The Nominee Director In Canada

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It is a common practice in Canada for an individual to be nominated as a director of a corporation by stakeholders who have a significant interest in the corporation, such as shareholders, employees or creditors. These directors are often called "nominee directors." While the duties owed by a nominee director to the corporation are identical to those owed by an independent director, the relationship of the nominee director and his or her nominating stakeholders poses unique challenges to the nominee director in fulfilling their duties. It is important to understand these challenges to ensure that risks inherent in the nominee director's position are mitigated and stakeholder expectations are effectively managed.

A pre-existing relationship shared by the nominee director and the nominating stakeholders may lead the director to feel a loyalty to those stakeholders. In addition, by virtue of nomination, the director may feel like they are the advocate of the stakeholder and must therefore represent the interests of that group, acting as its eyes and ears in respect of the corporation. This relationship may be further influenced by the fact that the security of the nominee director's employment may depend upon the support of the stakeholders. The nominee director may also hold a financial interest in relation to the stakeholder.

The loyalty a nominee director may have towards nominating stakeholders should not be confused with their legal duty. The principal duty a director owes in respect of their position is that of a fiduciary; that is, 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. This principle is found in statute and at common law.

With respect to the common law, the competing loyalties of the nominee director are particularly relevant to the discussion of fiduciary duty where the interests of the corporation and the nominating stakeholders are not aligned. In such circumstances, the interest of the corporation must prevail. Where interests are not in conflict, there may be circumstances where a nominee director is entitled to protect the interests of its nominating stakeholders.

It is important to understand the ways in which a nominee director's fiduciary duty may be breached. A director who takes direction from a stakeholder without exercising his or her ability to exercise their best judgment is likely in breach of their fiduciary duty. To fulfill their fiduciary duty in this respect, a nominee director must analyze a situation from the corporation's perspective at the time a decision is made. An analysis made in hindsight will not be sufficient, even where the outcome of this analysis leads to the same conclusion as a contemporaneous review.

This analysis is particularly important in situations where minority shareholders will be impacted by a course of action. In these situations, where no analysis has been taken as to whether or not a course of action is in the best interests of the corporation, the course of action may be found to be unfairly prejudicial to minority shareholders.

A director may also be in breach of their fiduciary duty where they do not disclose certain information to the board of directors. Disclosure will be required where the director holds information that could have an adverse or serious consequence on a vital aspect of the corporation's business. A non-disclosure agreement cannot serve as a shield to this requirement. In circumstances where a director has signed a non-disclosure agreement in respect of information received that would impact a vital aspect of the corporation, the director is in breach of their fiduciary duty if this information is not disclosed to the board.

In addition to a fiduciary duty, a nominee director also owes a duty of confidentiality. There are restrictions on the information that a director is able to disclose to the corporation's stakeholders. The guiding principle requires a director to maintain the confidentiality of information they acquire by virtue of their position as a director of the corporation. Shareholders and creditors of a corporation do not have the right to access certain financial records, minutes of directors' meetings or resolutions of the directors while directors hold a statutory right to access this information at any time. The difference in the rights granted to a shareholder and a director suggest that this information is intended to remain confidential within the board.

A board of directors may be wary of the presence of a nominee director on the board given the concern that the information that is communicated to their nominating stakeholders. That being said, a board cannot restrict a nominee director's access to information to which they are statutorily entitled regardless of whether the board speculates the nominee director has an improper motive in requesting the information. The risk of the improper use of information is however mitigated by the duty of confidentiality the nominee director owes to the corporation. Furthermore, if the nominee director fails in this regard, the corporation may seek a remedy for the breach.

It has been said that the life of a nominee director who votes against the interests of their appointing stakeholder is neither happy nor long, but the duty of the nominee director is to cast their vote towards the course of action best suited for the corporation, regardless of how such course may impact the interests of their appointing stakeholder. To discuss nominee director "best practices", please contact one of the authors or another member of BLG's Corporate & Commercial Group.

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