

EXECUTIVE SUMMARY

To: K. R. Cohen, Ph.D., C. Psych., CEO
Re: Executive Summary: Board Seats for External Organizations
Date: May 3, 2018

INTRODUCTION

This is an executive summary of portions of a memorandum prepared for the Canadian Psychological Association (the “**Association**”) on October 25, 2017. The purpose of this summary is to provide an overview of legal issues that may exist when one or more external organizations are entitled to nominate individuals to the Association’s Board of Directors (the “**Board**”). For purposes of this summary, we refer to such individuals as “**Nominee Directors**”.

BOARD SEATS FOR EXTRNAL ORGANIZATIONS

(1) Applicable Laws

Generally speaking, the issues relating to Nominee Directors are concerned with conflicts of interest, since Nominee Directors can be seen as having potentially competing fiduciary obligations to each of (1) the organization on whose Board they serve, and (2) the organization who nominated them to serve on that Board (and on whose Board they may also serve).

Sections 148(1)(a) and 148(1)(b) of the *Canada Not-for-profit Corporations Act*, which governs the Association, codify the fiduciary obligations owed by directors to the corporations on whose Boards they serve. Those sections require, respectively, every director to “act honestly and in good faith with a view to the best interests of the corporation” and to “exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances”. Canadian courts have found that the first of those duties, which is also known as the duty of loyalty, includes the duty to (1) maintain confidences; (2) act honestly and openly; and (3) avoid conflicts of interest.

It can be difficult for Nominee Directors to manage those duties for more than one organization. First, a Nominee Director may be expected by their nominating organization, who may also employ them, to share information about the other organization on whose board they serve (the “**second organization**”). However, as a general principle, Nominee Directors cannot share any confidential information of the

second organization with the nominating organization without the express permission of the second organization's Board. Under applicable laws, Board deliberations are presumed to be confidential information. Second, the duty to act honestly and openly requires that a Nominee Director disclose information to the organization that affects a "vital aspect" of the organization's business, even if that disclosure conflicts with the Nominee Director's duties to maintain that information as confidential. As such, this is a narrow exception to the general duty to not disclose confidential information stated above. If the Nominee Director is a director of the nominating organization, she or he may be obliged to disclose confidential information of the second organization to the nominating organization because it is "vital" to the nominating organization. Third, the fiduciary duty includes a duty to avoid conflicts of interest. In other words, a person who owes a fiduciary obligation to one organization should not become a director of another organization if the interests of the two organizations are divergent.¹ In such cases, it could be difficult for a director not to prioritize the interests of one organization over the other, particularly if the director is employed or paid by one of the organizations. Taken together, if the interests of the nominating organization and the second organization on whose Board the Nominee Director serves overlap or potentially overlap, the Nominee Director can be placed in a difficult if not untenable position.

(2) Discussion

The By-laws of the Association provide that the Board will be composed of, among other Directors, one nominee from each of four external "partner organizations". In some cases, the Association has diverging or potentially diverging interests with those organizations. For instance:

- The Association and partner organizations may compete for memberships.
- The CPA funds a practice council that is composed of a partner's member organizations. The Association and the partner's member organizations have a number of dual roles as well as diverging and potentially diverging interests.
- The Association acts as an accrediting body for another partner's member organizations.

When we look at the foregoing relationships between the partner organizations and the Association through the lens of the legal duties identified above, we see a number of potential issues. For instance, in practice, how can a Nominee Director limit their access to information from an organization because they may have disclose it to the other organization if it pertains to a "vital aspect" of operations? In addition, how can the duty to avoid conflicts of interest be managed when the interests of the nominating organization and the Association diverge? These are difficult questions to answer in the abstract – let alone in the context of fast-paced of Board deliberations.

(3) Recommendation

The most practical way to avoid real or potential conflicts of interest is to eliminate Board seats for all four external organizations.

In doing so, there are perhaps two accepted options if the Association wishes to continue to receive input from those organizations at Board meetings. First, the Association could create an "Observer" (also known as a "Permanent Invitee") role for the external organizations, which would allow each of them to have an Observer (i.e. a representative) attend the Association's Board meetings without the right to

¹ Kevin P. McGuinness, *Canadian Business Corporations Law*, 3rd Ed. (2017) at §14.289.

vote. Observers are not subject to fiduciary obligations, and consequently, could enter into non-disclosure agreements with the Association to maintain the confidentiality of Board deliberations. Further, Observers could more easily be denied information where there is a conflict of interest. Second, in the alternative, the Association could create an advisory panel that consists of the external organizations. That panel could convene when requested by the Board to study a particular question, or provide periodic input to the Board. In most cases, this option would avoid the need for non-disclosure agreements, since the flow of information to the external organizations could be controlled.

(4) Other Considerations

Although not a legal issue, the four external organizations and their respective members are not necessarily members of the Association. As a result, the four director positions are determined by organizations who do not necessarily “represent” the Association’s members. It seems possible that some members may believe that those Director positions limit the responsiveness of the Board to their concerns, which, if true, would strengthen the case to remove the ability of those organizations to nominate Directors.

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