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A Corporation and a Community: Fiduciary Duties of University Board Members

Introduction

This advisory reviews the concept of fiduciary duty and considers its application to a university's board of governors. The conclusion is that reliance on the corporate law concept of fiduciary duty to deny or inhibit representation by board members appointed as academic staff representatives is a misapplication of the concept within the collegial governance system.

An important feature of collegial governance in Canadian universities is the presence of academic staff on governing boards. This right arises either directly from the governing statute for the University or through University by-laws authorized under the statute. Representatives may be elected from the faculty body or, in some cases, appointed by academic staff associations or drawn from faculty members of the Senate. Regardless of how they are appointed or elected, these board members or governors are representing academic staff at the institution. That is the genesis and the rationale for their appointment or election to a board. Yet, when academic staff associations object to overly restrictive confidentiality, conflict of interest, board solidarity language, or other restrictive board documents that inhibit or interfere with the ability of the faculty to represent the constituency from which they are appointed, they are met with the sweeping statement that these restrictions are necessary to comply with fiduciary duties/obligations of university board members.

It is the view of the Canadian Association of University Teachers (CAUT) that such restrictions or limitations are inconsistent with the concept of fiduciary duty in a setting where collegiality through academic staff representation is an essential and fundamental feature of university governance. Furthermore, such restrictions create a "democratic deficit" in university governance. That is, these board positions are reserved for academic staff representatives and interference with their ability to actually represent their constituents through communication and consultation is legally improper. In fact, it reflects a concept of fiduciary duty that is incompatible with collegial governance.

The Supreme Court of Canada recognizes that universities are a unique community of scholars. Thus, the Court wrote:

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The [provincial, foundational] Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy ... [I]ts immediate and direct responsibility extends primarily to its present members.[1]

Although a corporate body in the meaning of "corporate" as a legal entity, a university is not a corporation in the corporate law sense. Universities are not subject to the same statutory framework as private or public corporations that are organizations incorporated pursuant to the relevant corporations' laws for commercial or community purposes. As such, application of corporate law principles arising out of the statutory corporation sector, such as fiduciary duty, must be approached with caution.

University boards include different stakeholder or community representatives who earn their place through methods of appointment that take into account representation of those groups. Corporate boards are composed of individuals normally appointed or elected by the board members themselves. Unlike for universities, there is no statutory or policy requirement that such appointments represent any particular community, expertise, or background.

University boards, unlike corporate boards, are thus inherently stakeholder/representative boards. In fact, the move toward increased faculty representation on university boards was a deliberate change that resulted from the *Duff-Berdahl Report*, in the 1960s.[2] At the time, numerous crises at universities across the country necessitated a reexamination of collegial governance and the exercise of power by university presidents. The conclusion was to strengthen the former, while weakening the latter. Robust and functional collegial governance involves the representation of internal communities on the governing board. Any policies or actions that hinder this representation undermine collegial governance as a form of balancing and sharing of power and responsibilities within a university. Less representation in university governance is less collegial.

Based on statute and jurisprudence, it is CAUT's view that the fiduciary duties of university board members can, and, indeed must, take into account the interests of their constituents in carrying out their board duties and responsibilities. To do anything less is inconsistent with the governance model under which a university board legally operates.

The concept of fiduciary duty

The fiduciary duty is a legal obligation to act in the best interests of another, who is usually called the beneficiary. Fiduciary duties exist for parents and their children, for the Crown and Indigenous communities, and for directors and their corporation. If there is a fiduciary duty, then the fiduciary (person with the power or discretion or authority) must exercise loyalty, reasonable levels of care, and skill — always in keeping with the best interests of the beneficiary (person who is dependent on the fiduciary to make decisions for it). The legal rationale for imposing a duty is to create ethical norms for the use of power over others.[3]

The fiduciary duty imposes strict obligations.[4] It has existed in common law for centuries and has been codified in the various directors' obligations provisions found in the legislation governing corporations throughout Canada over the past century.[5] The Supreme Court has described two broad sources of fiduciary duty: common law and statute. The source affects the nature of the obligations that arise as the statutory fiduciary duty is arguably stricter and less open to flexible application than the common law form.

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1. *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, pp. 594-595. Special thanks to Prof. Theresa Shanahan for her assistance with background materials and cases relevant to university governance. For a further discussion of the legal framework of university and collegial governance, see her forthcoming paper, "Fiduciary Duties of University Governing Boards: Implications for Self-governance and Collegial Decision Making."
2. Davis, Brent. "Governance and Administration of Post-Secondary Institutions," *Handbook of Canadian Higher Education*, Ed. Theresa Shanahan, Michelle Nilson, and Li-Jeen Broshko, McGill-Queen's UP, 2015, pp. 65-66.
3. Aagard, Lindsay. "Fiduciary Duty and Members of Parliament, "*Canadian Parliamentary Review*, Summer 2008, p. 32.
4. *Peoples Department Store Inc. (Trustee of) v. Wise*, [2004] SCR 461, para. 38.
5. See, for example, s. 134 of the *Ontario Business Corporations Act*, *R.S.O. 1990*, c. B. 16 and s. 122 of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44.

Establishing a fiduciary duty

To establish a fiduciary duty in the common law form, the courts will look at the "*Frame* indicia" to determine whether or not a fiduciary duty should exist in a particular relationship. These indicia were enunciated by Justice Wilson's dissent in the 1987 Supreme Court of Canada family law case of *Frame v. Smith*.[6] In 2011, the Supreme Court affirmed these criteria in the decision of *Elder Advocates of Alberta Society v. Alberta*, which involved elderly persons in care and the government of Alberta.[7] As a result, in order to impose a non-statutory fiduciary duty applying the "*Frame* indicia," a Court will consider:

1. Was there an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries?

2. Is there a definable person or class of persons who are vulnerable to the fiduciary's control?

3. Are there legal or substantial practical interests of the beneficiary(ies) that the fiduciary can adversely affect through its discretion or control?[8]

The common law form of fiduciary duty is thus a duty imposed by looking at the particular relationship involved in any given case. Since the common law duty covers a wider range of relationships, it is described in more flexible terms than the corporate director fiduciary duty arising under a business or other corporate governance statute. To the extent that a statutory duty of some form does not apply to a university, the common law fiduciary duty would apply to the members of the board of governors.

Looking first to the common law, based on our review of governance at thirty universities,[9] considerations under the "*Frame* indicia" in respect to university governance would include the following elements:

1. Almost all of the boards reviewed require members to accept, either in writing or by attornment to the policies, that they will act in the best interests of the university, declare conflicts of interests, and not act in their own or another's interest.

2. The university is an identifiable class of "person" (or corporate body) vulnerable to the fiduciaries' control, since the board is the governing non-academic body of the University.

3. Board members have the power and ability to make decisions that affect the interests and rights of the beneficiary (the university). Examples include the board's ability to ratify collective agreements, approve purchases and sales of real estate, and develop non-academic policy.

Based on the common law indicia, university board members are in a fiduciary relationship vis à vis the university. Nonetheless, since universities are creatures of statute or charter, it is possible that some form of a statutory fiduciary duty will also apply. Indeed, where legislation is specific that a fiduciary duty applies — either from the university's foundational statute or from another statutory source — it will likely supersede the common law fiduciary duty.

In any event, it is CAUT's view that the source of the fiduciary duty (common law or statutory or combination of both) does not make a material difference to the character of the fiduciary duty that exists for university board members (i.e. reflecting the unique structural nature and objectives of a university). That is, no matter the source of that duty, unlike a corporation sector director, university board members must take into account a constellation of interests and concerns when determining the best interests of the university and expressly recognize the representational nature of their board in doing so.

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6. [1987] 2 S.C.R. 99, para. 60.
7. 2011 SCC 24.
8. This is often a property interest. Supra, para. 36.
9. *CAUT Governance Report*. Forthcoming 2018.

Fiduciary duty in the context of university board members

All universities in Canada are creatures of statute whether by an Act of the province itself or through inheriting a Royal Charter from before the province existed.[10] Out of the thirty universities reviewed by CAUT in its forthcoming report on governance, not a single one was incorporated pursuant to the processes set out in the various provincial corporations or business corporation acts and thus none were directly subject to a general corporate statutory regime. Further, sections in university incorporation acts that create the governing boards do not contain language specifying a fiduciary duty for board members or, where there is some language, it is not in the same form as found in general corporations statutes.[11]

For example, in Ontario, the *Business Corporations Act* ("*OBCA*") does not apply to universities as the Act only applies to corporations with share capital.[12] Portions of another piece of legislation, the *Corporations Act*, however, could arguably apply to a university incorporated under its own specific statute since a university may also be considered a corporation without share capital.[13] For our purposes, it is noteworthy that a statutory fiduciary duty is only contained in the *OBCA*, since there is no equivalent fiduciary duty section in the *Corporations Act.* The *Corporations Act* only states that directors/board members must declare any conflicts of interest they have with respect to direct or indirect interests in proposed contracts.[14] The requirement to declare conflicts is an aspect of a fiduciary's responsibility, but the language of that section is insufficient to establish a full, statutory form of fiduciary duty as applies in the general corporate world.[15]

British Columbia and Alberta may be the clearest example in Canada of a statutory fiduciary duty in the university sector. In BC, the *University Act* first states that the *Business Corporations Act* does not apply to universities,[16] but then provides for a specific statutory fiduciary duty for university board members, which requires them to act in the best interests of the university.[17] In Alberta, the *Post-secondary Learning Act* creates the same obligation for university board members.[18] The term "best interests" is not defined anywhere in either legislation, but CAUT argues that the statutorily-mandated inclusion of faculty, staff, and students on the board of each university in both provinces means that "best interests" has to be considered and applied within this representational regime.[19] Thus, the fiduciary duty provision cannot be read in isolation from the board composition requirements. The best interests of the body corporate that is the university is an amalgam of the interests of the communities represented on its board of governors.

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10. This includes British Columbia and Alberta, where there is an umbrella universities statute applicable to all universities in those provinces. In Alberta, the *Post-Secondary Learning Act* governs. In B.C., it is the *University Act*.
11. One exception being the *University of Toronto Act*, 1971, c. 56 where s. 2(3) uses the same kind of language found in most corporations legislation (good faith, best interests, honestly, etc.), which is applicable, nonetheless, in the context of university governance and the objectives of the Act.
12. *Business Corporations Act*, R.S.O. 1990, c. B. 16, ss. 1 and 2.
13. *Corporations Act*, R.S.O. 1990, c. C.38, ss. 1, 117, and 71. This appears to be recognized, for example, in the *University of Toronto Act* where it is specified that certain portions of the *Corporations Act* do not apply and that in the event of any conflict otherwise between the two statutes, the terms of the *University of Toronto Act* prevail. *University of Toronto Act*, 1971, c. 56, s. 1(2) & (3).
14. *Corporations Act*, supra, s. 71(1).
15. Compare the very clear language found in s. 134 of the OBCA: "Every director and officer … in exercising his or her powers and discharging his or her duties to the corporation shall, (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill," or the language found in s. 122 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44: "Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence, and skill." This is clear and sufficient language establishing a fiduciary duty.
16. *University Act*, R.S.B.C. 1996, c. 468, s. 3(4).
17. *University Act*, supra, at s.19.1. It states, "The members of the board of a university must act in the best interests of the university."
18. S. 16(5) uses almost identical language: "The members of the board must act in the best interests of the university."
19. Supra, s. 19.

Fiduciary duty in the context of collegial governance

Fiduciaries must act in the best interests of their beneficiaries. It is useful to note, however, that even in the corporate world the Supreme Court has specified that the interests considered need not be confined to those of just the shareholders and directors. [20] The ultimate conclusion in describing the statutory fiduciary duty by the Court was that the board members/directors may, "consider, inter alia, the interests of shareholder, employees, suppliers, creditors, consumers, governments and the environment."[21]

Thus, even for the more strict form of fiduciary obligation arising from statute rather than common law, best interests can take into account broader interests than merely those defined by the owners of the corporation. This should give further pause in applying the corporate law interpretation of fiduciary duty in the university context given a university is subject to a collegial governance model incorporating representation from university communities on its board of governors.

Nevertheless, the nature of the fiduciary duty applied in the university sector must reflect the nature of university governance. Collegial governance is the basis for representational membership on a university board. [22] In the case of the academy, such appointments are not made to persons **who happen** to be academic staff, but made **because** they are academic staff. To subsequently obstruct or interfere with a representational member consulting or canvassing the academic staff community they are to represent cannot be acting in the best interests of an institution as it is contrary to the university governance model itself. Recognizing representation, but denying representational rights, undercuts collegial governance and the representational framework on which it is based. A corporate law model that ignores this reality thus cannot be used to define the nature and scope of the fiduciary duty for university board members.

Best interests of the communities represented

From a corporate law perspective, fiduciary duty of university board members, and the conflicts of interest rules on which they are based, often reflect a false dichotomy between the best interests of the university and the interests of the internal university communities represented on a university board. This perspective of best interests is based on an idea of the university as a form of corporate body that exists without faculty or students. In another words, applying a fiduciary duty from the corporate world is consistent with a view that a university is just a corporation similar to those normally subject to the general corporations' law regime.

In the university sector, board members from the faculty community, amongst other such representative members, must be free to function as representatives for the community they are there to represent. The tradition of collegial governance and the statutory board composition requirements make this essential. Otherwise representation is a sham: the board member's status as faculty becomes only an eligibility criteria for board membership, not for the representation of faculty that is fundamental in the collegial governance model.

As such, representatives of academic staff should not be hindered from communicating and consulting with their constituents, or from participating in board processes on the basis that they represent an internal community with separate interests from the "whole" university community. Rather, the applicable approach is the opposite; they should not be so hindered **because** they are required to represent the community from which they derive their appointment. Interfering with this process creates a democratic deficit in university governance:

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20. Directors are permitted to consider other interests reflecting the Courts' deference to their business judgement. See *Peoples*, supra note 4 , at paras. 63-65; also see para. 42.
21. Ibid.
22. As can be seen from the *CAUT Governance Review* (forthcoming) , faculty, student, and staff representation on the board is a legislative requirement in the vast majority of cases and required through by-laws made under the authority of the legislation, with Memorial University of Newfoundland as the lone example of no faculty representation on its board.

if there were no interest for an academic staff representative to represent on the board, then why have a representative at all? And, if there is such an interest, then how can policies that obstruct or interfere with the determination and consideration of such interests be consistent within the objectives and best interests concerns that must underlie the application of the fiduciary duty in the university context?

Resistance to a concept of fiduciary duty incorporating representation obligations may come from the corporation sector view that the best interests of a university will inevitably conflict with those of the particular groups/communities/constituents and that the board members are there to serve that narrow corporate law definition of best interests. However, that ignores the representational nature of the governing body of a university where the board has to take into account the interests of its constituent communities in its decision making process if the governance model is to have any meaning.

Thus, where the goals and objectives of the university align with the immediate or long-term goals and objectives of faculty, staff, or students (e.g. job security through the ongoing existence of the institution, recruiting quality academic staff through attractive terms and conditions of employment, or ensuring stable enrolment by not increasing tuition past a certain point), there is no conflict of interest in determining the best interests of a university. But even where there may be disagreement as to what is in the best interests of the university, it is the role of a university board to consider those diverse interests mandated by representational representation in making decisions affecting the broader community. In the end, best interests may be identified to override the interests of any particular member of the group, but that does not mean those interests can be prevented from being heard before and after the decision is made.

Even when the goals and objectives of the university may not align, or are potentially at odds with those of faculty, staff, or students, it is not necessarily a breach of the fiduciary duty for a representative board member to participate in related discussions and decisions. This would even be the case for a corporate board, where there is no such representative membership mandated by statute or by-law. For example, the British Columbia Court of Appeal found that a company director who entered into a loan agreement with his company was not in breach of his fiduciary duty because the company had full disclosure of the material facts, had its own counsel, and had other members to rely on for advice when negotiating the agreement.[23] In coming to this conclusion, the Court relied on the Supreme Court's rulings that not every self-interested act by a fiduciary conflicts with the fiduciary duty.[24] Where express representation of interests is provided for in a university board, it is therefore a misuse of the fiduciary obligation to follow a blanket exclusion of faculty and other internal board members from discussions and votes that indirectly or directly affect them.

Best interests through the lens of statutory objectives

The determination of best interests, as applied in the context of a fiduciary duty in a university board setting, must consider the objectives and goals of the university, often expressed in terms of teaching, learning, and research for the public good. These goals may not, however, constitute an exhaustive list.[25] Some examples here serve to illustrate how the best interests may be gleaned from the statutory objectives of a university. More often than not, these align with — rather than stand in opposition to — the interests of internal communities represented on the board.

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23. *Kidder v. Photon Control Inc.*, 2012 BCCA 327, paras. 57-62.
24. *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011] 2 SCR 175, para. 150.
25. The British Columbia Supreme Court found that a university in that province may work toward other purposes (in the context of tax law). See para. 81 of *British Columbia Assessors*, Areas No. 1 & 10 v. *University of Victoria*, 2010 BCSC 133.

- Under the *York University Act*, "The objects and purposes of the University are … the advancement of learning and the dissemination of knowledge; and … the intellectual, spiritual, social, moral and physical development of its members and the betterment of society."[26] Learning and the dissemination of knowledge are inextricably linked to what academic staff do at the university, and why students enroll. Interfering with faculty representatives' ability to represent their constituents frustrates the very nature of the university board, which is inherently a meeting of the stakeholders and communities, the members that form the university.
- The *University of New Brunswick Act* provides that the work of a university focuses on teaching, research, extramural teaching and service, and co-operation with other governments and bodies in furthering those goals.[27] Since the purpose of the university is to further those goals in concert with others, the interests of the constituents doing that work should be at the forefront, and the voices of the board members representing those interests must be heard and not frustrated. Stifling those voices by obstructing or interfering with the ability of representatives to carry out this statutory role is contrary to the *Act*.
- The University of Sherbrooke has its objects defined by statute as higher learning and research.[28] Arguably, the needs and interests of academic staff and students align more squarely with such purposes. The administration, therefore, should not be able to invent a concept of best interests of the university based on a corporate interpretation of fiduciary duty as something existing separate, apart, or at odds with these goals and the interests of the internal communities that are represented on the board.

Conclusion

The general corporate law conceptualization of fiduciary obligation does not fit the university as an institution subject to collegial governance with a representational board of governors. University boards are governed by specific statutes and have different objectives than those in the corporate world. The fiduciary duty, and best interests doctrine on which it is based, must therefore also be considered and applied based on the unique university model.

In CAUT's view the misinterpretation and misapplication of a corporate concept of fiduciary duty effectively hinders university board members from acting as representatives of their communities. University boards are required to be stakeholder boards. As set out in statute or university by-law or other governance documents, certain board members are required to be representatives from particular internal university communities such as academic staff.

The fiduciary obligation of every university board member is to act in the best interests of the university. There can be no determination of the best interests of the university without considering the interests of the university's constituent parts as mandated by a representational board. Interference with the ability of representational board members to freely act as representatives interferes with the exercise of the fiduciary duty rather than acting as any form of breach.

26. *York University Act*, 1965, s. 4.
27. *University of New Brunswick Act*, 1984, Acts of New Brunswick, ch. 40, s. 6.
28. *Loi concernant l'université de Sherbrooke*, Lois du Québec 1978, ch. 125, article 3.