.

Article 17 is the most problematic or troublesome of the draft conflict of interest provisions, owing to its mandatory language. Article 17 states that members *shall not* refuse an assignment to a case, or withdraw from a case, by reason only of certain enumerated circumstances or circumstances analogous to them. The effect of such language is to remove the discretion of FST members to determine whether they are in a conflict of interest or in a position where a reasonable apprehension of a conflict of interest would exist.

Article 17(b) states that a conflict of interest will not arise solely from the fact that a party is a current or former client of the member's current or former firm in respect only of matters not within the FST's jurisdiction when the member at no time had a personal client

relationship with the party. This provision is problematic due to the likelihood of an apprehension of bias arising from such circumstances. It is possible that in such circumstances a member may have an actual pecuniary interest in the issue he or she is being asked to adjudicate, owing, for example, to his or her position as an equity partner entitled to a distribution of profits from the firm or former firm. This section would also seemingly compel a FST member to sit on a panel that is to adjudicate issues brought by a party could be a significant client of the member's law firm. The member would be forced to sit on the panel knowing that the decision the member makes could have significant repercussions on the member's firm's future relationship with a client and, as a result, the member's relationship with his or her partners. It is also possible that a member could be in contravention of Rule 2.04 of the *Rules of Professional Conduct* (see: [http://www.lsuc.on.ca/pdf/rpc\\_2.pdf](http://www.lsuc.on.ca/pdf/rpc_2.pdf)).

While Article 17(c) is substantially uncontroversial, we believe that some clarification is required. The provision states that a conflict of interest does not exist due only to the fact that a party is a former client of the member's current or former firm in respect to the matters within the FST's jurisdiction if the firm did not act for the party in the current proceedings, the member at no time had personally a client relationship with the party, and the party's client relationship with the firm ended at least one year before the commencement of the hearing. Recent jurisprudence on this issue indicates that there must be an actual or formal severance of a professional relationship to dissipate conflict of interest concerns. Rather than stating that the member's professional relationship with the party ended at least one year before the commencement of the hearing, the provision should read that the member's professional relationship with that party was formerly severed at least one year before the commencement of the hearing. While the difference may be subtle, the current drafting would seem to compel FST members to sit on panels adjudicating matters in which a party had a relationship with their firm and advised the party in relation to the matters before the FST, but such advice had been sought more than one year prior to the actual hearing. While such a situation could give rise to a conflict of interest under the *Rules of Professional Conduct*, the member would be barred from removing himself from the panel.

Article 17(e) states that a conflict of interest will not arise when the panel involves a party that, while not a member of the member's current firm, was at some point advised by a current or past partner or associate of the member's current or former firm, other than the member, in respect of the very matter before the FST, if the party's client relationship with any firm with whom the member was or is associated came to an end at least one year prior to the hearing. This provision would, once again, seemingly compel a member to serve on a panel despite the likelihood of an apprehension of bias.

In the circumstance described, the panel member's firm or former firm acted on the very file at issue. Lawyers have a duty of loyalty and confidentiality to their clients that lasts beyond the termination of the solicitor-client relationship. Compelling a panel member to adjudicate an issue on which a party to the hearing was given legal advice by the panel member's firm or former firm would put the panel member in clear conflict with his or her professional obligations as a lawyer. This provision could thus hamper any effort to attract legal professionals to serve on the FST. Perhaps more problematic, there is a strong likelihood that a reasonable apprehension of bias would be found to arise in such circumstances.

Article 17(f), however, is not only an appropriate provision, but also a necessary one. In contrast to Article 17(e), the effect of Article 17(f) would likely allow for the participation of a broader array of experts on the FST. In practice, it would be extremely difficult, if not impossible, to find experts to serve on panels determining common pension issues if panel members would be found to be in a conflict of interest owing solely to the fact that they are currently advising their clients on those same issues. For example, if a member was in a conflict of interest position solely by virtue of the fact that he or she was being asked to adjudicate a *Monsanto*-related issue while he or she was providing professional advice on such issues, most legal professionals involved in the pension field would be effectively barred from serving on the FST. As it would be untenable to provide that such circumstances would constitute a conflict of interest, we agree with the inclusion of Article 17(f).

While Article 17(g) would generally be acceptable, the mandatory language of Article 17 could potentially compel a panel member to act in a situation where there will be a clear appearance of a conflict of interest. While publishing an article, giving a lecture or otherwise expressing an opinion relating to an issue that arises in a panel hearing would not normally bar a member from serving on a panel, there may be instances in which it would be appropriate for the member to remove himself or herself from a panel due to his or her prior public statements. For example, if a FST member has taken a very strong and public stance against a specific position, it would be reasonable for a party to a proceeding to be concerned that that member, if on the panel, would have a predisposition relating to that issue that would affect his or her impartiality in adjudicating the dispute.

Our concerns relating to Article 17(i) are closely related to those already provided with regard to Article 17(b). In instances where a panel member is receiving a fixed income out of a funded plan, sitting on a panel in which that plan is implicated would not necessarily give rise to a conflict of interest. However, in some situations, the effect of Article 17(i) may be to compel a member to sit on a panel despite the fact that he or she has a direct pecuniary interest in the issue being adjudicated.

### **Procedure to be Followed when Potential Conflict of Interest Concerns Arise**

Notably absent from the Draft Code are provisions and procedures relating to situations where the FST Chair finds him or herself in a conflict of interest. Sections 35 to 37 of the SOAR Code contain express provisions related to a conflict of interest affecting a tribunal chair. Given that the FST does not have a full-time Chair, the possibility of conflicts of interest must be addressed.

With respect to the procedure outlined to apply to panel members who find themselves in situations outlined in Article 17 of the Draft Code or closely analogous circumstances, the mandatory language of Article 18 is problematic. Article 18 states that a FST member *shall not refuse* to accept the FST Chair's assignment to such a panel or, except with consent of the FST Chair, refuse to continue to serve on such a panel, provided that he or she is confident of his or her ability to participate impartially in the conduct of the hearing and in the decision-making of the panel. Once again, discretion must be left with a panel member to refuse to accept the FST Chair's assignment when the member believes that he or she is in a conflict of interest position or in a position that would give rise to a reasonable apprehension of a conflict of

interest. We prefer the procedure used in Section 29 of the SOAR Code that would provide panel members with the personal discretion to determine whether or not he or she would continue with a hearing when the FST Chair determines that the circumstances of the potential conflict of interest are “insignificant”.

Our concerns relating to Article 19 are centred primarily on the Article’s drafting. Article 19 outlines a process that a panel member is to follow when he or she encounters circumstances other than those set out in Article 17 that might reasonably be expected to put the member in a conflict of interest position. Article 19 provides that information relating to a possible conflict of interest shall be shared with other members of the panel, and that the panel, not the member, shall decide whether it is advisable and feasible to alert the parties to those circumstances. Given, once again, that it is the reputation of the panel member, not just that of the FST which is called into question when conflict of interest allegations arise, a panel member should have discretion to determine whether or not the potential conflict situation is communicated to the parties.

Article 21 provides that after they join the FST, members are allowed to continue their private practice as pension advisors and advocates subject to certain restrictions. Notably, however, Article 21 does not provide any guidance to members engaged in practices outside of the pension realm. Article 21 seems to indicate that the restrictions provided do not apply to those engaged in other industries that are regulated by the FST such as the insurance industry. This omission should be remedied.

Article 22(b) provides that if a lawyer at a law firm has been a member of a FST panel, no other lawyer of that law firm may question the correctness of the decision of that panel. While we generally agree that the law firm should not be involved in a judicial review or appeal of that decision, we do not agree that the law firm cannot subsequently take issue with the particular decision on behalf of any other client. In our view such a restriction would unnecessarily hamper the law firm's ability to serve the interests of other clients in subsequent cases.

### **Disclosure Obligations**

Article 23 provides that a member shall fully disclose any actual or apparent conflict of interest that may arise as a result of any direct or indirect beneficial interest in specific entities. It is suggested that disclosure obligations should arise from any actual or *perceived* conflict of interest, rather than an apparent conflict of interest.

Further, Article 23(b)(iv) requires a member to disclose any actual or apparent conflict of interest that may arise as a direct or indirect beneficial interest in the engagement of the management of a business within a regulated sector, other than as a legal advisor or actuarial or pension consultant or an employee engaged in the supervision, management or administration of a pension plan or pension fund. It is not clear what situation this provision is targeted to address. More specificity is required with respect to the regulated sectors that are to be impacted by the provision.

With regard to Article 24, it is once again important to note that the Draft Code does not provide any guidance with respect to the procedures to be followed when the FST Chair finds himself or herself in a conflict of interest position.

### **Responsibilities to the Tribunal Chair**

Articles of the Draft Code need to be renumbered, since the numbering for Articles 23 and 24 is duplicated.

There is little in the Draft Code concerning conflicts that may be faced by the FST Chair. Once again, we recommend that provisions similar to Sections 35 to 37 of the SOAR Code, related to the obligations of the FST Chair, be added to the Draft Code.

With respect to Article 25, it is not clear why the conflict must have a “substantial basis” before it is brought to the attention of the FST Chair. We prefer the language in Sections 67 to 71 of the SOAR Code.

### **Responsibilities to the Tribunal**

With respect to Article 28, concerning expertise, we suggest the broader language of Section 72 of the SOAR Code be used instead.

Article 29, concerning policies, appears very similar to Section 73 of the SOAR Code, except that the Draft Code has added the phrase “unless particular circumstances warrant some variation”. It was not clear to why this phrase was added.

We recommend adding reference to the term “meetings” in Article 31, concerning member availability.

We recommend adding a provision similar to Section 76 of the SOAR Code to ensure that an FST member does not publicly criticize the “decisions, procedures or structures” of the FST. However, it should be possible for a member’s firm (and other members of the firm) to criticize a decision to advance the best interests of its client.

Article 32, concerning disclosure, is not as preferable as Section 78 of the SOAR Code. We also recommend deleting the provision in parenthesis and provide that the FST Chair will be advised promptly when something has been disclosed.

We recommend replacing the word “respected” in Article 33, concerning confidentiality, with the word “maintained”.

Article 34, concerning disclosure, appears redundant. We believe that Article 32 already addresses this issue.

Article 35, concerning continuing confidentiality, would be more appropriate in the section dealing with Responsibilities Following the Expiration of Appointment at the end of the Draft Code.

We recommend rewording Article 36, concerning members exploiting their position, to add “or as a person in a position of authority”, similar to language used in Section 79 of the SOAR Code.

With respect to Article 38, political activities, specific provisions related to part-time members should be added. We recommend reference to the provisions set out in Sections 90, 91 and 92 of the SOAR Code.

### **Responsibilities to the Tribunal Registrar**

No comments.

### **Responsibilities Following the Expiration of an Appointment**

We recommend moving Article 35 to this section.

It is not clear from the wording of the Articles how a member who continues on a *per diem* basis under Article 41 would be treated under Article 40 for the prohibition on appearances before the FST.

Article 42 is similar to Article 36, although it offers continuing obligations after expiration of the appointment, but we do not believe that the phrase “improper advantage” is clear.

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