

January 21, 2009

File No. 214281

SOLICITOR-CLIENT PRIVILEGE

The Chair of the Board of Directors of
Toronto Port Authority
60 Harbour Street
Toronto, ON M5J 1B7

Dear Sir:

Conflicts of Interest

You have asked for our opinion whether two members of the board of directors (the "Board") of Toronto Port Authority ("TPA") would be disqualified from either participating in discussions of the Board, or voting on decisions of the Board, relating to the following respective matters:

1. In the case of Mark McQueen, a dispute (the "Dispute") regarding whether TPA is entitled to receive the opinion and file of Goodmans LLP ("Goodmans") in respect of certain advice provided by Goodmans, over which Mr. McQueen and Lisa Raitt have asserted claims of privilege, including, without limitation, a proposed arbitration of the Dispute; and
2. In the case of Colin Watson, any matter relating to Porter Airlines Inc. ("Porter"), including, without limitation, Porter's contractual and other business relationships with TPA and those aspects of Porter's operations over which TPA has regulatory oversight, having regard to the fact that Mr. Watson has declared to the Board that he is a personal friend of Robert Deluce, the President and Chief Executive Officer of Porter.

Relevant Provisions of Letters Patent

Pursuant to section 5.1 of the Letters Patent of TPA effective June 8, 1999 (the "Letters Patent"), the conduct of the directors and officers of TPA is governed by the Code of Conduct set out in Schedule E to the Letters Patent (the "Code of Conduct"). Section 2.1 of the Code of Conduct provides, to the extent relevant, as follows:

"A director or officer shall not allow his or her personal interests...to conflict with or to give rise to the appearance of

a conflict with the duties and responsibilities of the director or officer or the interests of [TPA]."

Section 3.3 of the Code of Conduct provides, to the extent relevant, as follows:

"A director or officer who is in conflict within the meaning of Article 2 of this Code shall not participate in discussions or vote on any decision of, or provide recommendations to, the Board on any matter related to the conflict..."

None of the exceptions to these provisions in the Code of Conduct are relevant to the issues regarding Messrs. McQueen and Watson.

Section 3.1 of the Code of Conduct requires a director or officer to make written disclosure of a conflict or the appearance of a conflict forthwith after he or she becomes aware of the conflict or the appearance of a conflict. Under section 4.3 of the Code of Conduct, where such a disclosure is made to the Board by a director or officer, or facts are brought to the attention of the Board which indicate a conflict or appearance of conflict, the Board shall forthwith determine whether the director or officer is in a conflict, whether the director or officer has failed to comply with the Code of Conduct, whether the conflict has been or will be satisfactorily addressed and whether (in the case of a director) to request a director to resign. Under section 4.4, the Board shall provide a director or officer with an opportunity to be heard in connection with a determination made pursuant to section 4.3. Under section 4.6:

"Where the Board has determined that a director has failed to comply with the Code, the Board shall forthwith provide the entity that proposed the appointment of such director to the Board with notification of the failure to comply along with full particulars of the circumstances giving rise thereto."

Relevant Provisions of Conflict of Interest Act

Seven of the directors on the Board, including Messrs. McQueen and Watson, are appointed by the Governor in Council. These members of the Board are therefore "public office holders" within the meaning of the *Conflict of Interest Act*, S.C. 2006, c.9, s.2 (the "Conflicts Act"), which defines such term in section 2 to include, among other persons, "a Governor in Council appointee". Section 4 of the Conflicts Act provides as follows:

"For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to

further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests."

Subsection 6(1) of the Conflicts Act provides as follows:

"No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest."

Section 21 of the Conflicts Act further provides that:

"A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest."

Finally, section 9 of the Conflicts Act provides that:

"No public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests."

The Conflicts Act does not define "an official power, duty or function", but in our opinion members of the Board are exercising official powers, duties or functions for purposes of the Conflicts Act in acting as directors of TPA and, specifically, in discussing and making decisions regarding the affairs of TPA at Board meetings.

Analysis

Mark McQueen

In our opinion, if Mr. McQueen were to participate in the discussions of the Board in relation to the Dispute, or vote on a decision of the Board regarding the Dispute, his personal interest in the Dispute would conflict with or give rise to the appearance of a conflict with his duties and responsibilities as a director of TPA to act solely in the best interests of TPA within the meaning of section 2.1 of the Code of Conduct. Mr. McQueen is therefore precluded by section 3.3 of the Code of Conduct from participating in discussions of the Board relating to the Dispute or voting on any decision of the Board relating to the Dispute.

With respect to what would give rise to the appearance of a conflict within the meaning of section 2.1 of the Code of Conduct, reference may be made to the comments of Sopinka, J., delivering the judgment of the majority of the Supreme Court of Canada, in *Old St. Boniface Residents Association Inc. v. The City of Winnipeg*, [1990] 3 S.C.R. 1170 at p. 1196 (referring to a conflict on the part of a municipal councillor):

"I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. ... Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest."

It is self-evident that Mr. McQueen's personal interest in the Dispute is adversarial to TPA, since Mr. McQueen is asserting a claim of privilege that would preclude TPA from obtaining the opinion given by Goodmans or Goodmans' file in respect of its advice. In our opinion, a reasonable person would conclude that it might be difficult for Mr. McQueen to be objective in discussing or deciding what is in the best interests of TPA in connection with the Dispute.

In addition, in our opinion, Mr. McQueen is in a conflict of interest within the meaning of section 4 of the Conflicts Act, because in acting as a member of the Board in considering and making decisions in regard to the Dispute, he would have an opportunity to further his private interest in maintaining his claim of privilege. As such, in our opinion, he is precluded under sections 6 and 21 (and probably section 9 as well) of the Conflicts Act from participating in the discussions of the Board relating to the Dispute and voting on any decision of the Board relating to the Dispute.

Colin Watson

In our opinion, Mr. Watson would be in a conflict of interest within the meaning of section 4 of the Conflicts Act in participating in the discussions of the Board relating to Porter, or in voting on decisions of the Board relating to Porter, because doing so would provide him with an opportunity to further the private interests of one of his friends. While Porter, as a corporation, is a separate person in law from Mr. Deluce and it is Mr. Deluce with whom Mr. Watson has a personal friendship, Mr. Deluce is not merely an employee of Porter. He is the senior executive officer of Porter, he is identified with Porter as its public spokesperson and we understand that he has a significant financial interest in Porter. In order to give meaning and effect to the provisions of the Conflicts Act, in our opinion, "friends" should be broadly interpreted for the purposes of the Conflicts Act to include a corporate entity through which a friend of a public office holder carries on business. Therefore, in our opinion, Mr. Watson is precluded by sections 6 and

21 (and probably section 9 as well) of the Conflicts Act from participating in discussions of the Board relating to contracts or other business dealings between TPA and Porter and from voting on decisions of the Board relating to such matters.

In our opinion, Mr. Watson may also be considered to have a personal interest, by reason of his relationship with Mr. Deluce, that would give rise to the appearance of a conflict, when the Board considers or decides on matters relating to Porter, with his duties and responsibilities to act solely in the best interests of TPA, as a member of the Board, within the meaning of section 2.1 of the Code of Conduct. The *St. Boniface* decision indicates that a relationship with another party may create the appearance of a conflict and constitute a disqualifying personal interest (at pp. 1197-98):

"The disqualifying conduct relied on in this case consists of Councillor Savoie appearing before the Finance Committee and speaking on behalf of the developer. ... This submission would have substance if there was something to suggest that the Councillor's support was motivated by some relationship with or interest in the developer rather than in the development. ... the reasonable apprehension of bias test...would have been appropriate if it had been found that the Councillor had a personal interest in the development, either pecuniary or by reason of a relationship with the developer. In such circumstances, the test is that which applies to all public officials: would a reasonably well-informed person consider that the interest might have an influence on the exercise of the official's public duty?"

In this case, in our opinion, a reasonable person would be concerned, having regard to Mr. Watson's close personal friendship with Mr. Deluce and Mr. Deluce's close identification with Porter, that Mr. Watson might have difficulty in being objective in assessing what would be in the best interests of TPA in matters relating to Porter. Therefore, in our opinion, Mr. Watson should not, under the Code of Conduct, participate in discussions of the Board relating to Porter, nor vote on decisions of the Board relating to Porter.

Yours very truly,

