

Conflict of Interest and the Public Library Board



Conflict of Interest is a complex and frequently misunderstood issue. It is of considerable importance to public library board members since failure to correctly handle a conflict situation may result in personal embarrassment or even costly penalties.

The misunderstanding often arises from confusion between true conflict of interest and what may be called divided loyalty. Conflict of interest has a strict legal definition of direct or indirect pecuniary or monetary gain. Legislation specifies how board members of corporations must disclose conflicts. Since library board members are members of municipal **local boards**, they are also governed by municipal legislation which takes precedence in regulating the manner of disclosure.

Divided loyalty arises out of a broader, loosely defined concept of potential for conflict. It can occur when a board member has a conflict between his or her positions on two different boards or between personal beliefs and the board's policies on a particular issue. It is essentially a question of bias. Divided loyalty is not a legal issue, but one of an ethical nature. The guiding principle in both situations is to govern in the best interests of the library.

Understanding Conflict of Interest

Understanding **conflict of interest** requires a review of the legal implications of being a member of a public library board. Conflict of interest can best be summarized in this way:

"Conflict of Interest can arise in two major ways:

- a) where a director ¹ is motivated by considerations other than the best interests of the library or
- b) where the director has a personal interest in a contract with the board either as an individual or as a member of another organization."

Library board trustees have a **fiduciary duty** "to act honestly and in good faith and in the best interests of the corporation" and to carry out his or her responsibilities with a "minimum standard of care." This means that a director must exercise that care which may be reasonably expected from someone of his knowledge and experience. Conflict of Interest is a violation of **fiduciary duty**.

¹ There is some confusion over whether to refer to public library board members as trustees or directors. In some publications the term 'director' is used since a library board member is expected to carry out services, which involves risk. Because a trustee's duties involve preserving assets, he or she is held to a higher and more onerous standard of care. However, it could be argued that the library board member also has a 'trustee' function. For the purposes of this paper, both trustee and director are used to refer to the public library board member.

Fiduciary Duty

Fiduciary duty forbids directors to put themselves in a position where their duty to act in the best interests of the corporation is compromised by their self-interest.

Two common examples of Conflict of Interest are ***Corporate Opportunity*** and ***Party to a Material Contract***.

Corporate Opportunity arises when a director learns, through his or her duties, of a business opportunity which the library board has or was seeking, and takes advantage of it either as an individual or as a member of another organization. Corporate Opportunity simply is not allowed.

Party to a Material Contract is the second and perhaps more common example of Conflict of Interest. It occurs when a trustee/director or officer of the library board is:

- a party to (involved in) an actual or proposed material contract (contract involving money) or transaction with the library or
- has a material interest in (such as a holding a share or membership in) another corporation or partnership which is a party to a material contract or transaction with the library board.

Legislation governing Library Boards and Conflict of Interest

Public Libraries Act, R.S.O. 1990, chapter P.44

Since it would be an obvious conflict for a trustee/director to be employed by the board of which he or she is a member, the ***Public Libraries Act, R.S.O. 1990, chapter P.44*** is very clear in stating that library board members may not be “employed by the board or by the municipality or county, or in the case of a union board, by any of the affected municipalities,” (Section 10,d).

The Act also specifies that all meetings of the public library board and any committees are open to the public except in very specific circumstances (Section 16.1). The public nature of the meetings is also a safeguard for the board.

The Municipal Conflict of Interest Act

In 1972, first ***Municipal Conflict of Interest Act*** (MCIA) was introduced. It permitted candidates with “pecuniary” (relating to or consisting of money) interests to run for local government while disclosing these interests and abstaining from considering the matter at council. Then in 1983, revisions to the legislation clarified the dual principles of “disclosure and abstention”. Since then ***the Municipal Conflict of Interest Act*** has regulated municipal politicians, and members of special purpose bodies (including public library boards) with respect to conflict of interest situations.

In the legal case, *Moll v. Fisher* (1979), it was stated that: “The obvious purpose of the Act is to prohibit members of council and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest.”. However, there is no clear definition of “conflict of interest” in the statute. Rather, there is a general understanding that the situation occurs “when your public duty conflicts with your private interest”.

The MCIA legislation applies to members of a Council and member of Local Boards (Section 1) with 16 named types of local boards including the school board, police services board, committee of adjustment and the public library board. The MCIA legislation applies to any meetings including any regular, special, committee or other meeting of a council or local board, “where a member... has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration...” (ss. 5(1)).

There are three types of pecuniary interests:

- **Direct** – financial or money interest, gain or loss,
- **Indirect** - (a) shareholder/director or senior officer of a “private” corporation; (b) has a controlling interest in [10% of voting rights] or is a director or senior officer of a “public” corporation; (c) is a member of a body; or (d) is a partner/employee
- **Deemed** - - direct or indirect pecuniary interest of these family members (a) parents (b) spouse (c) children (if known to the Member)

It should be noted that there are several exemptions including having “an interest which is so remote or insignificant that it cannot reasonably be regarded as likely to influence the Member”.

Under MCIA legislation, there is a process for identifying a Conflict of Interest (Sub-section 5 (1)) and so, a member complying with the Act is required to do the following:

- when present at a meeting of the council or local board;
- at which the Member has a pecuniary interest in a matter;
- which is the subject of consideration;
- To disclose, prior to any consideration of the matter;
- the interest and its general nature.

Under MCIA legislation there is also a statutory obligation for “abstention” which means that (pursuant to Section 5), the board member:

1. shall disclose the general nature of the interest before the matter is considered;
2. shall not participate in the discussions;
3. shall not attempt to influence (before, during or after);
4. shall not vote; and
5. leave the meeting if it is closed to the public.

Sometimes, the process of abstention creates a situation where there are fewer members than usual and keeping quorum may become an issue. Under Section 7 of the MCIA legislation, this situation is covered in that where members have declared a pecuniary interest and remaining members do not constitute quorum, remaining number of members shall be deemed to constitute a quorum, provided such number is not less than two. Where the remaining membership is “less than two”, municipality or local board can apply to court for an order authorizing council...to give consideration to, discuss and vote on the matter out of which the interest arises.

The MCIA legislation does have “Enforcement” clauses (ss. 8-9). Under MCIA:

- An “elector” can apply to a judge to determine if Act was breached;
- Application must be filed within six weeks of learning of Member’s alleged contravention;
- No application after six years from date of alleged breach.

Two examples of conflict of interest:

1. Board member John Doe owns 50% of a computer company which is bidding on the contract to supply the library's new computer system. Is this a conflict of interest for Board member Doe?
2. Board member Mary Right has a fourteen-year-old daughter who works in the library as a page. Should she declare an interest and refrain from voting on the new salary scale for library employees?

Both board members clearly have a pecuniary interest. Board member Doe is apt to realize some financial gain as a result of the contract. Since Board member Right's daughter is a child under the age of eighteen, she too could gain. Both must declare the interest.

Conflict of interest or divided loyalty?

Divided loyalty tends to occur most frequently for:

- municipal councillors appointed as council representatives
- representatives of different municipalities on union or county public library boards.

How do these members handle such divided loyalty situations plaguing them? They must:

- make the best decision for the library board when acting as a library board member
- listen to all sides of an issue, yet still be aware of the interests of both boards
- acknowledge other loyalties and participate in fair and open-minded discussion

The action of the library board has to be in the best interests of the library. ***The individual member with the conflict must be guided by what is in the best interests of the library. The allegiance is to the board the member is sitting on when the vote is taken.*** That is, while sitting as a library board member at a library board meeting, the director's allegiance is to the library. Nevertheless, this should not stifle the expression of diverse opinions as part of the job of the board member in making decisions about the affairs and future of the library.

There's no doubt that such situations can be uncomfortable. The municipal councillor/library board member is a director of two separate corporations - the municipality and the library board. He or she has a fiduciary duty to act in the best interests of both. However, the municipal councillor, as a member of the library board's appointing body, may well be required to vote according to council's wishes since his or her membership on the board is a form of delegation.

The library does not exist by itself. It exists within a community. Library boards must recognize that no one sheds other roles completely when dealing with library business. A board member might be faced with a conflict between attending a scheduled board meeting or attending her son's championship hockey game or between the belief in the principle of freedom of information and membership in an anti-pornography lobby group.

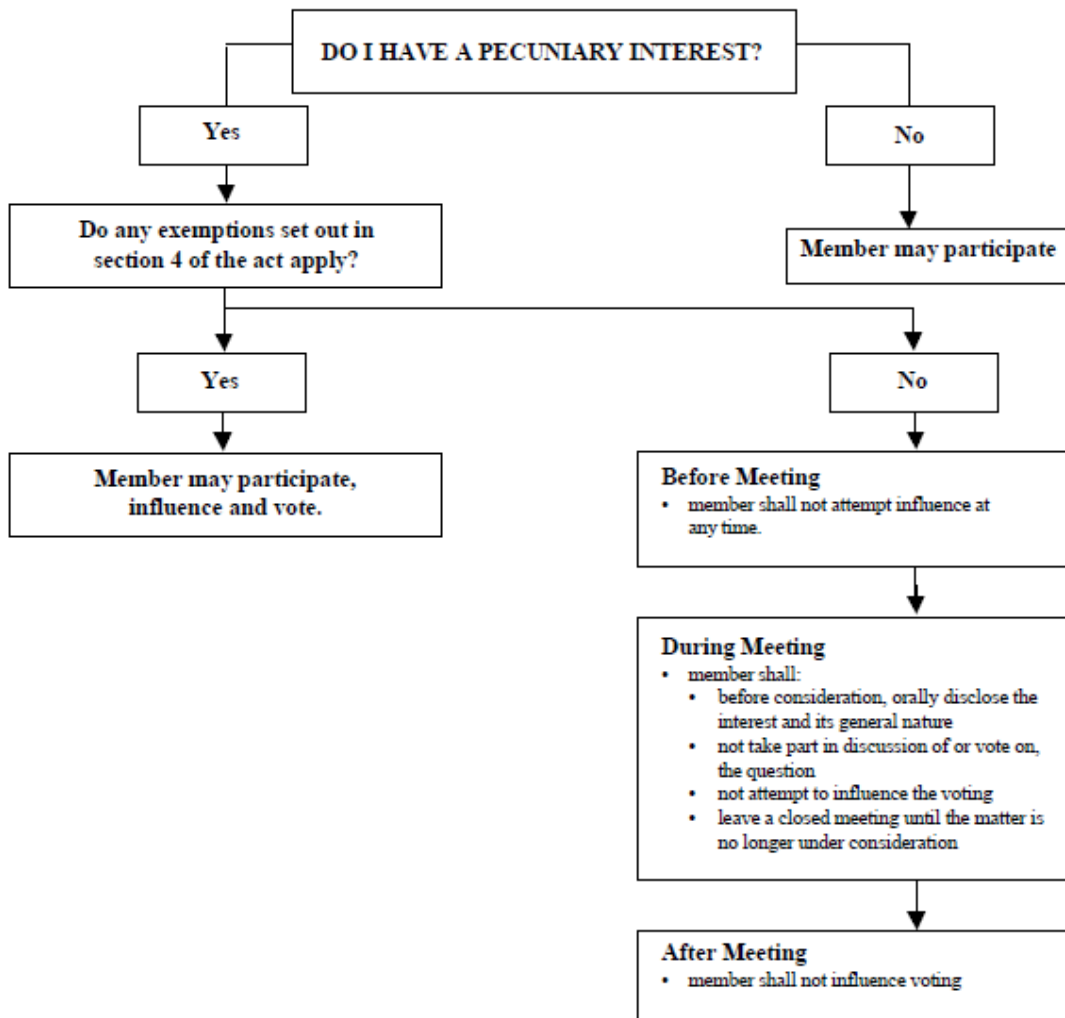
This is not to say that library board members should avoid having opinions and expressing them in the course of deciding library business. Having a bias or favouring a particular issue may suggest a conflict, but legally does not constitute a conflict of interest.

Here are some additional guidelines for trustees to keep in mind about conflict of interest and divided loyalties.

- If a pecuniary interest exists, declare it.
- Realize/recognize that once the decision is reached, **THE BOARD SPEAKS WITH ONE VOICE.**
- Board members have ethical as well as legal responsibilities.
- Be aware of the potential for conflict.
- Ask the question: “Is what I am doing in the best interests of the library or is it coloured by some other loyalty?”
- Ask the question: “If this situation were to become public, would it cause discomfort?” If it would, perhaps a conflict or bias should be declared.
- If the board member has a direct or indirect pecuniary interest, the board member may not proceed without declaring the interest. The flow chart included here will assist library board members in acting in accordance with the requirements of the **Municipal Conflict of Interest Act.**

Municipal Conflict of Interest Act

A member of a public library board must ask, on every item on the agenda, the following question:



As a further protection for library board members, the following actions might be of help:

1. Attend all board meetings. If regular attendance is not possible, the member should seriously consider resigning from the board.
2. If a board member is absent from a board meeting, he or she is deemed to have consented to the resolutions passed at that meeting unless the absent member dissents from the resolution in an appropriate manner within seven days of becoming aware of it. *Members cannot avoid responsibility by staying away from a meeting.* Furthermore, the member is obligated to declare a pecuniary interest orally and in writing at the next meeting and must refrain from any influence related to the issue.
3. A board member should consider whether a reasonable person would accept the information presented at a board meeting or whether, in the circumstances, further inquiry is required. For example, if a report is inconsistent with established policies and procedures, a board member should ask questions regarding those inconsistencies. Since the management of the library reports to the board, board members are entitled to any information belonging to the library. As the board appoints all of the officers, the board requires the full cooperation the officers. This does not, however, mean that the board should try to do the CEO's job.
4. Board members selected or appointed for their particular qualifications, that is to say an accountant, lawyer, business person, **may** be held to the standard of a reasonably prudent professional of the particular type appointed and not the lesser standard of a reasonably prudent ordinary citizen. This potential for a higher standard of care is not firmly established yet, but may well be on the horizon.

In conclusion

The legal requirement for library board members is to deal with the question of pecuniary interest. IF there is a pecuniary interest, the member must declare it and follow the proper procedures. If there is no pecuniary interest, the member may proceed to participate in the meeting, the discussion and the voting.

Keep in mind that everyone comes to the board table with biases. While these biases may colour the member's thinking and voting, they are not of a pecuniary nature and therefore, do not disable the member from participating. Such biases will only affect the extent to which the member is able to keep an open mind in the discussion of the issue.

Even though public library boards in Ontario have laws to guide them in carrying out their duties, they might consider developing a "**Code of Ethics**" as part of their own governance policies.

Library Boards exist to develop, promote and monitor library services as a public trust. To this end, library board members should be committed to the following principles:

- The primary goal of public library board members is to ensure that the public has access to the highest quality library services possible.

... continued

- Board members should ensure that each person has access to the most complete library service possible compatible with equal service for others. Where limitations in service are unavoidable, any inherent inequality of service should favour those residents least able to obtain alternate service.
- Library board members should observe ethical standards with truth, integrity and honour.
- Board members who have a pecuniary interest must declare that interest in the required manner and remove themselves from closed meetings and from attempting any influence.
- Board members should distinguish between their personal views and those of the institution by respecting the position of the board, even though they may disagree. Once the board speaks, it speaks with one voice.
- Board members should respect the confidential nature of library records within the framework which allows for the monitoring of material usage and the need for public accounting.
- Board members should respect the established structure of the library.
- Board members should attempt to work harmoniously with the board and ultimately accept its will.
- Board members should limit their trusteeship role to policy governance and advocacy.
- Board members are expected to take responsibility for their personal development through continuing education opportunities and participation in provincial and national library organizations.
- Board members should support intellectual freedom in the selection of library material.

*This publication is adapted from *Trustee Tips #13 – “How to run effective meetings”* A publication of the Library Trustee Development Program, 1996. Also adapted from ***Sourcebook for Small Public Libraries: Directors’ Liability (Administration 3)***, Southern Ontario Library Service, Gloucester, Ontario, 1994. Section on Municipal Conflict of Interest Act is from AMCTO Zone 6 meeting of April 18, 2013 by Rick O’Connor, City Clerk and Solicitor for City of Ottawa.

Disclaimer - *The material presented here is intended to provide background information only and in no way constitutes legal advice. In the event of a legal question, board should seek qualified legal counsel. Citation of sections of specific legislation is for convenience only. For accurate references and context, recourse should be had to the official volumes.*