

Directors' Duties to the Corporation; Focus on Dual Loyalty

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Presented by:
Arlene O'Neill
Cliff Goldfarb





Directors' Duties to the Corporation: Starting Point

- The duty to act in the best interests of the corporation “comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly” (*BCE Inc. v 1976 Debentureholders*).
- Consider the interests of its stakeholders.
- Carefully consider all alternatives reasonably available to the corporation in the circumstances.
- Non-profit: “Directors of not-for-profit and charitable organizations are subject to fiduciary duties at common law.” (*London Humane Society (Re)*)

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Directors' Duties to the Corporation

- Business Judgment Rule: the norm is not perfection.
- “Deference should generally be given to directors’ business decisions so long as the decision in question is within a range of reasonable alternatives” (*Maple Leaf Foods v. Schneider Corp.*)

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Dual Loyalty: The Predicament of a Nominee Director

- Two way duty: Duty of confidentiality vs. duty to disclose.
- The director has a duty to refrain from disclosing confidential information to third parties.
- However, a director who possesses information coming from the stakeholder who arranged for his or her appointment may have an obligation, as a director, to disclose to the company any part of the information which relates to a planned transaction or operation which may have a material impact on the company and *vice versa*.

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Duty of Confidentiality

- Confidentiality can be lost if the information in minutes is disclosed. A good example is litigious proceedings.
- “Although I agree with the Applicants that no privilege attaches at law to such minutes, I think this is an important commercial interest. The board of directors of a corporation is charged with the responsibility to manage the corporation. The directors must be able to conduct open and frank discussions if they are to discharge their responsibilities to the corporation and the shareholders. In the ordinary course, it is certainly arguable that, for this reason, disclosure of minutes of board meetings, and related notes of participants, would give rise to a serious risk to an important commercial interest.” (*SRM Global Master Fund Limited Partnership v. Hudbay Minerals Inc.*)

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Duty of Confidentiality: For-Profit

- OBCA and CBCA seemingly suggest that certain documents are to be kept confidential:
 - OBCA ss. 140 and ss. 144 outline a variety of corporate records that “shall be open to inspection by directors” including accounting records and records containing minutes of meetings and resolutions of the directors and any committee thereof.
 - CBCA ss. 20(4) grants similar rights
- However, pursuant to OBCA s. 145(1) shareholders and creditors of an OBCA corporation have no statutory right to view accounting records or minutes of meetings and resolutions of the directors and any committee
- CBCA s. 20(2) and ss. 20(4) are nearly identical

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Duty of Confidentiality: Non-Profit

- All non-profit corporation statutes seemingly limit disclosure of directors' meeting minutes to the directors:
 - CNCA ss. 21 and 22
 - ONCA 2010, ss. 92, 95
 - OCA, ss. 299, 300, 305

Duty to Disclose

- A fine line: Non-disclosure will be found to breach the director's fiduciary duty only if the information could have a material negative impact on the corporation
- "In this case, however, the trial judge was completely justified in finding a breach of fiduciary duties on the part of the directors representing PWA because they failed to disclose that part of the negotiations with AMR which affected the Gemini Partnership in a vital aspect of its business. Indeed, the transaction with AMR contemplated a serious loss to the partnership, the loss of the hosting service." (*PWA Corporation v. The Gemini Group Automated Distribution Systems Inc. et al.*)

Duty to Disclose

- CBCA s. 120 (almost identical to OBCA s. 132):
- **120.** (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of any interest that he or she has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer
 - (a) is a party to the contract or transaction;
 - (b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or
 - (c) has a material interest in a party to the contract or transaction.

Common Law and Dual Loyalty: United Kingdom

- “In my judgment, the fact that a director of a company has been nominated to that office by a shareholder does not, of itself, impose any duty on the director owed to his nominator. The director may owe duties to his nominator if he is an employee or officer of the nominator, or by reason of a formal or informal agreement with his nominator, but such duties do not arise out of his nomination, but out of a separate agreement or office. Such duties cannot however, detract from his duty to the company of which he is a director when he is acting as such.” (*Re Neath Rugby Ltd*).

A Different Perspective: Australia

- “It is both realistic and not improper to expect that such directors will follow the interests of the company which appointed them subject to the qualification that they will not so act if of the view that their acts would not be in the interests of the company as a whole.” (*Re News Corporation Limited*)
- “Directors usually act in accordance with the wishes and interests of a party that has brought about their appointment and on whose goodwill their continuation in office depends unless that places them in breach of their duties.” (*Canwest Global* (1997) 24 ACSR 405)

Advising Directors: In-House Counsel

- Considering Directors’ interests but also the interests of their family members:
 - A director may not profit directly or indirectly from his or her position and may not favour the interest of someone not at arms’ length with the director over that of the corporation (OCA s. 71, CNCA s. 141)
 - ONCA and ONCA go further and prohibit the director from attending any part of the meeting at which a conflict is discussed (OBCA s.132(5), ONCA s.41(5))

Advising Directors: In-House Counsel

- Case study: Nominee director participating in a vote that could negatively impact the organization they represent.
 - What level of participation is appropriate?
 - What rights do nominee directors have if they recuse themselves?
 - Should a director that recuses himself/herself record a dissent even if they did not vote due to conflict?

Solutions

- Corporate processes available to avoid potential conflicts before they arise
- Possible approaches:
 - (a) Restrict eligibility of directors
 - (b) Establish board policy and procedure to declare and address situations of conflict in accordance with applicable law (sample provisions attached)
