

Director and Officer Conflicts of Interest (CNCA)

The *Canada Not-for-profit Corporations Act*, [S.C. 2009, c. 23](#) ("CNCA"), imposes certain obligations on directors and officers when faced with a potential **conflict of interest** in the affairs of the corporation.

What Is a Conflict of Interest?

The CNCA does not define "**conflict of interest**", leaving it to be determined by the common law. An actual **conflict of interest** arises in a situation where the personal or business **interests** of a director are in **conflict** with the best **interests** of the corporation. For example, an actual **conflict of interest** may occur where a director or one of his or her family members or close business associates may receive a direct or indirect personal gain or benefit, or a direct or indirect advantage or privilege, arising out of a contract or relationship with the corporation.

A potential **conflict of interest** could be said to exist if a director believes he or she is in a position in which his or her ongoing duties as a director might be influenced by a relationship with a third party.

A different type of **conflict of interest** arises when a director is elected or appointed to a board to represent the **interests** of a member or other stakeholder in the corporation. Such a director has a "dual loyalty", which may result in a **conflict** whenever the corporation is engaged in a matter where the **interests** of the stakeholder are involved. Unfortunately, the director may be in breach of his or her duty of loyalty to the corporation by acting in accordance with his or her duty of loyalty to the stakeholder, or vice versa. While it may be possible to mitigate against this to a certain extent by agreement or by adoption of a code of conduct or unanimous member agreement, this type of relationship can still lead to considerable uncertainty. An active corporation should consider having a code of conduct to define **conflicts of interest** and outline how they are to be handled, to describe director's duties and responsibilities and to address the giving and receiving of gifts and any other matter directly relevant to the activities of the corporation.

Disclosure Requirements

A director or officer who

- is a party to a material contract or material transaction (a "matter") with the corporation, whether made or proposed;
- is a director or an officer, or an individual acting in a similar capacity, of a party to such a matter; or
- has a material **interest** in a party to any such matter,

must disclose to the corporation the nature and extent of such **interest** in writing, or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors (CNCA, s. [141](#)(1)).

Time of Disclosure

For a director, the disclosure must be made at the meeting at which the matter is first considered, the first meeting at which the director becomes interested in the matter or, if the person becomes a director after the matter exists, then at the first meeting after becoming a director (CNCA, s. [141\(2\)](#)).

In the case of an officer who is not a director, the disclosure must be made immediately after the officer becomes aware that the matter has been or is about to be considered at a meeting, or if the person becomes an officer after the matter exists, then immediately after the officer becomes so interested (CNCA, s. [141\(3\)](#)).

Disclosure Where Approval Not Required

If a director or officer has an interest in a matter or proposed matter that does not normally require approval by the directors or members, the director or officer must still disclose in writing to the corporation, or request to have entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of the interest. This should be done immediately after the director or officer becomes aware of the matter or proposed matter (CNCA, s. [141\(4\)](#)).

Abstention from Decision-Making

A director required to make a disclosure under s. [141\(1\)](#) of the CNCA shall not vote on any resolution to approve the matter unless it

- relates primarily to the director's remuneration as a director, officer, employee, agent or mandatary of the corporation or an affiliate;
- is for indemnity or insurance under s. [151](#) of the CNCA; or
- is with an affiliate (CNCA, s. [141\(5\)](#)).

Although the director may not vote on a matter, he or she is still counted for the purposes of determining whether there is a quorum at the meeting (CNCA, s. [141\(5\)](#)). The minutes or portion of the minutes of a directors' meeting that contain disclosures of a conflict, and any other documents that contain those disclosures, may be inspected by members during the corporation's usual business hours (CNCA, s. [141\(7\)](#)).

Where Contracts of Transactions Allowed

If the disclosure of the interest was made in accordance with s. [141\(1\)](#) of the CNCA, the directors approved the matter and the matter was reasonable and fair to the corporation when it was approved, then a contract or transaction for which disclosure is required under that provision is not invalid. Consequently, the director or officer with the interest in the matter is not accountable to the corporation or its members for any profit realized from the matter, whether it be due to their interest in the matter or because the director was present or was counted to determine whether a quorum existed at the meeting of directors or committee of directors that considered the matter (CNCA, s. [141\(8\)](#)).

Member Approval and Confirmation

Even if the conditions in s. [141](#)(8) of the CNCA are not met, a director or officer acting honestly and in good faith is not accountable to the corporation or to its members for any profit realized from a matter for which disclosure is required under s. [141](#)(1) of the CNCA, and the contract or transaction is not invalid by reason only of the **interest** of the director or officer in the matter if

- the matter is approved or confirmed by special resolution at a meeting of the members;
- disclosure of the **interest** was made to the members in a manner sufficient to indicate its nature before the matter was approved or confirmed; and
- the contract or transaction was reasonable and fair to the corporation when it was approved or confirmed (CNCA, s. [141](#)(9)).

Failure to Disclose

Where a director or officer fails to disclose an **interest**, the court may, on application of the corporation or any of its members, set aside the contract or transaction on any terms it thinks fit; require the director or officer to account to the corporation for any profit or gain realized on it; or exercise both options (CNCA, s. [141](#)(10)).

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