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# **OFFICE OF THE INTEGRITY COMMISSIONER**

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**REPORT**

**OF**

**THE HONOURABLE COULTER A. OSBORNE  
INTEGRITY COMMISSIONER**

**RE: THE HONOURABLE GREGORY SORBARA,  
MINISTER OF FINANCE**

**TORONTO, ONTARIO  
AUGUST 19, 2004**

**RE: THE HONOURABLE GREGORY SORBARA, MINISTER OF FINANCE**

[1] In a complaint made under s. 30 of the *Members' Integrity Act, 1994*, John Baird, the member for Nepean – Carlton, has alleged that Gregory Sorbara, Minister of Finance and member for Vaughn – King – Aurora, has contravened the *Members' Integrity Act, 1994* (including its various references to parliamentary convention) by continuing to have responsibility for the Ontario Securities Commission (OSC) and the Toronto Stock Exchange (TSX) after he had been advised that the affairs of Royal Technologies Inc. (Royal) were being investigated by the OSC, Canada Revenue Agency and the RCMP. I will refer to the specific elements of Mr. Baird's complaint in more detail shortly. For now, I note that Mr. Baird's allegations in general focus on Mr. Sorbara's failure to disclose the existence of the on-going investigations of Royal during a time frame in which he exercised ministerial responsibility for the OSC and TSX as Minister of Finance.

[2] Before he was appointed to the Cabinet on October 23, 2003, Mr. Sorbara was a director of Royal and Chair of its audit committee. His Royal shares (1,000 shares owned jointly with his wife) were transferred to a blind trust which I approved on January 5, 2004. The shares remain in the trust as far as I know.

**The Police Investigation of Royal and s. 32 of the *Members' Integrity Act, 1994***

[3] Section 32 of the *Members' Integrity Act, 1994* provides:

*Police investigation or charge*

32. *If the Commissioner, when conducting an inquiry, discovers that the subject-matter of the inquiry is being investigated by police or that a charge has been laid, the Commissioner shall suspend the inquiry until the police investigation or charge has been finally disposed of, and shall report the suspension to the Speaker. 1994, c. 38, s. 32.*

[4] I know nothing about the status of the police investigation to which I referred above, however, Mr. Baird has not suggested, nor is there any evidence to suggest, that Mr. Sorbara is the subject matter of the investigation. On the

material before me, therefore, I do not think that s.32 requires that I suspend the inquiry triggered by Mr. Baird's complaint until the police investigation (assuming it is on-going) has been completed.

### **The Facts**

[5] The facts relevant to Mr. Baird's allegations are for the most part not in dispute. They are referred to in his complaint and most seem to be generally accepted by Mr. Sorbara. I will set out what I consider to be the important facts below and then address the specific issues that Mr. Baird has referred to in his complaint.

[6] On December 22, 2003 the OSC wrote to Royal and advised Royal that it was the subject of an on-going OSC investigation. The OSC sent a copy of its December 22, 2003 letter to Market Regulation Services (RS) and Royal's officers and directors.

[7] The OSC's December 22, 2003 letter did not specifically request that Royal publicly disclose the existence of the on-going OSC investigation of Royal. It did, however, note that the OSC viewed its investigation as being "material". It is apparent to me that the OSC expected that Royal would respond by promptly publicly disclosing the investigation. That did not occur. Royal's position at the time was that it needed further information about the investigation before making a decision about public disclosure of the OSC investigation.

[8] On December 22, 2003, the OSC's media relations manager, Wendy Dey, advised her counterpart at the Ministry of Finance about the OSC's Royal investigation. This contact was consistent with the long-standing practice of notifying the Ministry of matters on which the Ministry might be asked to comment. The OSC and the Ministry of Finance officially confirmed that this practice was in place from at least 1998.

[9] On December 22 or 23, 2003, David Brown mentioned the Royal investigation in a telephone conversation with Peter Wilkinson, Mr. Sorbara's Chief of Staff.

[10] At this point Royal's position was that it needed further information before deciding whether to disclose the ongoing investigation.

[11] Late in the day on December 22, 2003 RS and the OSC informed Royal or its counsel that no further information about the investigation would be forthcoming and asked that the OSC investigation be made public. Royal was not satisfied with this and again approached the TSX and the RS. They were apparently advised that they could keep the investigation temporarily confidential. In any case, Royal did not then disclose the fact that there was an ongoing OSC investigation of Royal's affairs.

[12] On December 24, 2003 counsel for Royal and officials of the TSX came to an agreement that Royal did not have to immediately disclose the existence of the then ongoing OSC investigation. This arose out of the discussions on December 22, 2003 involving Royal, the TSX and RS.

[13] Mr. Sorbara was not a party to the discussions about Royal disclosing the existence of the OSC, Canada Revenue Agency and police investigations. He did not contact the TSX or the OSC about the matter, nor did the TSX contact him.

[14] Mr. Sorbara did not disclose the existence of the OSC investigation publicly, or even to the Premier. In his view it was for the OSC or Royal to make that disclosure.

[15] I pause here to note that the disclosure of on-going investigations present difficult problems for the OSC and the target of an OSC investigation. Some investigations lead nowhere. The disclosure of such investigations will almost

inevitably have a negative effect on the market value of the company involved. Similarly, the non-disclosure of investigations which are material and which eventually reveal alleged wrong-doing also create problems since without public disclosure the shares of a publicly traded company that is under investigation by the OSC, will be traded without knowledge of this material fact.

[16] Mr. Baird's allegations of breaches of the *Members' Integrity Act, 1994* can be conveniently grouped and summarized as follows:

**Mr. Sorbara's Ministerial Oversight of the OSC and TSX**

[17] Mr. Baird alleges that Mr. Sorbara was in a position to influence or compromise the OSC investigation of Royal until February 25, 2004 when his responsibility for the OSC ended. He submits that as a result Mr. Sorbara is somehow in breach of the *Members' Integrity Act, 1994*. Under this general heading Mr. Baird also notes that Mr. Sorbara's responsibility for the TSX did not end until March 4, 2004 when an Order in Council was issued transferring the *Commodity Futures Act*, the *Toronto Stock Exchange Act* and the *Toronto Futures Exchange Act* to the Chair of Management Board. Mr. Baird queries what contacts Mr. Sorbara and his Ministry had with the TSX throughout, including the February 25, 2004 to March 4, 2004 period.

[18] Mr. Baird emphasized the perception of conflict from Mr. Sorbara's standpoint between December 22, 2003 and February 25, 2004 in relation to the OSC and between December 22, 2003 and March 4, 2004 in relation to the TSX.

[19] Mr. Sorbara has stated in his response that he has not influenced or attempted to influence decisions of the OSC or TSX having anything to do with Royal.

### **The Appointment of Susan Wolberg Jenah as Vice-Chair of the OSC**

[20] Ms. Wolberg Jenah was appointed as Vice-Chair of the OSC by Order in Council dated February 18, 2004. Her appointment followed the recommendation of a committee of the OSC which put her (and no one else) forward for consideration for appointment as Vice-Chair. David Brown, Q.C., the Chair of the OSC, wrote to Mr. Sorbara on November 10, 2004 urging prompt government action to fill the vacancy created by the resignation of Howard Wetston as Vice-Chair of the OSC in 2003. His letter endorsed Ms. Wolberg Jenah's appointment.

[21] Mr. Baird, to his credit, acknowledges that Ms. Wolberg Jenah was duly qualified to be appointed as Vice-Chair of the OSC. He stated in his letter of complaint, "I wish to cast no aspersions on the qualification of Ms. Jenah." It would have been better had Mr. Baird left it there. However, he went on to take issue with the fitness of her appointment, as distinct from the fitness of Ms. Wolberg Jenah, because of Mr. Sorbara's involvement in it.

[22] Mr. Baird submitted that, although the appointment of a Vice-Chair of the OSC is by the Premier, such an appointment would not be made without the input of the Minister of Finance. I accept this submission.

[23] The crux of this aspect of Mr. Baird's complaint is that Mr. Sorbara was involved in appointing someone as Vice-Chair of the OSC who could be his "judge" should the Royal investigation lead to *Securities Act* charges against Mr. Sorbara. Mr. Baird put it in this way in his letter of complaint:

*The Vice-Chair of the OSC is frequently called upon by the Investigations Branch of the Commission to act as the presiding authority over investigative hearings and tribunals.*

...

*As presiding authority, the Vice-Chair would have had the authority to call witnesses, weigh evidence, bring down decisions and assign sanctions against corporations or individuals who have violated the Securities Act.*

*It is this power wielded by the Vice-Chair of the OSC that raises my personal concern as there is a possibility that Ms. Jenna could be called to preside over an investigative hearing involving Royal Technologies and/or its Directors. This relationship brings with it two distinct potential conflicts of interest. (Emphasis added.)*

[24] Mr. Baird also noted that OSC Vice-Chairs have indirect reporting lines to the Minister of Finance and because of that when a Vice-Chair comes up for re-appointment the Vice-Chair's chances of re-appointment are enhanced if the impression he/she has left with the Minister is good. Apart from the perception of conflict in this area, Mr. Baird, in my view unfortunately, takes this theme further by suggesting:

*The reporting lines within the Securities Act and the convention that dictates the manner in which the OSC operates, could potentially have an impact on the manner in which the Chair, Vice-Chair, or any member of the Investigations Branch of the OSC conduct their affairs with relation to the Royal Group Technologies investigation.*

[25] This unfortunately drags into the mix the OSC's Chair, its two Vice-Chairs (including Ms. Wolberg Jenah) and members of the OSC's Enforcement Branch. The submission suggests that their objectivity somehow might be compromised as a result of Mr. Sorbara's capacity to influence their appointment.

[26] I will return to Ms. Wolberg Jenah's circumstances in the Analysis and Conclusion section of this Report.

### **The Securities Act Regulations**

[27] This part of Mr. Baird's allegations concerns two Regulations approved by Mr. Sorbara as Minister of Finance on February 25, 2004. Mr. Baird contends that the approval of these Regulations demonstrates that Mr. Sorbara had a "hands on role" with respect to the OSC when he was aware of the Royal investigation and was the Minister responsible for the OSC. The regulations did not need the Minister's approval to come into force. Absent ministerial approval the regulations would have come into force in 60 days after their submission to the Minister of Finance.

[28] Based on this, and the other allegations of conflict or perceived conflict, Mr. Baird submits that I should conduct a thorough investigation under s.31 of the *Members' Integrity Act* into the conduct of Mr. Sorbara as related to the OSC, the TSX and Royal's OSC investigation.

[29] To complete the factual matrix relevant to this complaint, I attended at Mr. Sorbara's office and met briefly with him. I then reviewed Mr. Sorbara's Ministry appointment calendar, telephone logs and records of events and meetings to which he was invited. In the December 22, 2003 to March 8, 2004 period these latter records show both the accepted and rejected meeting and event invitations. I also spoke briefly with Lori Spadorica, Special Assistant Policy in Mr. Sorbara's office. The purpose of this was to determine what, if any, contact there was between the Minister and his office, and the OSC and TSX in the December 22, 2003 and March 8, 2004 period. I recognize that the absence of contact in this period would not answer some of Mr. Baird's perception of conflict concerns. It would, however, determine whether there was actual conflict from Mr. Sorbara's standpoint produced by his actions or by the OSC or TSX in the period in question, or at any time.

[30] I also spoke with David Brown, Chair of the OSC, to determine whether Mr. Sorbara or any one in his ministry interfered, or attempted to interfere, with the Royal investigation at any time.

### **Analysis and Conclusion**

[31] The *Members' Integrity Act, 1994* does not address perceived conflicts. It does specifically address in numerous sections what constitutes an actual conflict. I assume the Legislature did this intentionally. In the end, breaches of the *Members' Integrity Act, 1994* based on actual conflicts of interest expose members to the array of sanctions set out in s. 34 of the *Act*. Members in perceived conflict of interest circumstances are left to face what may generally be characterized as political, not *Members' Integrity Act*, problems.

[32] With two exceptions, I am satisfied that there was no contact about the Royal matter between the Minister, or his office, and the OSC and TSX after December 22, 2003. One of the exceptions was an invitation from the TSX, accepted by Lori Spadorica, to attend a breakfast meeting organized by the Economic Club of Toronto. Ms. Spadorica attended the meeting and returned to work. This occurred a couple of days after she began work in her present position. No business involving the TSX, the OSC, the Minister of Finance or Royal was discussed. The second exception was an invitation extended to Mr. Sorbara by e-mail on January 1, 2004 to attend a TSX private dinner. This invitation was declined by ministry staff.

[33] I am satisfied that no steps were taken by Mr. Sorbara, directly or indirectly, that would have had any effect on anything to do with the Royal matter. I am also satisfied that Mr. Sorbara did not influence or attempt to influence the OSC investigation of Royal during the time in which he was responsible for the OSC as Minister of Finance. Accordingly, what is left under this part of Mr. Baird's complaint is the perception of conflict issue.

[34] I see no merit in this part of the complaint. Mr. Sorbara has no authority over the operations of the OSC or the TSX, both independent entities. Thus, it could have been manifestly wrong had Mr. Sorbara involved himself in any aspect of the Royal investigation. Beyond that I am satisfied that he did not interfere or attempt to influence the OSC, TSX, RS or Royal itself in respect of the Royal matter, including the threshold issue whether Royal should disclose the existence of the OSC investigation.

[35] In addition, it is clear that neither Mr. Sorbara nor the Ministry of Finance staff had anything to do with the arrangements between Royal and the TSX the effect of which was that Royal did not have to make a public disclosure of the existence of the OSC investigation in late December 2003.

[36] I can dispose of the Susan Wolberg Jenah and the Regulation issues briefly.

[37] There is no doubt that to some limited degree Mr. Sorbara was involved in the appointment of Susan Wolberg Jenah as the Vice-Chair of the OSC. His involvement came through the process of his approving Ms. Wolberg Jenah's appointment to the OSC and forwarding his approval to the Premier and through the Premier to Cabinet. In addition, Mr. Sorbara in fact approved the two regulations to which I have referred to earlier. Thus he was involved, albeit tangentially, in these regulations coming into force.

[38] The suggestion that in participating in Ms. Wolberg Jenah's appointment, Mr. Sorbara appointed his own judge presumes that at some undefined point in the future Mr. Sorbara will face charges under the *Securities Act* brought by the OSC's Enforcement Branch and that Ms. Wolberg Jenah will be on the panel of Commissioners exercising their adjudicative functions in respect of the OSC's allegations. There is no evidence to support the presumption that Mr. Sorbara will be in the position of a respondent to be judged by the OSC in respect of some elements of the Royal matter. In any case, if Ms. Wolberg Jenah were involved in the Royal matter in her former capacity as general counsel to the OSC she would not sit as an adjudicator and thus would not be in a position to judge anyone involved, including Mr. Sorbara. Furthermore, if there is a legitimate issue of perceived bias, Ms. Wolberg Jenah would not sit as an adjudicator. It seems to me that recusal factors such as bias or perceived bias are best advanced by counsel for respondents and the OSC as matters come forward, not by me on an essentially non-existent record.

[40] Lastly, the Regulations under the *Securities Act*, to which I referred earlier are of general application. They are not focused on any particular corporation. They have absolutely nothing to do with the OSC's Royal investigation. This part of Mr. Baird's complaint stands on its own, devoid of any factual underpinning. Mr. Sorbara's role in issuing the two Regulations could not have influenced the OSC's investigation of Royal in any respect. This is a non-issue which does not come close to providing evidence of a breach of the *Members' Integrity Act, 1994*.

[41] In summary, I see no merit in the complaint when its constituent elements are looked at separately or cumulatively. The complaint has not been established and is therefore dismissed. No further investigation is warranted.

DATED at Toronto this 19<sup>th</sup> day of August, 2004.

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The Honourable Coulter A. Osborne