OLTHUIS KLEER TOWNSHEND LLP

BARRISTERS AND SOLICITORS

Artwork by Robert Solomon

Legal Opinion for:

SAHTU RENEWABLE RESOURCES BOARD

Re:

BOARD MEMBERS' OBLIGATIONS

From:
Lorraine Land & Jessica Iveson
OLTHUIS KLEER TOWNSHEND LLP
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Contents

I. INTRODUCTION

A. The Question You Asked

We are providing you, separately, with a legal opinion on the jurisdiction and powers of the Sahtu Renewal Resources Board (SRRB). You also asked us, in the context of providing that legal opinion, to answer a related but separate question:

> **"Could you clarify how Board members can negotiate their role in decisions of the Board with respect to [Environmental Assessment] processes and their accountabilities to the organisations that nominated them?"**

The members on the SRRB are facing a concern which is common to many of the co-management boards established under the northern land claims agreement. Members on the SRRB are nominated by land claims and government bodies. Board members have questions about the degree to which they should (or should not) 'represent' or advocate the views of the bodies which nominated them when they perform their duties as members of the SRRB.

B. Summary of Opinion

The SRRB members' obligations are informed by provisions in the Sahtu Dene and Metis Comprehensive Land Claim Agreement (SDMCLCA)[1] and by principles of common law (regarding the duties of administrative tribunals and directors of non-profit organizations).

The basic rule is that SRRB members must act independently of the governments and organizations that nominated them, when making decisions as the SRRB. Board members are not simply 'mouth pieces' for the bodies that nominate them.

At the same time, it is presumed that the bodies that nominate the board members are confident that their nominees hold compatible views. This was in fact intended by the SDMCLCA negotiators, because a key goal of the land claim settlement was to ensure the robust participation of the Sahtu Dene and Metis in decision-making about wildlife, land and water use and environmental assessment.

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[1] *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (Ottawa: Minister of Public Works and Government Services Canada, 1993) (SDMCLCA).

The Board members are free to hold views that are compatible with the views of the body that nominated them, and can even take into account the interests of the bodies which nominated them. The SRRB members must, however, keep an open mind and focus on the best interests of SRRB and on their obligations to fulfill the mandate of the SRRB. (That is different from being under a duty to the nominating bodies by reason of being nominated or appointed by them).

II. OBLIGATIONS UNDER THE SAHTU DENE AND METIS COMPREHENSIVE LAND CLAIM AGREEMENT

A. Objectives of the Land Claim Agreement

A key intention of the SDMCLCA negotiators was to ensure that Sahtu Dene and Metis perspectives and needs were fully integrated into decision-making about land, water and resources in the claims area. This is reflected in the objectives of the SDMCLCA, including these objectives:

> 1.1.1. The Sahtu Dene and Metis and Canada have negotiated this agreement in order to meet these objectives ….
>
> (f) to provide the Sahtu Dene and Metis with wildlife harvesting rights and the right to participate in decision making concerning wildlife harvesting and management;
>
> (g) to provide the Sahtu Dene and Metis the right to participate in decision making concerning the use, management and conservation of land, water and resources….[2]

The objective of ensuring robust representation of Sahtu Dene and Metis perspectives in decision-making about wildlife management, specifically, are reflected in the objectives listed in Chapter 13 of the SDMCLCA, which lays out the provisions for Wildlife Harvesting and Management:

> 13.1.1 This chapter has the following objectives:
>
> (e) to involve participants [the Sahtu and Metis enrolled under the SDMCLCA] in a direct and meaningful manner in the planning and management of wildlife and wildlife habitat…

[2] SDMCLCA, s. 1.1.1.

The mechanism established by the SDMCLCA to meet the objective of ensuring Sahtu Dene and Metis participation in wildlife management decision-making is the appointment process that ensures that the political body representing Sahtu interests[3] nominates half of the nominees for appointment to the SDMCLCA.[4]

B. Section 13 Obligations on Board Members

The obligation of SRRB members to act independently of their nominating bodies is rooted in the provisions of the SDMCLCA setting out the obligations of Board members.

1. SRRB MEMBERS MUST ACT "IN THE PUBLIC INTEREST"

First of all, the section of the SDMCLCA that legally establishes the SRRB also provides that the Board "shall act in the public interest."[5] The interest of the public, rather than their nominating bodies, is the primary obligation of Board members.

2. SRRB MEMBERS CAN HAVE ORGANIZATIONAL TIES TO CROWN OR LAND CLAIMS BODIES

The provisions of the SDMCLCA that set out the appointment process for SRRB members make it clear that a Board member does not have a conflict of interest merely because they are public servants (of the Crown) or employees of the land claim bodies.[6] This provision clarifies that a conflict of interest (or a situation of bias) does not exist simply because someone is employed by the Crown or the Sahtu bodies.

3. SRRB MEMBERS MUST ACT IMPARTIALLY

The SDMCLCA requires SRRB members to swear an oath before commencing their duties.[7] The oath commits each member to the following obligations, including to act impartially:

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[3] The political organization representing Sahtu Dene and Metis interests was the Sahtu Tribal Council (STC) at the time that the SDMCLCA was signed. The STC was subsequently incorporated as the Sahtu Secretariat Incorporated (SSI).

[4] Article 13.8.3 of the SDMCLCA provides that:

> The Board shall consist of seven members appointed as follows:
> (a) six members and six alternative members … of whom three members and three alternate member shall be appointed from nominees put forward by each of the Sahtu Tribal Council and government …

[5] SDMCLCA, s. 13.8.1(a).

[6] SDMCLCA, s. 13.8.4(a).

[7] SDMCLCA, s. 13.8.4(b).

> I do solemnly affirm (or swear) that I will faithfully, truly, impartially and honestly, and to the best of my judgement, skill and ability, execute and perform the duties required of me as a member of the Board.[8]

III. ADMINISTRATIVE LAW OBLIGATIONS ON BOARD MEMBERS

The SRRB is an "administrative tribunal". Administrative tribunals are specialized governmental agencies and boards that operate at arm's length from government and are expected to exercise their role in a nonpartisan manner. There are a wide variety of types of administrative tribunals, with different types of relationship with government, different scopes of power and different types of obligations. Over time, the common law has developed legal principles (related to concepts of 'natural justice' and 'procedural fairness') that apply to administrative tribunals. Some of these common law requirements apply to the functions of the SRRB, and specifically to the situation of the 'independence' of Board members.

A. SRRB Members Must Be Free From "Bias"

One key requirement of administrative tribunals is that they must be free of bias and maintain an open mind when making decisions.[9] The leading case in Canada about the independence of tribunal board members actually took place in relation to the McKenzie Valley pipeline proposal in the 1970's. A bias challenge led to the removal of the Chairman of the National Energy Board (NEB) from the NEB Panel considering the pipeline application. (The senior partner in our law firm, John Olthuis, argued that case for the Dene). The case went all the way to the Supreme Court, who confirmed that it was proper to remove the NEB Chairman on basis of bias. The Supreme Court set out the following description of, and legal test for, bias:

> …. [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not

[8] Schedule III to Chapter 13.

[9] *Old St. Boniface Residents Assn. Inc. v Winnipeg*, [1990] 3 SCR 1170 at 1190; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

> that [the decision-maker], whether consciously or unconsciously, would not decide fairly.[10]

B. "Free From Bias" Means "Impartial" Not "Objective"

Subsequent cases have further clarified that tribunal decision-makers are not required to be '**objective**' but they are required to be '**impartial**':

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different point of view with an open mind.[11]

Administrative tribunal decision-makers must be free from interference from the person or group who appointed them.[12] There is, however, a spectrum of institutional independence and what is required can vary depending on the type of tribunal. The requirement of independence must be adapted in a flexible manner and must be informed by an analysis of the tribunal's enabling statute.[13] The extent of independence required of a tribunal decision-maker will depend on a "functional and pragmatic analysis" of the role of the tribunal that looks at the nature of the tribunal, the interests at stake, and other indicators of independence.[14]

The SRRB is a type of tribunal that is more like a government policy-maker than a court (or 'quasi-judicial body,' such as energy boards that hold formal hearings and have rules of evidence, or tribunals that can determine a person's freedom such as a parole board or an immigration board). In the case of a policy driven tribunal (such as the SRRB), the test for "reasonable apprehension of bias" must be applied in a more flexible manner than in the case of administrative tribunals that play more of a court or quasi-judicial role decision-makers.[15]

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[10] *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394 – 395.
[11] *R. v. S. (R.D.)*, [1997] 3 SCR 484 at para. 119.
[12] *Valente v the Queen*, [1985] 2 SCR 673 (the leading case on the need for administrative tribunals to be institutionally independent of those who appoint them); see also Guy Regimbald, *Canadian Administrative Law*, 1st Ed. (Markham, Ont: LexisNexis) at p. 361.
[13] *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch*), [2001] 2 S.C.R 781 at 794.
[14] *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, see particularly pages 51 - 52. Gerald Hackman and Lorne Sossin describe the 'functional and contextual approach' for looking at the spectrum of institutional independence in "*How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence*", (2005) McGill L.J. 193-264 at para. 80 – 85.
[15] *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 47.

A functional and pragmatic analysis of the SRRB's role would also look at the enabling legislation for the Board to understand what 'independence' means in the unique context of the SRRB. The SRRB was set up with the explicit intention of ensuring that the views of the Sahtu Dene and Metis are reflected in wildlife decision-making, which is the primary focus of the SRRB. It is a co-management Board based on the goal of joint management of wildlife resources in a manner which brings together Dene, Metis and Crown perspectives. While Board members are expected to be 'independent' from the nominating bodies, it is reasonable to assume that they are expected to have views similar to those of their nominating parties, while acting 'independently' from those bodies.

In sum, under the principles of administrative law, the SRRB members do not need to be completely 'objective' or removed from the viewpoints of their appointing bodies, but they do need to be impartial when dealing with a decision on wildlife management issues, i.e., free to entertain and act upon a different point of view with an open mind. This may mean occasionally making decisions that conflict with the interests of their nominating bodies.

IV. "NOT-FOR-PROFIT CORPORATIONS" LAW OBLIGATIONS OF "REPRESENTATIVE DIRECTORS"

A. The Duty of Care and Duty of Loyalty Owed by SRRB Members

The SRRB is a not-for-profit corporation (established by specific legislation rather than under a federal or territorial business corporations statute).[16]

The common law has developed principles regarding the legal obligations of board members ("directors") of not-for-profit corporations, which can be applied to the question of the

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[16] The SRRB is established by the SDMCLCA and the *Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c. 27:

The SDMCLCA provides that:

> 13.8.1 (a) A Renewable Resources Board shall be established to be the main instrument of wildlife management in the settlement area ...
>
> 13.8.1 (b) The Board shall be established by virtue of settlement legislation at the date thereof.

The *Sahtu Dene and Metis Land Claim Settlement Act* gives statutory effect to the SDMCLCA and provides that:

> 4 (1) The Agreement is hereby approved, given effect and declared valid.
>
> 4(2) For greater certainty, any person or body may exercise the powers, rights, privileges and benefits conferred on the person or body by the Agreement and shall perform the duties and is subject to the liabilities imposed on the person or body by the Agreement.
>
> 5 For the purposes of carrying out its objectives, the Renewable Resources Board established by the Agreement has the capacity, rights, powers and privileges of a natural person.

independence of SRRB members from their appointing bodies. There is a line of cases that deal specifically with the situation where directors are nominated to a board by another body, and the obligations to the nominating body versus the board to which they are appointed. This section explores the common law principles governing the obligations of "representative directors", and the implications of those common law principles for the SRRB members.[17]

Board members are required to exercise their power with competence (or skill) and diligence in the best interests of the organization. They owe what is called a "fiduciary duty" to the corporation. The duty is a "fiduciary" duty because the obligation to act in the best interests of the organization, at its core, is an obligation of loyalty, honesty and good faith.[18]

Board members' fiduciary duties can be divided into two main branches:

(a) the duty of care; and,

(b) the duty of loyalty.

The duty of care requires that Board members be competent – i.e., act with a certain level of skill – and be diligent.[19]

The duty of loyalty requires that a Board member act honestly and in good faith in the best interests of the organization. The "fiduciary" nature of the relationship that a Board member has to the organization means that the member must act for the organization's benefit and make his or her personal interests secondary to the best interests of the organization.

B. In the Case of a Conflict, Board Members' Duty of Loyalty is to the SRRB

A conflict of interest can arise where a board member's duties to the organization which he or she serves conflict with duties that the member owes to another person or body.

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[17] A good resource on the obligations of board members is Jane Burke-Robertson's *Duties of Directors* in the *Primer For Directors Of Not-For-Profit Corporations*, Industry Canada, 2002 available here: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Primer_en.pdf/$FILE/Primer_en.pdf.

[18] From Jane Burke-Robertson, *Duties of Directors* in Primer For Directors Of Not-For-Profit Corporations, Industry Canada, 2002.

[19] The duty of competence and the duty of diligence must meet a certain "standard" (or level) of care. The standard of care required is not relevant for this memo, so I am not providing further analysis here.

In 'not-for-profit corporations' law, an important principle is that a board member of a not-for-profit corporation must put the interest of the corporation first and not breach his or her duty of loyalty to the corporation when there is a conflict with the interests of nominating bodies. This is because of the "duty of loyalty" owed by board members:

> A director nominated by a particular shareholder of the corporation is not in any sense relieved of his or her fiduciary duties to the corporation. A nominee director is not accorded an attenuated standard of loyalty to the corporation. The director must exercise his or her judgment in the interests of the corporation and comply with his duties of disclosure, and must not subordinate the interests of the corporation to those of the director's patron.[20]

For SRRB members, the "duty of loyalty" means:

- Acting in the best interests of the SRRB at all times;
- Not favouring the interests of the nominating body if that interest is different from the interest of the SRRB;
- Not disclosing the SRRB's confidential information to the nominating body; and
- Disclosing to the SRRB information coming from the nominating body which relates to a planned activity or operation likely to have a negative impact on the SRRB.[21]

C. Board Members Can, However, Take Into Account the Interests of the Nominating Bodies

A board member, while owing a "duty of loyalty" to the organization they are appointed to, can still consider the interest of the body that nominated them to the board.

An appointed board member, without being in breach of his duties to the organization, may take into account the interests of his or her nominating body, provided that his or her decisions as a board member are in what he or she genuinely considers to be the best interests of the

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[20] *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 8 B.L.R. (2d) 221 and 221n (Ont. Gen. Div.); aff'd (1993), 10 B.L.R. (2d) 109 (C.A.), leave to appeal to SCC refused (1993), 10 B.L.R. (2d) 244, per Callaghan CJOC at 8 B.L.R. 265.

The duties of directors of not for profit corporations, including their obligations to nominating organizations, is also informed by the leading case on the duties of corporate directors in Canadian law: *BCE Inc. v. 1976 Debentureholder*, [2008] 3 S.C.R. 560. The Supreme Court made it clear in *BCE* that, if the interests of the corporation conflict with the interests of stakeholders, "the directors' duty is clear — it is to the corporation".

[21] See *Duties of Directors*, supra at 15. The first two points can also be described as "the duty to act independently" (See *Directors' Duties in Canada*, Bennett Jones LLP (3rd ed., 2006), Ch 2, p. 56.).

organization. This a different from being under a duty to the nominating body by reason of being appointed by that body.[22]

V. CONCLUSION

It is not surprising that the members of the SRRB have questions about how to balance their role on the Board with their obligations to the land claims and government bodies which nominated them. Indeed, the SDMCLCA sets up the SRRB as a co-management structure that is based on principles of representing and balancing different perspectives in the process of decision-making about wildlife.

As seen from the above analysis, SRRB members do have statutory obligations to act impartially, and common law duties to avoid bias, and be 'loyal' to the SRRB including acting in the SRRB's best interest rather than in the best interest of the body that nominated them.

These obligations to act impartially, and to act independently from nominating organizations, does not mean however that Board members will not share the views of their nominating bodies or that they cannot take the interest of the nominating bodies into account. The critical thing is that SRRB members must keep an open mind during decision-making, and consider first what is in the best interest of the SRRB (including the public interest which the SRRB must serve).

[22] *Re Neath Rugby Ltd*., [2009] EWCA Civ 291 at para. 32 – 33 (U.K. Court of Appeal). See also the Supreme Court's decision in *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. at paragraphs 40, 66 and 81.