

Conflicts of Interest

Ontario's Not-for-Profit Corporations Act
Common Law
Policies
Charities

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Housekeeping

There will be a period for questions at the end of each section, but feel free to ask questions throughout by unmuting or typing in the chat.

Disclaimer

This presentation is:

- **general legal information** – it isn't legal advice tailored for your specific situation.
- **a high-level overview** – conflicts of interest are often context-specific and case law can be controversial.
- **about law** not ethics.

Key Terms

- **Material:** Important; more or less necessary; having influence or effect (Black's Law Dictionary 4th ed.)
- **Person:** includes an (ONCA s.1):
 - individual,
 - sole proprietorship,
 - partnership,
 - unincorporated association,
 - unincorporated syndicate,
 - unincorporated organization,
 - trust,
 - body corporate and
 - a natural person in his or her capacity as trustee, executor, administrator, or other legal representative
- **Fiduciary:** Obligations that arise in relationships of trust and dependence in which one party is required to put the interests of another party first. (Fiduciary Law, Rotman)

Conflicts of Interest (COIs) in Ontario's Not-for-Profit Corporations Act

Defining COIs

Declaring COIs

Mitigating COIs

Approving COIs

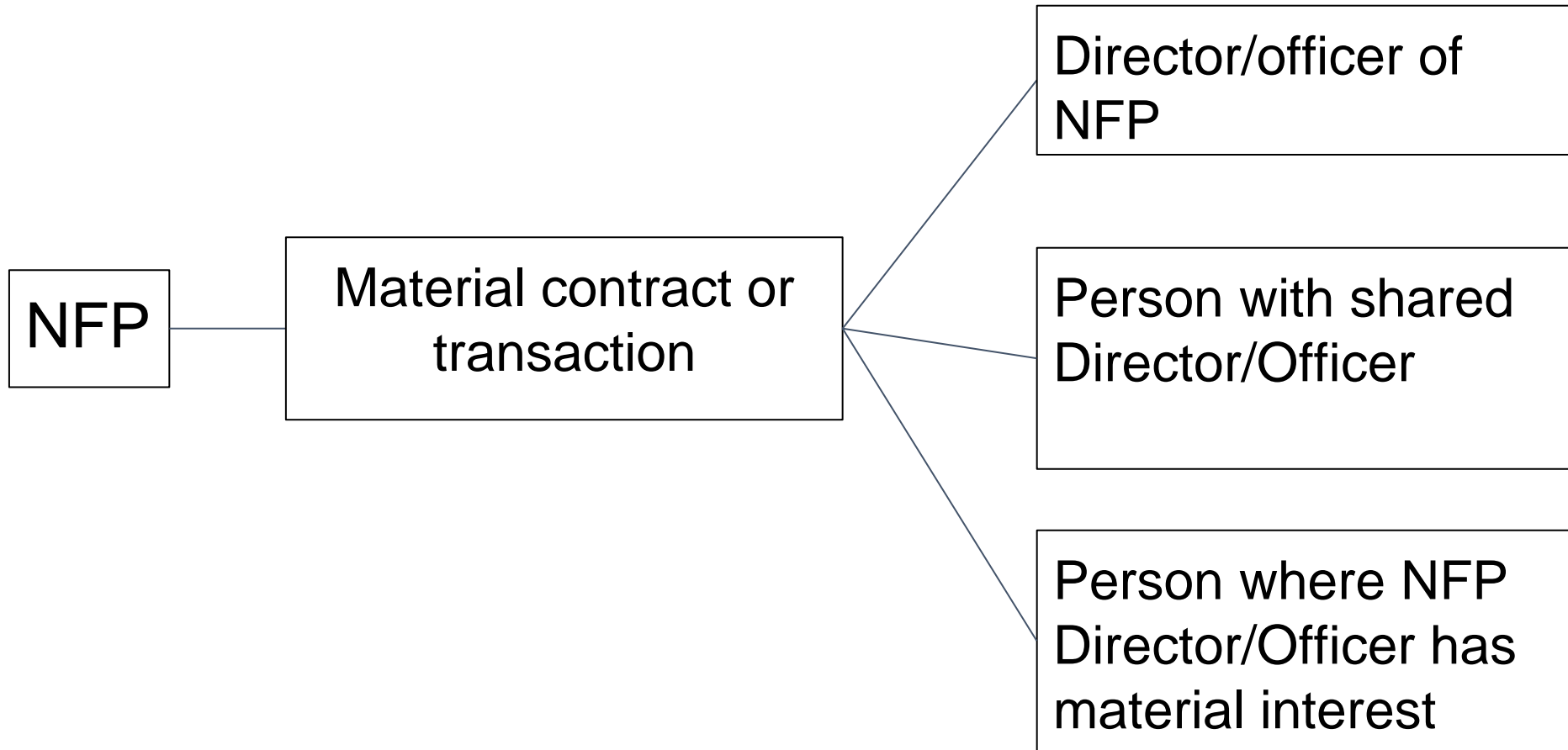
Penalizing COIs

Defining COIs

- **Who:** A Director or Officer of your nonprofit
- **What:** A material contract or transaction with your nonprofit and:
 - The director or officer personally
 - A person that your director or officer:
 - Is a director or officer of
 - Has a material interest in
- **When:** Contract/transaction is current or proposed

Source: ONCA s.41(1)

Defining COIs (cases)



Declaring COIs

When: General notice of director/officer's role in another person and indication any contract/transaction=COI, or

- **Director:** First possible board meeting...
- **Officer:** Immediately...
 - When COI is first being considered
 - When individual develops COI
 - When individual finds out they have COI
 - When individual become director/officer if they already have COI

What: Nature and extent of COI

Effect: Agreement not voidable. Director/Officer not liable for profits (assuming agreement was reasonable and fair)

Source: ONCA s.41(2)-(4), (8)-(9)

Mitigating COIs

- Director/Officer shall not attend board meeting where COI voted on, unless:
 - (a) contract about director remuneration
 - (b) one for indemnity or insurance; or
 - (c) one with an affiliate.
- If remaining directors drop below a quorum as a result of COI, remainder are considered quorum.

Source: ONCA s.41(5)-(6)

Approving COIs

- If all directors have a COI, members must approve the decision
- If the rules were not otherwise followed, a director or officer can also be protected from liability if:
 - The members pass a special resolution at a members' meeting approving the COI
 - The nature and extent of the COI were disclosed to the members in the notice of that meeting

Source: ONCA s.41(7), (10)

Penalizing COIs

If COI rules are not followed, a director, member or officer can apply to the Superior Court of Ontario to:

- Set aside the contract or transaction
- Require the director or officer to pay to the nonprofit any profits
- Do whatever else the Court thinks fit
- Apply general penalties for non-compliance with ONCA, including fines of up to \$5,000 and 6 months in jail*

Source: ONCA s.41(11), s.193

Conflicts of Interest (COIs) in the Common Law

Defining COIs

Whose COIs?

Mitigating COIs

Penalizing COIs

Defining COIs

- **Duty of loyalty:**

- Directors and officers have a duty to put the interests **of the corporation** ahead of their own.
 - Other individuals can have it to if in position of trust.
- Directors and officers have a duty to **avoid situations** in which their personal interests do or might conflict with the interests of the nonprofit,
For example:
 - Contracts with the director/officer or their corporation
 - Paying directors/officers
 - Directors/Officers pursuing an opportunity that “belonged” to the nonprofit

Source: Nicholls, C. (2005) *Corporate Law*, Toronto: Toronto: Emond Montgomery pg. 307-308

Declaring COIs

Director/officer's **duty to act honestly**, includes a general duty to disclose information relevant to the board's decision-making.

Mitigating COIs

No specific procedure. Depends on the case.

Penalizing COIs

A court has wide jurisdiction to correct the situation created by the COI:

- Set aside contracts
- Force director/officer to account for profits
- Impose penalties

Policies

Common Elements of Policies

Common Elements of Policies

- **Purpose:** Integrity of organization
- **Application:** Who does it apply to?
- **Rule:** Eliminate or mitigate conflicts
- **Definition:** Typically wider than legal requirement (e.g. friends not just family)
- **Disclosure procedure:** Who? What? When?
- **Steps to be taken:** Attending meetings, voting, discussing, accessing files, etc.
- **Conflict resolution:** Who decides when people disagree if there's a COI?
- **Consequences for breach:** Discipline and expulsion
- **Rules for amendment:** Who controls policy?
- **Date and signature:** Like other policies

Sample: https://oodp.ca/media/woocommerce_uploads/Board-Conflict-of-Interest-Policy-Sample.pdf

Conflicts of Interests for Charities

Charities Accounting Act

Income Tax Act

Penalties for Charities

Family Members on the Board

Charities Accounting Act

Can never pay directors for work they do as directors.

Payment to directors or connected persons must meet standards set out in PGT Guide or must apply to Superior Court of Ontario for exception.

Source:

https://www.publications.gov.on.ca/store/20170501121/Free_Download_Files/300777.pdf

Income Tax Act

Unacceptable Private Benefit: Any quantity of benefit to a private individual not justified by pursuit of charitable purposes.

Undue Benefit: Making available directly or indirectly the property, income, or rights of the charity in any way to a proprietor, member, shareholder, trustee or settlor of the charity or anyone who is not at arm's length with them.

Source: [CPS-024 Guidelines for Registering a Charity Meeting the Public Benefit Test s.3.2.4](#),
[CSP-U02 Undue Benefit](#)

Penalties for Charities

Consequences for conflicts of interest could include:

- Loss of charitable status
- Suspension of receipting privileges
- Directors or trustees must pay back any profits
- Fine of up to 110% of amount of undue benefit
- Not being able to be a director of another registered charity for 5 years

Family on the Board

It is not prohibited to have multiple individuals from one family on the board together, but...

- They must vote in the best interests of the nonprofit (may be embarrassing to disagree)
- 50+% not at arm's length makes the charity a private foundation:
 - Must tell CRA
 - Additional rules to follow

Questions?

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