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A Director's Guide to Declaring Conflicts of Interest

By Sonja Hodis

While acting as a director (or officer) of a condominium, one must be alert to potential conflicts of interest and know how to address them properly. It is not uncommon, especially in smaller communities, for directors to own businesses, be employed by businesses, or be related to owners of businesses that engage in contracts and transactions with the condominium corporation. Conflicts of interest can also arise when the board must deal with an issue concerning directors in their capacity as unit owners while they are sitting board members.

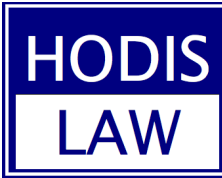
A conflict of interest in itself does not terminate directors' ability to continue in their roles as directors or owners, or to transact business with the condominium corporation. But it does require directors to ensure that the conflict is made public and they have removed themselves from their decision-making role where conflicts exist. This will ensure that contracts are not set aside and directors have not breached their statutory duties under the current Condominium Act.

A conflict of interest is simply a situation where a person has an ability to obtain a personal benefit (whether direct or indirect) from a decision made in his or her official capacity. The reason conflicts of interest become a problem — if not disclosed and the director removed from the decision-making process — is that a director has a duty to act honestly and in good faith and in the best interests of the corporation and owners. That duty can't be fulfilled if that same director is acting for personal benefit or is perceived to be acting for personal benefit.

Sections 40 and 41 of the Condominium Act define a conflict of interest for directors and officers of a condominium corporation and outlines their disclosure obligations. If directors or officers find themselves in a conflict of interest, or suspect they may be in a conflict of interest, they should take the following steps.

1. Identify whether a conflict of interest exists

A director who has a direct or indirect "material" interest in a contract or transaction in which the condominium corporation is a party, or a proposed contract or transaction in which the condominium corporation may become a party, is in a conflict of interest. What is "material" will depend on the factual circumstances. Although "material" is not defined in the Condominium Act, it is commonly understood to mean a personal or financial interest that could affect a reasonable person's judgment or influence his or her vote. If in doubt, err on the side of caution and declare the conflict.



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2. Disclose the conflict

Disclose in writing to the condominium corporation the nature and the extent of the interest at issue. Make the disclosure at the board meeting at which the contract or transaction, or the proposed contract or transaction, is first considered. If the director is not present at this meeting, then he or she should disclose the conflict at the next directors' meeting. If the director develops an interest in a contract or transaction after the corporation has entered into it, he or she should disclose that interest at the next directors' meeting.

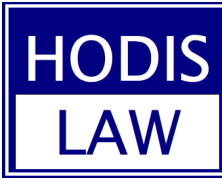
If the contract or transaction is one that, in the ordinary course of the condominium corporation's business, does not require approval by directors, then it can be disclosed at the first directors' meeting held after the director in question becomes aware of the conflict of interest.

Note: Special rules apply to the selling or buying of personal or real property of the condominium corporation and disclosure requirements. See section 40(3) of the Condominium Act.

3. Remove oneself

Make sure to physically remove oneself from the room when the board undertakes any discussions about the transaction or contract that poses the conflict of interest. The director with the interest is not entitled to be present during these discussions. Nor is the director with the interest entitled to vote on any motions relating to the contract or transaction. He or she does not count towards quorum on the vote unless:

- a) The director's interest is limited solely to directors and officers liability insurance;
- b) The director's interest is limited solely to remuneration as director, officer or employee of the condominium corporation; or
- c) The board of directors is the first board of directors and the director has been appointed by the declarant to this board and his or her interest arises, or would arise, solely because he or she is a director, officer or employee of the declarant.



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4. Create a record

Ensure that the board minutes record directors' disclosure of conflicts of interest and their removal from all discussions and decision-making in relation to the transaction or contract in question.

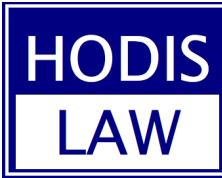
Failing to properly follow the above steps could result in the contract or transaction being set aside and/or require the director in conflict to account to the condominium corporation for his or her profit or gain, which may possibly include paying damages to the condominium corporation. In addition, the owners may lose confidence in the director's leadership and requisition a meeting to have the director removed from the board or even sue the director for breach of his or her fiduciary duties.

However, if directors who are in conflict of interest comply with the above steps and act honestly and in good faith, section 40(7) of the Condominium Act relieves them from having to account to the owners or the condominium corporation for any profit or gain realized from a contract or transaction. Disclosure and good faith also prevent the contract or transaction from being set aside for the reason that a director had an interest in it. Following the above steps may also provide a director with a defence to a lawsuit or owners' demands for him or her to be removed from the board. A director's strongest protection is being open and transparent.

If a director has inadvertently failed to comply with the above recommended steps, section 40(8) of the Condominium Act offers one last opportunity to avoid having to account to the owners or the corporation for any profit or gain the director has realized and having the contract or transaction set aside. Section 40(8) allows the owners to confirm and validate the contract or transaction in question.

In order to meet the requirements of section 40(8), a director must show that he or she acted honestly and in good faith; that at least two-thirds of owners at an owners' meeting called for the purpose of confirming or approving the contract or transaction voted in favour of doing so; and that the nature and extent of the director's interest is declared and disclosed in reasonable detail in the notice of meeting. Obtaining quorum for an owners' meeting and obtaining the requisite level of approval is not guaranteed and can sometimes be challenging.

Although section 40(8) is a saving provision, it is recommended that directors follow the four steps outlined above to ensure that they fulfill their statutory duties and do not suffer the consequences of failing to disclose a conflict and removing



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themselves from the decision-making process. Condo boards and corporations can ensure that directors properly disclose conflicts of interest by incorporating the four-step procedure into the Director's Code of Conduct that directors should sign when they begin or renew a term of office.



Sonja Hodis is a litigation lawyer based in Barrie that practices condominium law in Ontario.. She advises condominium boards and owners on their rights and responsibilities under the *Condominium Act, 1998* and other legislation that affects condominiums such as the Human Rights Code. She represents her clients at all levels of court, various Tribunals and in mediation/arbitration proceedings. Sonja has also gained recognition for creativity and tenacity in ground breaking human right caselaw in the condominium industry. Sonja can be reached at (705) 737-4403, sonja@hodislaw.com or you can visit her website at www.hodislaw.com or watch her videos at www.condoinmotion.com.

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