DUAL LOYALTIES ON NON-PROFIT BOARDS: SERVING TWO MASTERS

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No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve both God and Money. [Matthew 6:24]
1. Outline of Topic
The Canada Widget Marketing Association ("CWMA") is established by regulation under the Canadian Widget Marketing Act (the "Act"). The members of CWMA are its board of directors, appointed by the Canadian Widget Manufacturers’ Association, the Widget Transportation Association, the Independent Widget Sellers Association, Widget Workers Union, Widget Purchasing Consortium, Canada Department of Widgets, Widget Exporters of Canada ("WEC") and the Canadian Widget Users Council.
CWMA is set up to create and run a plan to regulate the Widget industry (the “Plan”). Unfortunately, the Plan adopted with the support of the majority of the board is not acceptable to WEC, whose representative on the board, Sarah Sharp, has spoken out vocally at board meetings and at meetings of WEC, of which she is a director and the CEO.
At board meetings of CWMA she has also been party to confidential discussions on matters which could affect the foreign markets for Canadian Widgets, which she wishes to make known to WEC and its members. While remaining on the CWMA board, she works on WEC’s campaign to oppose the Plan coming into effect, by appearing on business television shows and writing letters to the press.
1. As a director of CWMA, what were Sarah’s duties to CWMA prior to approval of the Plan?
2. Does this change when the Plan has been approved?
3. To what extent can Sarah promote the interests of the WEC, which may not, at least in the majority opinion, be in the best interests of either CWMA or the Canadian Widget industry?
4. Can Sarah disclose CWMA confidential information to WEC, and if so, can she further disclose it to members of WEC?

5. What are the legal remedies available to CWMA or its constituent organizations against Sarah or WEC?

6. Would such remedies be available to stop Sarah from continuing to act publicly against the Plan, allow her to be removed from her directorship, or give CWMA damages from her or WEC?
7. Would any of this change if Sarah’s position on the CWMA board was non-voting?

8. Would any of this change when the new *Canada Not-for-Profit Corporations Act* is proclaimed, if the constituent organizations enter into a unanimous members’ agreement, under which they assume responsibility for decision-making?
9. Would it make a difference if Sarah has a genuine belief that a different version of the Plan, not coincidently the one proposed by WEC, would work better and be in the best interests of CWMA?

10. What if CWMA has a code of conduct which specifically permits its directors to put their stakeholder interest first?
11. What if that code also provided for disclosure to the stakeholder of confidential information on a “need to know” basis, provided the stakeholder also agreed to maintain it in confidentiality?

12. To what extent is such a code of conduct effective, in the light of common law and statutory requirements?
2. Background

2.1 Stakeholders and Nominees

2.2 Duties of a Nominee Director

• Act in best interests of corporation
• Not favour stakeholder’s interest
• Not to disclose confidential information
• Disclose stakeholder information

2.3 The Basic Rule
3. What the Law Should Be
   • Articles or agreement enforceable
   • Disclosure
   • Must consider effect of favour stakeholder
   • Disinterested quorum
   • True conflict rules prevail
4. Definition of Fiduciary

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [*Frame v. Smith*, SCC 1987]
5. Corporate Director as Fiduciary

5.1 The Peoples Case

We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.
5.2 The BCE Case

...conflicts may arise between the interests of corporate stakeholders inter se and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.
5.3 The Scope of the Duty of Loyalty
6. Duty of Confidentiality

6.1 Duty Not to Disclose

6.2 Duty to Disclose Third-Party Information
7. The Business Judgment Rule
8. How duty of loyalty applies to decisions
9. Contracting Out – Unanimous Member’s Agreement
10. The Position of the Non-Voting Director
10.1 Is a Non-Voting Director Really a Director?
10.2 Hospital Boards
10.3 Consensus Decisions
10.4 Summary
11. Workarounds and Precautions
11.1 Limits to Workarounds
11.2 Conclusion
12. Remedies and Sanctions
12.1 Removal of Director
12.2 Exclusion of Director
12.3 Denial of Access to Records
12.4 Civil Liability
12.5 Liability of a Stakeholder in Tort and Oppression Remedies
13. Other Jurisdictions
13.1 United States
13.2 United Kingdom
13.3 Australia
13.4 New Zealand
Connecticut Business Corporations Act

s. 33-756 (d) A director .... shall consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation,
(3) the interests of the corporation's employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located. A director may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation.
Companies Act, 2006, UK

172 Duty to promote the success of the company

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.
(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.
14. Do We Need Legislation, Or Can The Courts Handle This?

14.1 The Case for the Courts

14.2 What Would Legislation Look Like?
14.3 A More Radical Legislative Approach

- Articles or agreement enforceable
- Disclosure
- Must consider effect of favour stakeholder
- Disinterested quorum
- True conflict rules prevail
14.4 Remedies
15. The End