

# ONTARIO SECURITIES COMMISSION

## GUIDELINES FOR MEMBERS AND EMPLOYEES ENGAGING IN ADJUDICATION

### Article 1: General Provisions

#### 1.1 Purpose

These guidelines (“Guidelines”) are intended to provide guidance to Members and employees on the professional and ethical standards expected of them in the exercise of their adjudicative responsibilities to ensure that all proceedings before the Commission’s adjudicative panels are, and are seen to be, conducted with integrity, competence, effectiveness, independence and impartiality.

The Guidelines outline broad, generally accepted principles governing the conduct of Members and employees while engaged in the adjudicative process. The Guidelines are not exhaustive and cannot anticipate all possible circumstances in which Members or employees may be called upon to exercise judgement while carrying out their adjudicative responsibilities. Members and employees must always conduct themselves in accordance with applicable law and, in particular, when engaged in the adjudicative process, must adhere to the principles of administrative law governing administrative tribunals. The Guidelines are also intended to describe the adjudicative procedures of the Office of the Secretary and the role of Independent Adjudicative Counsel, which have been adopted by the Commission in accordance with those principles.

#### 1.2 Definitions

In these Guidelines,

“**Act**” means the *Securities Act*, R.S.O. 1990, c. S.5 and the *Commodity Futures Act*, R.S.O., 1990, c. C.20;

“**Adjudicative Committee**” means the Adjudicative Committee of the Commission;

“**Chair of the Panel**” means the Member assigned to preside as Chair of a Panel;

“**Code**” means the Code of Conduct of the Commission as amended from time to time;

“**Commission**” means the Ontario Securities Commission;

“**Independent Adjudicative Counsel**” means legal counsel employed from time to time by the Office of the Secretary whose principal function is to provide independent legal advice and assistance to Members on adjudicative matters;

“**Independent Adjudicative Personnel**” means Independent Adjudicative Counsel and clerks or articling students to the Vice-Chairs or to the Secretary;

“**Member**” means a member of the Commission as defined in Section 3 of the Act;

“**Panel**” means the Member or group of Members assigned to hear and determine a Proceeding;

“**Party**” means a Party as defined in the Rules (and, accordingly, includes Staff);

“**Proceeding**” means any adjudicative proceeding before a Panel pursuant to the Act where the Commission’s Rules apply;

“**Rules**” means the *Ontario Securities Commission Rules of Procedure* as amended from time to time;

“**Secretary**” means the Secretary to the Commission appointed pursuant to Section 7 of the Act and includes any Deputy Secretary; and

“**Staff**” means employees of the Commission excluding Members, the Secretary, Deputy Secretary and Independent Adjudicative Personnel.

### 1.3 Application

- (1) ***Guidelines apply to all Members and employees*** – These Guidelines apply to all Members, and to all employees of the Commission, when involved in the adjudicative process.
- (2) ***General obligation*** – All Members and employees of the Commission involved in the adjudicative process are expected to conduct themselves in a professional and ethical manner consistent with these Guidelines, the Code and the requirements of applicable law.

### 1.4 Publication and Amendment of the Guidelines

- (1) ***Publication*** – The Guidelines will be published in the Ontario Securities Commission *Bulletin* and on the Commission’s website.
- (2) ***Review of Guidelines*** – The Adjudicative Committee will review the Guidelines at least biennially and will recommend any appropriate amendments to the Guidelines to the Commission.

## Article 2: Fairness and Impartiality

### 2.1 Interpretation

Where the circumstances surrounding the participation of a Member in a Proceeding could raise questions about the Member’s ability to hear the matter and render a decision in a fair and impartial manner, the test for determining whether the Member should recuse himself or herself is whether the facts give rise to a reasonable apprehension of bias or lack of adjudicative independence in the mind of a reasonable and informed person (referred to hereafter as “bias”).

Any assessment of a Member's actual or perceived bias in the exercise of his or her adjudicative duties in connection with a Proceeding should include a consideration of all relationships or activities that could reasonably be apprehended as being incompatible with the exercise of that Member's adjudicative responsibilities.

Bias exists where considerations extraneous to a Proceeding could, or could reasonably appear to, influence a Member's ability to make a fair and impartial decision.

## 2.2 General Rule

No Member should participate as an adjudicator in a Proceeding where:

- (a) to do so would result in a violation of the Code;
- (b) to do so would give rise to bias; or
- (c) the Member is of the opinion that he or she, for any reason, should not participate.

## 2.3 Disclosure and Recusal

- (1) ***Duty to inquire and disclose*** – Each Member should, in carrying out his or her adjudicative responsibilities, consider and inquire into any circumstances that might give rise to bias and, immediately upon becoming aware of such circumstances, disclose those circumstances to the Secretary.
- (2) ***Before the commencement of a Proceeding*** – If a Member becomes aware of circumstances that might give rise to bias after the Member has been assigned to a Panel but before the Proceeding has commenced, the Member, as soon as becoming aware of the circumstances, should:
  - (i) without being required to give reasons or explanation, inform the Secretary that he or she will recuse himself or herself from the Panel and the Secretary shall immediately remove that Member from the Panel; or
  - (ii) request the Secretary's advice as to whether the circumstances would give rise to bias on the part of the Member. If the Secretary advises that the circumstances would give rise to bias, the Member may either (a) recuse himself or herself from the Panel without being required to give reasons or explanation, or (b) request the Secretary to refer the matter for further consideration as described in paragraph (iii) below; or
  - (iii) request the Secretary to refer the matter directly for consideration by the Chair of the Adjudicative Committee ("Chair") or a quorum of Members ("quorum") selected by the Chair. If the Chair or the quorum advises that the circumstances give rise to bias on the part of the Member, the Member shall immediately be informed of the Chair's or quorum's advice and the reasons for such advice, and the Member should recuse himself or herself;

(iv) if a Member has been advised in accordance with paragraphs (ii) and/or (iii) above that the circumstances give rise to bias on the part of the Member, and the Member chooses not to recuse himself or herself, the Chair or the quorum may require the Secretary to inform the Parties of the circumstances and invite the Parties to make submissions on the participation of the Member at or prior to the commencement of the Proceeding on which the Member proposes to sit. The Panel assigned to the Proceeding, including the Member, should, after considering the submissions, make a final determination of the matter prior to the commencement of the Proceedings;

(v) if it is determined in accordance with the foregoing process that the circumstances do not suggest bias, but are of a nature that make it desirable that they be disclosed to the Parties, the Secretary may, with the consent of the particular Member, inform the Parties of the circumstances prior to the commencement of any step in the Proceeding. If a Party objects to the participation of the Member, the Member may recuse himself or herself. If the Member chooses not to recuse himself or herself, the Panel, including the Member, shall invite the Parties to make submissions on the participation of the Member and should, after considering the submissions, make a final determination of the matter prior to the commencement of the Proceedings.

(3) ***During a Proceeding*** – If at any time during a Proceeding, a Member becomes aware of circumstances that might give rise to bias on the part of the Member, the Member should, as soon as practicable, request a recess in the Proceeding and inform the other Members of the Panel of the circumstances. The Member should either:

(i) without being required to give reasons or explanation, inform the other Panel Members that he or she will recuse himself or herself from the Panel and the other Members shall immediately inform the Parties of that Member's decision; or

(ii) request the advice of the other Panel Members as to whether the circumstances give rise to bias on the part of the Member. If the other Members of the Panel conclude that the circumstances do give rise to bias, the Member may recuse himself or herself immediately without being required to give reasons or explanation and the other Members of the Panel should immediately inform the Parties of that Member's recusal without being required to give reasons or explanation; or

(iii) inform the other Members of the Panel of the circumstances and, as soon as practicable in the Proceeding, inform the Parties of the circumstances and invite the Parties to make submissions on the continued participation of the Member;

(iv) if in the circumstances referred to in paragraph (ii) above, the Panel determines that although the circumstances do not give rise to bias on the part of the Member, they are of a nature that makes it desirable that they be disclosed to

the Parties, the Panel should, prior to the resumption of the Proceeding, inform the Parties of the circumstances and invite them to make submissions on the continued participation of the Member.

- (4) ***On Motion by a Party*** – If at any time prior to the commencement of or during a Proceeding, a Party alleges that circumstances exist that give rise to bias on the part of a Member, the Member may, without being required to give reasons or explanation, recuse himself or herself. If the Member does not choose to recuse himself or herself, the Panel, including the Member, shall invite all Parties to the Proceeding to make submissions on the continued participation of the Member prior to the continuation of the Proceeding.
- (5) ***Reasons*** – The Panel should provide oral reasons for its decision on any issues that are considered under paragraphs (3) or (4) of this Article and should provide written reasons at the request of any Party in accordance with the Rules.

### **Article 3: Responsibilities of Members Serving on Panels**

#### **3.1 Decisions**

Members must endeavour to make each decision in a Proceeding on a fair and impartial basis in accordance with these Guidelines and applicable law, including complying with principles of procedural fairness and the requirements of natural justice.

#### **3.2 Transparency**

Proceedings should be conducted in a manner that is, and is seen to be, transparent and fair.

#### **3.3 Priority of Adjudicative Duties**

Members should carry out their adjudicative duties with reasonable skill, diligence, care, courtesy and promptness and shall endeavour to ensure that their other obligations as Members of the Commission or otherwise do not detract from the performance of their adjudicative duties.

#### **3.4 Member's Conduct During a Proceeding**

- (1) ***Judicial manner*** – Members should conduct themselves at all times during a Proceeding in a dignified and judicial manner. Members should approach every Proceeding with an open mind and avoid inappropriate comments or conduct.
- (2) ***Member's questioning of Parties and witnesses*** – Members' questioning of parties and/or witnesses should not appear to advocate any particular position. Members should avoid undue interruption and interference in the examination and cross-examination of witnesses.
- (3) ***Decorum*** – Members should demonstrate in their conduct and should require from the Parties and all persons in attendance at a Proceeding, proper decorum and respect for the Parties, their representatives, witnesses, and the hearing process itself. Members should be aware and respectful of social and cultural differences.

- (4) ***Unrepresented parties*** – In order to assist unrepresented Parties in a Proceeding, Members, while preserving their impartiality, may explain to such Parties the procedural and evidentiary rules governing the Proceeding, but may not provide legal or strategic advice.

### **3.5 Role of the Chair of the Panel**

The Chair of a Panel should preside over the Proceeding and should endeavour to ensure that all of the Parties have a fair opportunity to present their case.

### **3.6 Panel Deliberations, Decisions and Reasons**

- (1) ***Decisions*** – Members should reach their decisions on all matters in a Proceeding based on the relevant law, the evidence presented to them and the submissions made. Members should conduct their deliberations and make their decisions independently of other Members of the Commission who are not on the Panel. The prospect of disapproval from any person, institution, or group, including other Members, should not deter a Member from making the decision that he or she believes is fair and just.
- (2) ***Issues not raised by the parties*** – In making a decision, a Panel should not consider issues or matters not raised or addressed in the Proceeding. If the Parties did not raise or address a relevant issue, or did not present relevant law or authority that could significantly affect the Panel's decision, the Panel should generally request the Parties to make submissions on the issue, law or the authority in question.
- (3) ***Consultations with other Members not on the Panel*** – A Panel may, solely on its own initiative if it considers it desirable to do so in the circumstances, consult on an informal basis with another Member who is not a Panel Member (other than the Chair of the Commission and any Member who would have an actual or perceived conflict of interest) on a legal question that is being considered by or that is before the Panel. For greater certainty, a Member who is consulted by a Panel in accordance with this Article shall not participate in the deliberations of the Panel, shall not comment on any finding of fact by the Panel and such consultation shall not derogate from the Panel's independent decision-making responsibility under Articles 3.1 and 3.6(1) or from the principle set forth in Article 3.6(2)
- (4) ***Timeliness*** – Members should take reasonable steps so that Proceedings are conducted in a timely manner, avoiding unnecessary delays.
- (5) ***Departing from prior Commission decisions*** – While due consideration should be given by Panel Members to previous Commission decisions and the desirability for a degree of consistency in Commission decisions, a Panel may depart from prior decisions of the Commission, but should generally explain the reasons for the departure in its reasons.
- (6) ***Timing for releasing reasons*** – A Panel should prepare its decision/reasons in a Proceeding without undue delay considering the urgency of the matter. On a reserved decision/reasons, the Panel should endeavour to issue its written decision/reasons within a reasonable period

following the conclusion of the hearing. A longer period for the preparation of decisions/reasons is appropriate in circumstances such as an unusually lengthy or complex Proceeding, or a Panel Member's illness or other unavoidable absence.

## **Article 4: Communications by Members serving on Panels**

### **4.1 Communications during the Proceeding**

- (1) *Communicating with Parties during a Proceeding* – A Panel Member should not communicate prior to or during a Proceeding, directly or indirectly, with any Party, including Staff, any witness, representative, interested person or legal counsel for any of the foregoing, with respect to any matter that is likely to be raised or is at issue in the Proceeding, except in the presence of all Parties, their legal counsel, if any, and the other Panel Members. Communications can be made by Panel Members to Parties through the Office of the Secretary.
- (2) *Communicating with Independent Adjudicative Personnel and the Secretary* – Notwithstanding Article 4.1(1), the Panel, or a Panel Member alone, may at any time communicate matters relating to a Proceeding in private with the Secretary and/or Independent Adjudicative Personnel. For the responsibilities of Independent Adjudicative Personnel, see Article 6.
- (3) *Communicating with media* – A Member of a Panel should not communicate with the media with respect to a matter that is before the Panel.
- (4) *Confidential information* – A Member of a Panel should not divulge confidential information related to a Proceeding unless legally required or authorized to do so.

### **4.2 Communications following a Proceeding**

- (1) *Reasons* – After a Proceeding has concluded and the Panel has issued its final decision and reasons, a Member who has served on the Panel should exercise caution in discussing any matter that was the subject of the Proceeding until the final disposition of the matter. A matter is considered to be **finally disposed of** only after the later of (i) where an appeal has not been filed, the expiry of the statutory time period for filing an appeal; and (ii) where an appeal has been filed, the exhaustion of the appeal process before the courts.
- (2) *Communicating with Parties following the Proceeding* – A Panel Member should generally not communicate with any Party, including Staff, any witness, representative, interested person or legal counsel for any of the foregoing, in respect of matters formerly before that Panel Member in a Proceeding.
- (3) *Communicating with other Members of the Commission in respect of an appeal of a Proceeding* – A Panel Member should not participate in any consideration or discussion by the Commission of any appeal or possible appeal of any decision in any Proceeding in which the Panel Member participated.

- (4) ***Communicating following the final disposition of a matter*** – Notwithstanding any other paragraph of this Article, after final disposition of a Proceeding (as defined in Article 4.2(1)), a Member who served on a Panel may participate in any discussion or review by the Commission of any matter that was the subject of the Proceeding or any appeal of the Proceeding. In doing so, a Member should not comment on the Panel’s deliberations, which should be treated as confidential. It is generally not appropriate for a Member to appear critical of another Member’s decision or reasons or to criticize an appellate decision that may have been critical of or overturned the decision in which that Member participated.
- (5) ***Communicating generally on matters relating to a Proceeding*** – Notwithstanding that a Member participated on a Panel, a Member may generally comment on any policy issue or matter of public interest under the Act, any issue that affects the operation of the Commission, the independence of Commissioners, fundamental aspects of the administration of the Act, or the Member’s personal integrity. A Member may also participate in discussions of Commission decisions, including participating in public or professional seminars, conferences and law reform or other scholarly or educational activities directed to the improvement of the law and an understanding of the Commission’s mandate and decisions and may, in connection therewith, discuss and comment on Commission decisions/reasons, including those of a Panel on which the Member participated.

## **Article 5: Participation by Members in the Commission’s Rule and Policy Making Functions**

### **5.1 Generally**

In discharging their responsibility for the administration of the Act, Members serve on the Commission, the Commission’s Board of Directors, committees of the Board, and Panels, and engage in other policy, rule-making and regulatory functions contemporaneously with exercising their adjudicative responsibilities. Although Members are expected to participate in the Commission’s regulatory functions at all times, Members should endeavour to independently perform their adjudicative roles and functions in accordance with these Guidelines.

## **Article 6: Secretary, Independent Adjudicative Personnel and Adjudicative Committee**

### **6.1 Role of the Secretary**

- (1) ***Assignment of Panel Members***– The Commission has delegated to the Secretary the authority to manage and administer the assignment of Panel Chairs and other Panel Members subject to the review and direction of the Adjudicative Committee. The Commission may, from time to time, issue directives to the Secretary with respect to the Panel assignment process and the Secretary shall administer the process in accordance with those directives. In assigning Panel Members, the Commission requires the Secretary to consider, among other things, the particular experience, expertise, background and

availability of Members and the nature of the issues that will be involved in the proposed Proceeding.

- (2) ***Conflict searches*** – In assigning a Member to a Panel, the Secretary shall ensure that the Commission’s conflict of interest policies are adhered to and that the appropriate conflicts search procedures are applied.
- (3) ***Independence of assignment process*** – While the Secretary may in his or her discretion consult with any Member (other than a Member who would be ineligible to be assigned to a Panel in accordance with these Guidelines), including the proposed Panel Chair, with respect to the assignment of a Panel for a Proceeding, no other person, including the Chair of the Commission, Staff or any Party to a Proceeding, shall suggest Panel Members or attempt to influence or participate in the selection of a Panel.
- (4) ***Reporting to Adjudicative Committee*** – The Secretary shall periodically report to the Adjudicative Committee with respect to the practices of the Secretary in assigning Panels and the Adjudicative Committee shall at least annually report thereon to the Commission.

## **6.2 Consultation with Independent Adjudicative Personnel**

- (1) ***Role*** – Independent Adjudicative Personnel may provide independent legal advice and assistance to the Members of a Panel. The role of Independent Adjudicative Personnel assigned to a Proceeding shall be determined by the Panel. The Panel may give instructions to Independent Adjudicative Personnel with respect to matters such as summarizing the facts and law, carrying out legal research, advising the Panel on administrative law matters, or assisting in the preparation by the Panel of initial drafts of a decision or reasons. Independent Adjudicative Personnel generally should not participate in the deliberations of a Panel, but may be present at those deliberations at the request of the Panel. Although the Panel may, at any step in the Proceeding, seek the legal counsel and advice of Independent Adjudicative Personnel, the role of Independent Adjudicative Personnel should be consistent with principles of procedural fairness. In considering any advice of Independent Adjudicative Personnel, the Panel should ensure compliance with Article 3.6(2) and applicable law.
- (1) ***Conflict*** – Independent Adjudicative Personnel shall not provide counsel or assistance to a Panel where to do so would be in violation of these Guidelines, the Code and applicable law.
- (2) ***Communications by Independent Adjudicative Personnel*** – Independent Adjudicative Personnel shall not discuss any matter that could be raised or that is at issue in a Proceeding with any person other than a Panel Member, other Independent Adjudicative Personnel or the Secretary, without the consent of the Panel.
- (3) ***Communications with Parties during a Proceeding*** – Independent Adjudicative Personnel shall not communicate during a Proceeding, with any Party, including Staff, any witness, representative, interested person or legal counsel for any of the foregoing, with respect to any matter that is likely to be raised or that is at issue in the Proceeding, except for

communications: (i) to a Party or any of such other persons of procedural or administrative information related to the Proceeding; or (ii) as otherwise authorized by the Panel or the Secretary.

- (4) ***Communications Generally*** – Independent Adjudicative Personnel shall not at any time comment on Panel deliberations or divulge confidential information related to a Proceeding unless legally required or authorized to do so.

### **6.3 Role of the Adjudicative Committee**

The mandate of the Adjudicative Committee is to oversee the Commission's adjudicative procedures and practices and recommend improvements thereto, as appropriate, to the Commission. The Adjudicative Committee will carry out the review referred to in Article 1.4(2), and the supervision of the Secretary referred to in Article 6.1(1), of these Guidelines. For greater certainty, the Adjudicative Committee should have no direct role or involvement in any Proceeding or the decisions of any Panel. A Member of the Adjudicative Committee is not, by reason of membership on that Committee, disqualified from being a Member of any Panel.

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