

CAUT Report on Board of Governors Structures at Thirty-One Canadian Universities

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Note that the numbers reported in this document may have changed since its original publication in 2018. Please see document 4.5 Cross Canada comparison of university board of governors for more current numbers.

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1| Introduction

Governance structures of Canadian universities are almost all bicameral, with administrative and financial responsibilities (boards/councils) separated from academic ones (senates/general faculties councils). The Canadian Association of University Teachers (CAUT) takes as a starting point that collegial governance requires the full and meaningful participation of internal board members — such as faculty, students, and non-teaching staff. At almost all universities examined in this report, academic staff representation on the governing board is mandated by statute or by-law created pursuant to that statutory authority. Academic staff are unique in that participation in the governance of one's university is an essential component of the exercise of academic freedom. As such, the representational nature of an academic staff member of a board is reinforced by their exercise of academic freedom. Academic freedom is not compromised, but enhanced by academic staff representation on a board.

This report examines the language used in the documents, policies, codes of conduct, by-laws, and legislation that control the governing boards at thirty-one Canadian universities. These documents, and the language used therein, have a normative effect on the people who sit on these boards as they frame the debate and processes through which decisions are made. Collegial governance is shaped by the structure established by these documents. Admittedly, this is a qualitative assessment. This report does not speak to how a board actually functions within these structures. Some universities may have excellent structures, but poor behaviour. The lesson for those places is to hold the board members accountable to their policies and practices. Other universities may have seemingly bad structures, but function much more openly and democratically. The lesson there is to put into writing these excellent behaviours before board membership changes.

Previous CAUT publications looked at who sits on these boards, with a growing trend of appointments coming from the corporate, for-profit sector. This report expands the review to look at how governing boards self-regulate and function. This report uses the term “structures” to mean the governing statutes, regulations, by-laws and codes of conduct, conflict of interest policies, and other governance rules. These structures — and codes of conduct, specifically — in many cases are limiting effective faculty, staff, and student representation that are an essential part of university governance. Adopting structures from the corporate world is contrary to the rich tradition of Canadian collegial governance. Reclaiming collegial governance involves reasserting the academic staff and internal member presence on governing boards, as well as dismantling the structures put in place as part of this trend.

In developing this report, CAUT asked the following questions for each university studied:

- How many academic staff sit on the board and what proportion of the total number do they form? What is the source of academic staff representation on the board?
- What kinds of fiduciary duty language do they use? Is it consistent with the University Governance Model?
- How do they define conflicts of interest, in light of collegial governance? Is there a conflict of commitment? Is the special position of members representing academic staff constituents recognized in the conflicts language? Does any of the language single out unions and academic staff associations?
- How do boards conduct meetings and govern behaviour between and by board members? How far (over)reaching are the confidentiality rules? Are they specific to certain subjects or do they generally apply to all information? Is censorship imposed on board members? Do the boards have closed meetings too easily or too often?

- Are there rules of board solidarity or forced civility?
- Is academic freedom enshrined in any documents relevant to the board?
- Is there interference with academic freedom of faculty board members?
- Are policies and practices “anti-representational” — i.e. is there a “democratic deficit” that interferes with the ability of a faculty member on a board to represent the faculty constituency that forms the basis for the member’s appointment?

Fundamentally, this report assesses how faithful universities are to the University Governance Model,¹ respecting the concept of academic freedom and representation for academic staff members in the governance structure.

Summary

All members of a university’s governance bodies are fiduciaries under the law.² This means that, similar to the directors of a trust or a non-profit, board members must act and decide with the **best interests** of the university in mind. This obligation applies to external board members (those from outside of the university’s community) and internal members (typically faculty, staff, and students) alike. The definition of best interests, however, must be considered in the context of university governance that is subject to specific statutory purposes and objectives.

Contrary to what many university administrations assert, the university governance structure is not akin to a

business corporation with only one governing body reflecting private — as opposed to public — interests and responsibilities. Unlike corporate boards, every university board is designed by statute to be a “stakeholder board,” where the public, academia, students, and alumni guide the university in concert. Corporate boards are not required by law to be structured in a similar fashion. Therefore, representation, consultation, and bringing together multiple interests are concepts that are inherent within the very structure of university boards. Representational board members should be elected, and their ability to represent their respective constituencies should be free from interference by board policies, structure, or practices. Further, the representational model that is a feature of collegial governance in Canada is subject to the exercise of academic freedom by faculty representatives on university boards. There is no equivalent for board members in the corporate world.³

What is wrong with governance at many universities?

- An interpretation of fiduciary duty that assumes that the university’s best interests are inherently at odds with those of academic staff, or that best interests are not a composite of the interests of all constituencies represented on the board;
- A democratic deficit whereby practices and procedures undermine the representative composition of the governing body and the obligation of representatives to report to and receive input from their constituents;
- Failure to recognize that academic staff retain their academic freedom when serving on a university board;

1. See the Glossary section of this report.

2. CAUT has developed an analysis of the fiduciary duty in the context of the Canadian University Governance Model, which is both collegial and representational. See Appendix A, “A Corporation and a Community: Fiduciary Duties of University Board Members.”

3. See the definition of academic freedom in the Glossary section of this report.

- Overbroad conflict of interest language that goes beyond an explanation of fiduciary duties;
- Board meetings that are too frequently closed;
- Confidentiality provisions that are overbroad and that cover all materials and discussions instead of being specific;
- Board solidarity, where board decisions must be supported publicly, even if the board member was opposed during debate;
- Language promoting a “tyranny of civility” during meetings.

As expected, almost all of the thirty-one universities reviewed contained language to remind board members that they are fiduciaries who must place the university's interests above all others, when voting and making decisions. However, none specify that the content of the fiduciary duty and the best interests underlying that duty must be determined in the context of the University Governance Model. The Model is one comprising a representational board that respects academic freedom for faculty members. In addition, all had some language on conflicts of interest, policies on recording meetings without permission, and strict policies on confidentiality of information and discussions from closed or in-camera sessions. Surprisingly, the majority of conflict of interest policies that mentioned “internal” members — those members who are also faculty or staff of the university — required that representational members recuse themselves from debate and voting on matters that affect their terms of employment. Although it is a conflict for internal members to vote on such matters, it is not inappropriate to include language that allows

representational members to participate in the debate, since they are in the best position to comment on how the board's decisions will be received and what impact they will have. In other words, while “voice” need not necessarily be accompanied by vote in certain situations, protecting academic staff voices is consistent with the representational model and the exercise of collegial governance and academic freedom.

Most concerning is the false dichotomy that overbroad conflict of interest policies create between the best interests of the university and those of its internal communities. A corporate-style approach to governance brings with it the business world's faulty assumption that academic staff do not share the same interests as the university, or that faculty interests cannot be accommodated in board decisions. A corporate-style approach to governance therefore assumes only the administration can determine what is in the best interests of the university. Such a one-sided process is antithetical to the idea of collegial governance. As discussed in Appendix A, this approach effectively ignores the purpose and objects of a university. Oddly, due to current trends of board membership, those in power are increasingly from environments that have nothing to do with research or education. The result is a troubling shift in culture, process, and concepts. Instead of non-university sector appointees adapting their understanding to the context of collegial university governance, we find that they are altering the university model to fit their understanding from the corporate world. This corporate approach does not fit with the fundamental right to academic freedom that academic staff possess at all times, including when serving on a university board.

Findings & patterns

Generally, the further west one goes, the more restrictive, closed, and less collegial university governance becomes. The universities with more appropriate governance structures overall were Toronto, Bishop's, McGill, and Waterloo — all in Central Canada and with high research output. These institutions had faculty representation on the board that was commensurate with the size of the board, frequently at or around 20% of the membership. They tended to have language that carved out internal members' ability to discuss or vote on matters of tuition, labour relations, and funding — rather than leaving these members conflicted out under more general, corporate-style conflict of interest policies. These universities also had language that either specifically enshrined academic freedom for internal board members or clarified that collegial governance necessitated representing and communicating with constituents. Where there is language to emulate, it is noted in the report. Where CAUT did not find anything inconsistent with principles of collegial governance, it is also noted.

The francophone universities studied tended to have more appropriate collegial governance structures, where there was broad representation on administrative councils from all internal constituencies. Their governing bodies, however, do not function with a great degree of openness. Sherbrooke, Montréal, and Laval have council meetings that default to closed rather than open and have provisions for going in-camera for certain issues or topics. It is worth noting that at the Université de Montréal, board members who represent university constituencies are specifically exempt from the confidentiality rules, thus ensuring that they can consult with, and report to, their constituents.

Saskatchewan and Regina have some of the smallest boards in Canada, and the only boards where the members were paid and receive access to university facilities and resources. Everywhere else, board members are volunteers. In addition, their governance structures require some form of board solidarity to silence dissent, criticism, or independent opinions. Both institutions adopt language that creates forced civility — a strong warning that vigorous dissent is not welcome. Saskatchewan specifically prohibits board members who are also students, staff, or academic staff from participating in protests, demonstrations, or labour disruptions. It also warns the lone academic staff member that they can expect to have academic freedom curtailed as a board member. CAUT asserts that a university policy is not capable of infringing upon a contractual and common law right, such as academic freedom. Memorial is an outlier for being the only university in Canada that does not practice a key component of collegial governance — that is, having faculty representation on its board. According to their statute, anyone who teaches at the university cannot sit on their board.⁴ All of these universities conduct board meetings behind closed doors, which hinders opportunities for accountability and transparency.

Part of the corporatization trend is an increasing willingness to include board solidarity language in various governing documents. Board solidarity requirements represent a direct threat to a faculty member's right to academic freedom. Equally concerning is the false dichotomy created between the best interests of the university and those of a constituent group within

4. Section 31 of the *Memorial University Act*, RSNL1990, Chapter M-7.

the university. This has its roots in interpretations of fiduciary obligations at law, but the current language being used goes beyond what is required/necessary.⁵ There are far too many examples of language that contributes to the democratic deficit by interfering with representational members' ability to represent their constituents, and is at odds with the concept of collegial governance. Representational members are on their university's board precisely because they represent a constituent group whose interests are at the heart of the mission and mandate of any modern Canadian university. In all cases, this representation is required by provincial legislation or by-law that is passed pursuant to that statutory authority. Faculty, staff, and student concerns are designed to be included. It is, therefore, an artificial frustration of that representational dialogue to deem these interests as in conflict with those of the university. It is not a conflict of interest for internal members to vote against tuition increases or in favour of stable library funding simply because they represent a community that may benefit from that decision. Better funding and lower tuition may actually be wholly aligned with the best interests of the university, as a whole. It is, therefore, in keeping with their fiduciary obligations to seek information from their constituents, to debate these issues with vigor, and to vote accordingly.

This report provides text that is quoted or paraphrased from the relevant source documents. This includes language around conflicts of interest, confidentiality, fiduciary obligations, and examples of language that CAUT finds objectionable or exemplary. For each portion, the citation is given with as much detail as possible. The analysis that follows it is qualitative and based on a comparison with fiduciary obligations at common law.

5. For a discussion of the fiduciary duty and the concept of the university's best interests, see Appendix A.

2| British Columbia

A note on British Columbia

All universities in British Columbia are governed by the *University Act*. With respect to governance, section 19(1)(c) of the *Act* requires that two out of fifteen board members for a university that is not the University of British Columbia must be elected by the academic staff members. For the UBC, Section 19(2)(c)-(d) requires three members elected by academic staff. The board size for the University of British Columbia is 21 members; it is 15 members for other universities.

British Columbia has a statutory fiduciary duty for members of boards of governors. It is contained in section 19.1. It states, “The members of the board of a university must act in the best interests of the university.” This definition is not inconsistent with the University Governance Model. For further discussion of the fiduciary obligation in the context of university governance, see Appendix A.

The *Act* prohibits certain members of the academic staff association’s executive from serving on the board. Section 23(1)(g) states,

The following persons are not eligible to be or to remain members of the board: ... a person who is an employee of the university and who is a voting member of the executive body of, or an officer of, an academic or non-academic staff association of the university who has the responsibility, or joint responsibility with others, to (i) negotiate with the board, on behalf of the academic or non-academic staff association of that university, the terms and conditions of service of members of that association, or (ii) adjudicate disputes regarding members of the academic or non-academic staff association of that university.

As discussed in Appendix A, such a provision is not required in order to promote the fiduciary obligation of board members. Moreover, it is contrary to the University Governance Model to require certain constituencies be represented, but then specifically exclude people who may be in the best position to represent those interests. Appropriate language would be to create a voice-vote distinction, instead of categorically disqualifying those who help to lead the faculty or staff association.

University of British Columbia

Number of faculty on board

See “A note on British Columbia.”

Source of faculty on board

See “A note on British Columbia.”

Fiduciary duty provisions

See “A note on British Columbia.”

Conflict of interest provisions

Section 23(1)(g) of the *University Act* creates a statutory conflict of interest rule. It disqualifies an employee or

faculty member who is in a position that involves negotiation or adjudication on behalf of their association. Section 5.4 of the *Code of Conduct* requires members in a conflict to recuse themselves from any discussions or votes, and withdraw from the meeting or meeting place.

The “best interests” of the university as a whole is a constellation of interests of its internal communities. Since academic staff and general staff representation is mandated by the statute, their best interests are a necessary part of the university’s. Those who are in a leadership position should not be barred from serving on

the board, since they would be very well-positioned to represent their constituents during board deliberations. In the event of an actual conflict, language could be crafted to allow for a voice-vote distinction, where members are allowed to contribute to the discussion, but required to recuse themselves from the vote.

The requirement to remove oneself from the meeting is excessive. The mere presence of one potentially or actually conflicted director amongst 21 non-conflicted members does not necessarily ruin the process or decision.

The Board of Governors Manual, at page 38, states that elected governors may face “the possibility of conflict between the interests of the constituency that elected them and the interests of the University” and are bound to act in the best interests of the University.

This provision inappropriately expands the statutory fiduciary duty found in section 19.1 of the *Act*. It is unfortunate that repetitive language is used against representational board members — as opposed to a reminder to external board members that they may have to recommend, recuse, or vote against transactions that may benefit them, their employer, or other organization with which they are affiliated. This false dichotomy is inconsistent with the representational nature of the University Governance Model.

Conduct & communications restrictions/ Code of conduct

Section 3.2 of the *Code of Conduct* states that a governor “is not a delegate or democratic representative of any interest or group.”

This language is entirely at odds with the University Governance Model, which is enshrined in the representation requirements for each board, according to the *Act*. It is highly problematic that a public body functioning for the public good, with board members

who are elected and appointed would seek to function undemocratically. CAUT asserts that the faculty board members are democratic representatives, whose constituents are mandated to be represented by law.

CAUT is aware of the changes made to the *Code of Conduct* in 2017. One of these changes involves the removal of a democratic representative from the language described above. Although it is a step in the right direction, the retention of the prohibition on acting as delegates or representatives still interferes with the proper role of the representational members.

The Board of Governors Manual, at page 39, states that requests for information from students and faculty to their own governors should be directed to the Board Secretary.

This provision interferes with the representational nature of internal membership on the board. Student and faculty members should be free to consult with and inform their constituents. Imposing controls on information is anathema to academic freedom.

Nature of meetings

The Board of Governors Manual describes meetings as open to the public, but that guests must request permission to attend. The number of guests is limited to 15.

Neither of these provisions is very open. Members of the university community and broader public should be allowed to observe the board in action without prior permission.

Other

Section 4 of the *Board of Governors Manual* enshrines academic freedom as a “fundamental principle.” It goes on to state that behaviour that interferes with the free and full discussion of ideas, even unpopular or abhorrent ones “threatens the integrity of the University’s forum” and will not be tolerated.

Although it is good to see academic freedom at the front of an important governance document, the wording is problematic. Rather than defining academic freedom as an academic staff member's right, it is vaguely defined and qualified as not including certain "behaviours." This wording skirts dangerously close to respectful workplace language. Better language would define academic freedom as a right that includes the ability to criticize the very system within which academic staff operate.

Simon Fraser University

Number of faculty on board

See "A note on British Columbia."

Source of faculty on board

See "A note on British Columbia."

Fiduciary duty provisions

See "A note on British Columbia."

Section 3.2 of the *Rules of the Board of Governors* goes further. It states that members must function primarily as a member of the board — "not as a member of any particular constituency."

The fiduciary obligation, when applied within the context of the University Governance Model, includes the interests of particular constituencies that are a part of the university. This is strengthened by the inclusion of particular constituencies on the board, as per Section 19 of the *University Act of British Columbia*. Internal rules and policies should not be inconsistent with the representational requirements of the Act.

Conflict of interest provisions

Conflict of interest provisions is defined in Section 9.1 of the *Rules of the Board of Governors* as "when a Member's other interests may put into question the independence,

impartiality, and objectivity that Members are obliged to exercise. It may be financial or otherwise."

CAUT believes that conflict of interest provisions should focus on financial conflicts, self-dealing, and misuse of office. This kind of language, where amorphous concepts of loyalty are used, could be used to interfere with the University Governance Model.

Section 9.3 requires that a member who is in such a conflict must remove themselves from the meeting, if in camera, and abstain from discussion or vote, if during open sessions.

Requiring a member to refrain from contributing to the discussion through silence or absence is excessive. Internal members should be allowed to contribute their voice as academic staff, general staff, or students, while being required to recuse themselves from the vote. At other institutions, representational members are specifically permitted to comment in general terms, and on behalf of their group or community. That kind of language should be included here.

Conduct & communications restrictions/ Code of conduct

Section 3.4 of the *Rules of the Board of Governors* states that a member expressing dissent from a board decision, "shall clarify that the dissenting view is that of the Member and not of the Board, and shall be obliged to qualify the dissenting view by indicating recognition of the Board's majority decision."

It is appropriate that there is an explicit provision allowing for dissent. This is in stark contrast to board solidarity provisions at other universities.

Section 7 sets out what topics are to be designated as in camera. These topics include disciplinary matters,

personnel, negotiations, and items where disclosure may harm the economic interests of the University.

Nature of meetings

Section 6.1 of the *Rules of the Board of Governors* states that meetings default to open, except when in camera.

Other

The document *Board Guidelines for Individual Board Members* repeats the prohibition on representing a constituency.

As discussed in Appendix A, there is nothing in the law on fiduciary duties of directors that prohibits taking into account the interests of a particular constituency as part of the interests of the whole. This provision is contrary to the statutorily mandated University Governance Model.

Thompson Rivers University

Number of faculty on board

See “A note on British Columbia.”

Source of faculty on board

See “A note on British Columbia.”

Fiduciary duty provisions

See “A note on British Columbia.”

Conflict of interest provisions

Chapter 14, Part V, Articles 1(b) & (e) of the *Board Governance Manual* specifically mentions a union as having the potential to conflict with the university’s interests. 1(e) specifically mentions a business owned by a union.

It is unfortunate that the statute entrenches the false dichotomy between the academic staff association or union’s interests and those of the university as a whole.

The general law on fiduciary obligations and conflicts of interest would not require a categorical prohibition on a board member serving in both roles (see Appendix A). With respect to a union owning a business, according to Article 1(e), it is highly unlikely since unions rarely, if ever, operate businesses.

Chapter 14, Part V, Article 1(g)(v) states that a conflict of interest involves influencing or participating in a decision where a member directly or indirectly receives a financial gain.

This provision catches all representational board members. Better language would be to create the appropriate voice-vote distinction. Voices from within the university community are important to consider when making decisions that affect tuition, salary, budgets, terms of work, etc. These voices should still be heard, and the representational board members can be excluded from the vote.

Article 2(f) requires that a member in a conflict of interest should leave the room and not participate in any discussion.

This is an excessive requirement. Appropriate language would allow for representational member participation, but require their recusal from the vote. This report uses the term voice-vote distinction for such a provision.

Article 3(d) arguably remedies the concerns noted above. It allows members in a conflict to still comment in a general fashion on issues that affect the group they represent. It also sets out when internal members should definitely abstain from voting — e.g. where the discussion is about their own program or negotiations.

Conduct & communications restrictions/ Code of conduct

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Nature of meetings

CAUT did not find any provisions that are inconsistent with the University Governance Model.

University of Victoria

Number of faculty on board

2/15

Source of faculty on board

See “A note on British Columbia.”

Fiduciary duty provisions

See “A note on British Columbia.”

The document *Statement of the Responsibilities of the Board of Governors and its Members* contains language similar to that found in statutory forms of fiduciary duty. It states,

[U]niversity interests take priority over personal or competing interests, public responsibility flows from the university being a public body, members must function as a member of the Board and not as a spokesperson for a constituency, confidentiality must be maintained with respect to matters in committee and during closed meetings, and board members must not assist any person or any organization in its dealing with the university, where such intervention may result in preferential treatment.

Section 4.2 of the *Procedures of the Board* document repeats the same prohibition on being a spokesperson for a constituency.

The statement about the public responsibility of the university is welcome. Most universities do not direct

their board members to that fact. It is not in keeping with the University Governance Model to impede members from acting as spokespersons for a constituency. The fact is constituency representation is mandated by statute.

Conflict of interest provisions

Section 5.3 of the *Procedures of the Board* requires that members who are in a conflict of interest must leave the room prior to any vote, and must not attempt to influence discussion or voting in any way.

Section 5.4 provides that matters that will affect a broad group within the university — e.g. faculty, staff, or students — will not place representational members in a conflict of interest. It does, however, prohibit representational board members from commenting on the specifics of terms of employment.

These provisions take into account that representational board members are mandated by statute to take into account the interests of their constituents.

Conduct & communications restrictions/ Code of conduct

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Nature of meetings

Section 3.4 of *Procedures of the Board* mandates that meetings be open, except for in-camera.

Section 3.9 prohibits the recording of meetings without permission of the Chair.

It is important for transparency and accountability that meetings default to open. In addition, although it is likely to be rarely granted, it is positive that there is a means for observers to record board meetings (*Manual*, Section 9.5).

3| Alberta

A note on Alberta

All universities in Alberta are governed by the *Post-Secondary Learning Act*. With respect to governance, Section 16 requires that all universities have one board member from the senate, one elected by the faculty, and one elected by the academic staff association. The size of these boards is 21 members. The idea of representation on university boards is further enhanced by the presence of sub-constituencies. Not only are faculty members mandated to be on the board, but they must also come from the academic governing body, from the faculty association, and directly from the faculty.

Alberta has a statutory fiduciary duty for the members of the boards of governors. It is contained in Section 16(5) of the *Act*. It states, “The members of the board must act in the best interests of the university.” This definition is not inconsistent with the University Governance Model. For further discussion of the fiduciary obligation in the context of university governance, see Appendix A.

University of Alberta

Number of faculty on board
3/21

Source of faculty on board
See “A note on Alberta.”

Fiduciary duty provisions
See “A note on Alberta.”

Conflict of interest provisions
The document *Conflict Policy: Conflict of Interest and Commitment and Institutional Conflict* defines a conflict of interest as “existing or perceived divergence between obligations to the University and personal or other party’s interests such that an observing party might believe that the latter influenced the former.”

The concept of a conflict of commitment is also defined by the same document. A conflict of commitment is “external or personal activities that are so demanding or organized in such a way that they interfere with obligations to the University.”

The definition of a conflict of interest should be focused on personal gain or commercial dealings. The above language leaves it open to be used against representational members.

Conduct & communications restrictions/ Code of conduct
CAUT did not find any provisions that are inconsistent with the University Governance Model.

Nature of meetings
Article 12 of the document *Standing and Other Committees of the Board of Governors: General Terms of Reference* states that committee meetings should be open to the public, unless topics such as labour relations or employee negotiations are being discussed.

It is good to see that even committee meetings are open to the public, since committee meetings are where important matters are turned into set packages for approval or disapproval by the board. At many universities, committee meetings are closed.

University of Calgary

Number of faculty on board

See “A note on Alberta.”

Source of faculty on board

See “A note on Alberta.”

Fiduciary duty provisions

See “A note on Alberta.”

Conflict of interest provisions

There is nothing inconsistent with the University Governance Model in Section III of the *Code of Conduct of the Board of Governors*.

Conduct & communications restrictions/ Code of conduct

Guiding Principles 1-2 of the document *Code of Conduct of the Board of Governors* states that members will act “without regard to their own private interests of the interests of the constituency that nominated or appointed them to the Board.”

It is contrary to the University Governance Model that internal board members disregard the interests of their constituents. This is especially true, since representational members are required to be represented on the board by the *Act*. Better language would remind board members of their fiduciary duty to the University as a whole, but allow them to be informed by and able to report to their constituents.

Guiding Principle 7 states that board members must “respect” the authority of the board and board decisions.

It is not clear what “respect” means for this provision, but it may refer to board solidarity. If that is the case, then

it infringes upon faculty board members’ right to academic freedom.

Section IV of the *Code of Conduct* states that confidentiality applies to proceedings and materials from closed and in-camera sessions.

Although this language might not over-reach, there should be a clear exception for representational board members to consult with their constituents, where appropriate.

Nature of meetings

By-law 8.5.2 states that meetings may be open, closed, or in-camera.

Appropriate language would require that meetings default to open, except when confidential or in-camera topics are being discussed.

By-law 8.5.3 provides that guests at board meetings may be invited to address the board.

It is good to see a clear avenue for the board to hear from members of the public or community.

Other

Section V of the *Code of Conduct* prohibits board members from engaging in political activity “that may be or may seem to be incompatible with duties to the University.”

It is a violation of academic freedom to require internal board members to relinquish their political rights in order to serve on the board. Very few universities concern themselves with the political activities of their board members. It is not clear why the University of Calgary has specific provisions on this issue.

University of Lethbridge

Number of faculty on board

See “A note on Alberta.”

Source of faculty on board

See “A note on Alberta.”

Fiduciary duty provisions

See “A note on Alberta.”

A requirement to always act in the best interests of the University is found in Section 2.1 of the *By-Laws*. It also states that all board members have an equal voice.

Section 3.6 of the *By-Laws* more fully articulates a fiduciary obligation for members: “Governors shall act honestly and in good faith with a view to the best interests of the University and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

Another document, the *Charter of Expectations*, requires that board members keep the whole University’s interests paramount, “regardless of how a person becomes a Governor.”

Although written in general terms — such that it applies to representational and external members — the contrast between the University as a whole and how a person becomes a governor implies that this provision is a specific directive to internal members. If that is the case, it is an interference with the representational University Governance Model.

Section 1.2.1.1 of the *Terms of Reference for an Individual Governor* states that board members must act in the best interests of the University as a whole, even when that “conflicts with his or her self-interest, or interest of some special interest group or constituency.”

This reminder of the fiduciary obligation starts out neutrally, but then singles out internal members. The inclusion of the term constituency is at odds with the representational University Governance Model, where representational board members are required by statute to be part of the board because of the constituency they represent.

Conflict of interest provisions

Section 3.8 of the *By-Laws* covers conflicts of interest.

Section 3.8.2 allows that members in a conflict may participate in discussions, if they disclose that conflict and all other members consent. Even after disclosure, they must not vote on the matter. They must leave the meeting if requested to by any other member.

Section 3.8.2 creates a specific exception for tuition discussion, where even a member in a conflict may discuss and vote.

Section 3.12 provides that members may participate in programs offered by the University, and may vote on such programs, even if participating in them, provided that there is no benefit to the member that is not available generally to the group of participants in that program.

These provisions guarantee participation rights to representational members, by creating an appropriate voice-vote distinction. It is entirely legal and reasonable for the board to assess a member’s conflict, and then decide that it is appropriate for the member to participate in discussions.

Section 3.1 requires that a member who has a labour grievance against the University must declare that as a potential conflict of interest.

Section 3.1 also specifies that academic staff who serve on the board retain their rights and responsibilities as academic staff, including the right to academic freedom. This language is unique and worth repeating here:

When acting as members of academic staff all of the relevant provisions of the Faculty or Sessional Handbook apply to members of academic staff serving as Governors. That is, members of academic staff serving as Governors retain all of the rights and responsibilities of members of the academic staff including the provisions of academic freedom, the right to question and criticize the administration of the University, and the right to grieve alleged violations of the Faculty Handbook by the Administration.

The specific guarantee of academic freedom to the faculty members on the board is a best practice that all universities should follow. Service on the board is service to the University, and faculty members should not sacrifice their professional and employee rights by serving on the board.

Lethbridge is the only Albertan university in this report that carves out a specific conflicts of interest exception.

Conduct & communications restrictions/ Code of conduct

Section 2.2.8.1 of the *By-Laws* contains a list of agenda items that are presumed confidential/closed. The list includes expected topics like litigation, individual information, and labour relations, but it also includes discussions of strategy with the Minister, and any information that would place the University at a competitive disadvantage for programs, purchases, projects, etc.

The idea of the University being put at a competitive disadvantage perpetuates corporate notions of competition between institutions — rather than the

more academic practice of collaboration in research and pedagogy. Research confidentiality is essential to quality academic work, but institutions and their academic staff should not be placed into contrived positions of competition for Ministerial funds or approval.

Section 3.13 articulates a confidentiality requirement for members. There is language here that could be overbroad, since it states that all records produced by the board or by a member remain the property of the board, and shall be returned upon request.

Section 4 of the *Code of Conduct* states that all non-public information that “might be of use to competitors of the University or harmful to the University or its stakeholders if disclosed, must remain confidential.”

This language is overbroad. The concept of “harmful to the University” is not defined, and open to possible abuse. Appropriate language would target certain information as confidential — e.g. contracts, labour relations, legal, etc.

Section 3.3.6 of the *Terms of Reference for an Individual Governor* allows board members to speak their own opinions as long as they make it clear they do not represent the board as a whole, and do not divulge any confidential information.

It is in keeping with academic freedom for faculty board members to explicitly provide the right to dissent as individual members. The statutory authority of a university board is not undermined by the public expression of dissent. In fact, in the context of university education, dissent, and differing views are expected and fostered.

Section 3.4.4. of the *Terms of Reference* describes an independent governor as one who is willing to differ from the Chair and other governors.

It is refreshing to see expectations of conduct such as this that align with the University as a place of rigorous debate. Contrast this language with other universities, where governance rules may encourage silence or resignation, in case of disagreement. This language should be followed elsewhere. Good governance is about holding management accountable.

Nature of meetings

Section 2.2.5 of the *By-Laws* provides that anyone may attend open portions of meetings, subject to space.

Section 2.2.5 allows the Chair to permit an observer to speak at meetings. There is specific language noting that Senior Administrators are especially welcome to attend.

Section 2.2.6 provides for portions of meetings to be declared closed, including agenda items listed in Section 2.2.8.1.

Section 2.2.7 requires that minutes from open meetings be posted online.

Section 2.2.8 prohibits the board from taking minutes or from making decisions while in camera.

Taken together, the provisions above constitute good language for openness and transparency. Meetings default to open, and all decisions are required to be made on the record.

Other

Section 1.2 of the *By-Laws* contains a statement affirming the bicameral nature of collegial governance. It states that the Board must consider the recommendations of the General Faculties Council (akin to a senate) on “matters of academic import.” It is a best practice to embed in governing documents a reminder to the board that it shares governance of the University with the relevant academic body. More universities should include the same content.

Section 2.4 of the *Charter of Expectations* states that it is the board’s job to approve the goals and strategies put to them.

Appropriate language would remind the board that their role is to think critically — rather than encourage them to be little more than a procedural step for administration. This provision does not fit with the expectation that governors be willing to challenge the Chair and the rest of the board.

4| Saskatchewan

A note on Saskatchewan

Together, the two major universities of Saskatchewan are notable for the limited faculty presence on their boards. Their boards are smaller than most universities' boards, and their members receive monetary payment in the form of honoraria and access to university facilities at no cost. In every other province, university board members are strictly volunteers. Both of these facts are worth mentioning because they make the two boards more like corporate boards rather than the boards of public bodies. Typically, corporate boards are smaller closed groups whose members receive payment. Public bodies and non-profits usually have more open boards of community, professional, and organizational volunteers.

The University of Regina and the University of Saskatchewan benefit from a unique version of the Senate. Their Senates do not govern academics at the university; this is done by the University Councils. The Senates are meant to provide province-wide input into the broad direction of the university, through the election of representatives from ridings across the province. Given their broad mandate, and inability to be involved with daily affairs, the Senates appear to have little to no power or influence over the university boards.

University of Regina

Number of academic staff on board

1/11

Source of academic staff on board

Statutory: Section 56.2.f of the *University of Regina Act* dictates that one member of the faculty who is a lecturer, assistant professor, associate professor or professor and who holds a full-time academic appointment at the University must be elected by members of the council.

Fiduciary duty provisions

By-law 3.2.a defines the fiduciary duty as placing the University's interests above those of "any internal or external constituency or individual."

By referring to "internal constituency," this language is contrary to the University Governance Model.

Conflict of interest provisions

CAUT did not find anything inconsistent with the University Governance Model in *By-law* 5.1.3.

Conduct & communications restrictions/ Code of conduct

According to *By-law* 3.2.g, the board's role is to "appoint and support the President."

Without any further qualifying language, this provision is inconsistent with representational governance, principles of accountability and independent governance, and the University Governance Model. This kind of language could be used to restrict the academic freedom of an academic staff board member. The language described below follows these themes.

By-law 3.5 requires that board members exercise "proper restraint in criticism of colleagues and officers" and that "[b]oard deliberations and particulars of votes will remain confidential." *By-law* 5.1.2 also requires that information and discussions are kept confidential.

Taken together, these provisions present strong rules that could silence dissent and criticism. This provision is inconsistent with the University Governance Model and academic freedom for the academic staff board members.

Nature of meetings

By-law 7.2 states that board meetings default to closed. It is inimical to the principles of openness and transparency in post-secondary institutions that board meetings are conducted behind closed doors.

University of Saskatchewan

Number of academic staff on board 1/11

Source of academic staff on board

Statutory: Section 42 of the *University of Saskatchewan Act* provides for one academic staff member elected by the academic staff membership of the University's Assembly.

Fiduciary duty provisions

By-law IV.7 states that board members must place "loyalty to the entire University above loyalty to any part of it or constituency within it."

By referring to any constituency within the University, this language is contrary to the University Governance Model.

Conflict of interest provisions

In the section "Examples of Conflicts of Interest" from the document *Guidelines Governing Board Member Responsibilities*, there are examples and explanations of conflicts of interests.

Page 6 provides an example of a conflict of interest as faculty or student board members attending a protest or demonstration that is against the actions or inactions of the board.

It infringes upon the academic freedom of the academic staff board member to specifically prohibit attendance or participation in demonstrations against board decisions. It is inconsistent with the University Governance Model to prevent the representational members from

presenting their constituents' interests and perspectives inside and outside of meetings.

Page 6 directs board members who are members of a bargaining unit to "absent themselves from discussions and votes on issues pertaining directly to their bargaining unit."

Language should create an appropriate voice-vote distinction, where the board member can participate in the discussion while not being able to vote.

Conduct & communications restrictions/ Code of conduct

Although board meetings are closed, board members are expected to "foster openness and trust among members of the Board, the administration, the faculty, the staff, the students, all levels of government, and the public." This is according to *By-law IV.9*.

Board members, in their communications, must "maintain respect and appropriate restraint," according to *By-law IV.11*.

These two provisions are very similar to respectful workplace policies, which may be used against minority or dissenting voices and opinions. Academic freedom can be constrained by ill-defined notions of "respect" and "restrained criticism." Academic freedom allows for a vigorous discussion of ideas and policies, including the governance of the university. Faculty members on university boards retain their right to academic freedom.

Standard 11 of the *Board Governance Standards* requires that all discussions and information from board and committee meetings be kept confidential.

This level of overreaching confidentiality hinders public accountability and the ability of academic staff members to consult with and report to their constituency. This

level of confidentiality interferes with the University Governance Model.

Standard 12 directs board members to refer requests for information to the Chair or President, and it states that their duty of loyalty prohibits them from “acting or speaking in any way that would disparage the University or bring it into disrepute.” This “duty of loyalty” is repeated at Page 4 of the *Guidelines Governing Board Member Responsibilities*.

This provision interferes with the University Governance Model by preventing the flow of communication and information between the representational board members and their fellow constituents. Academic staff should be free to communicate with their representative on the board. The conceptualization of the duty of loyalty is not in line with the application of the fiduciary duty in the University Governance Model, as discussed in Appendix A. Moreover, its prohibition on statements and conduct that are critical of the University is a violation of academic freedom.

Page 1 of the *Guidelines Governing Board Member Responsibilities* presents a good statement about the principal concern being the welfare of the University and its community of faculty, staff, students, and alumni. This contrasts with other provisions that interfere with representation of constituent interests. It also contains a board solidarity requirement: “Decisions taken by the board are considered to be collective decisions of the group. Board members must not, by their words or actions outside the board room, put themselves at odds with the board on which they serve.”

Page 2 of the *Guidelines* defines board solidarity as “the requirement that individuals who serve on a board must support the decisions of the board in their public statements and actions.”

This language is inconsistent with openness, transparency, and democratic decision-making. It is a violation of academic freedom to censor academic staff members. The academic world relies on vibrant and vigorous debate and discussion.

Page 4 directs a board member who cannot bring him or herself to agree with the rest of the board to resign. It states,

A dissenting vote may be recorded in the minutes, but the disagreement must not be voiced outside the board room. If a board member is unable to reconcile the board’s decision with the board member’s own personal beliefs ... resign.

This is the only institution that asks board members who cannot silence their dissent to resign. This is a violation of academic freedom and contrary to good governance practices that should hold board and management decisions to rigorous scrutiny.

Page 6 of the *Guidelines* prohibits board members from taking part in demonstrations, petitions, picket lines, or any other activities related to labour action, but it does allow members who are in a bargaining unit to exercise their right not to cross a picket line.

Representational board members do not give up their political and professional rights to expression and academic freedom by serving on the board.

Nature of meetings

By-law V.5 specifies that board meetings must default to closed (they are only open to board members and resource officers).

It is a problem for openness and transparency that board meetings are conducted behind closed doors, away from members of the University community whose representation is mandated on the board.

Other

Page 6 of the *Guidelines* requires the lone faculty member on the board “acknowledge that they will participate under constraints which do not apply to faculty at large ... Moreover, their ‘freedom to criticize the University’ takes a different form ... the freedom is limited by the duty of loyalty, which stipulates that a decision taken by the board is a group decision and must be publicly supported by all board members.”

CAUT strongly opposes any guideline that purports to limit the academic freedom for academic staff on university boards.

5| Manitoba

University of Manitoba

Number of academic staff on board

3/23

Source of academic staff on board

Statutory: Section 8 of the *University of Manitoba Act* requires that three board members be elected by and from the senate.

Fiduciary duty provisions

Section II of the *Board of Governors Code of Conduct* states that all board members have a fiduciary duty to act in the best interests of the University.

The language used in this provision does not foreclose representational interests being recognized as part of the University's best interests.

Conflict of interest provisions

The *Board of Governors Code of Conduct*, in Section II, provides a specific exemption from the conflict rules for representational members. It states that a member "who is a student at, or an employee of, the University, may take part in discussions and vote on all matters relating generally to the financial operations of the University, including remuneration, benefits, terms of employment and rights and privileges available to employees of the University generally."

It is a best practice to allow representational members to participate in the discussions. It is rare to allow them to vote. CAUT notes that the statutory composition for this board is largely similar to language used in the governing statutes for other universities. As discussed in Appendix A, it is not a breach of the fiduciary duty to discuss and vote on a matter where one stands to benefit, as long as the board is aware and steps are taken to provide other information and advice to the board.

Conduct & communications restrictions/ Code of conduct

The *Board of Governors Code of Conduct*, in Section I, requires that board members "respect the authority of the Board, once a decision is made."

This provision suggests that there is a board solidarity requirement. Any language like this should be removed from governance documents as a violation of academic freedom for representational members.

Nature of meetings

There does not appear to be a requirement for open or closed meetings of the board.

Although there is a document about meeting rules, it is silent on whether or not meetings should be open or closed. Appropriate language would require open meetings, except in limited cases when a discussion must move in-camera for bona fide reasons. Such openness is in keeping with the University Governance Model.

Other

The *Code of Conduct*, in Section III, provides that the Chair will investigate allegations of breaches of the *Code of Conduct* and make a recommendation to the Board, up to and including removal of the member.

There are no express requirements for procedural fairness in the form of a right to respond, make submissions to the board, or a right to representation. Fairness should be embedded in the rules. It should be noted that any allegations of breaches of the *Code* should be assessed in light of the University Governance Model.

6|Ontario

Carleton University

Number of faculty on board

4/32

Source of faculty on board

By-law: Articles 4.01(f)-(g) of *By-law* No. 1 requires two members of the teaching staff who are also senate members and two members elected from and by the teaching staff.

Fiduciary duty provisions

The fiduciary obligation is defined in Article II of the *Code of Conduct*.

Articles II.7 goes beyond the legal definition of the fiduciary duty to require forced civility amongst board members.⁶

The inclusion of board solidarity and forced civility provisions within the definition of the fiduciary obligation is a misunderstanding of the fiduciary duty within the context of university collegial governance. As discussed in Appendix A, the duty is owed to the beneficiary — in this case, the University as a whole. These two provisions confuse the board with the beneficiary. The board members do not owe a fiduciary duty to each other in the form of support for decisions and softened criticism and debate. These two provisions should be removed.

Conflict of interest provisions

The definition of a conflict of interest is found in Article III of the *Code of Conduct*. It includes a conflict of commitment. It reads, “A member of the Board is

involved in a conflict of interest where (i) the member owes a duty to the University as a Governor, and (ii) the member has a personal interest in the matter or owes a duty to act in the matter in the interests of a different person, group of persons, institution or organization.”

It is unfortunate that the concept of a conflict of commitment forms part of this provision. The definition focuses too much on non-commercial conflicts. The idea of loyalty is properly contained within the fiduciary duty. The conflict of interest language should focus on financials, self-dealing, misuse of office or resources, and the like.

Being on the executive of a staff or faculty association is specifically listed as a conflict of interest, at page 4 of the *Code of Conduct*.

This particular example unfairly targets representational members and their constituents. The University Governance Model is representational, and it should not be considered a conflict of interest to be a leader of a constituency and a board member. This promotes the false dichotomy between the interests of a particular constituency and the interests of the University as a whole. The two do not inherently conflict.

Article IV of the *Code of Conduct* sets out what a board member must do, if they are in a conflict. It states, “If a conflict is identified, the Governor must abstain from participation in any discussion on the matter, shall not attempt to personally influence the outcome, shall refrain from voting on the matter and, unless otherwise decided by the Board, must leave the meeting room for the duration of any such discussion or vote.”

The requirements to abstain from providing information that may influence the vote and to leave the room are

6. Carleton changed its *Code of Conduct* in January 2018 following a grievance by CUASA and public pressure by CAUT.

excessive. Appropriate language would create a voice-vote distinction, where the representational board members could still participate in the discussions from the perspective of faculty or staff, but recuse themselves from the vote. Considering that a university board is usually a large group of sophisticated and educated individuals, there is no need to have the conflicted member refrain from providing potentially relevant information in order to avoid undue influence. This is discussed in Appendix A. This provision interferes with the University Governance Model.

Conduct & communications restrictions/ Code of conduct

Article 4.03(b) of *By-law* No. 1 requires current members to sign on to the *Code of Conduct*.

Article I.5 of the *Code of Conduct* contains a very explicit respectful workplace policy for how board members conduct themselves. It reads, “Participate actively and openly in discussions, being respectful of the process, and of the opinions of fellow members of the Board, officers and staff, refrain from making disparaging comments of fellow members and staff and to leave their personal biases out of all board discussions.”

Respectful workplace policies may be used by the majority to stifle debate and criticism. As such, they are violations of academic freedom. Vigorous debate can be difficult and contentious. There is nothing inherently wrong with that. The law already sets out clear boundaries for interaction: criminal law, harassment, hate speech, human rights. These are objectively defined. Respect and what constitutes disparaging comments are not objectively defined.

Nature of meetings

Article 3.07 of *By-law* No. 1 provides that the public is only allowed at board meetings, upon invitation from

the Chair. Only board members, officers, the executive, and the auditors have a right to attend meetings. Article 6.04 repeats this.

Although this provision does not outright state that meetings are closed, it leaves public attendance to the discretion of the Chair. This is tantamount to having closed meetings, since guests and observers must apply to attend, and they can be ejected at any time for any reason. Appropriate language would make it a statutory or by-law requirement that meetings be open to the public. In addition, this kind of exclusionary language should not be repeated.

Other

Article 5.02 of *By-law* No. 1 contains mandatory language that upon a finding of non-compliance with the *Code of Conduct*, that member shall be removed. It is unusual and troubling that this section uses mandatory — rather than permissive — language.

Article 6.01 (d) allows only governors to review the minutes that are kept by the University Secretary.

Many universities allow anyone to review the minutes. A public body that uses public funds should be more open to public scrutiny of how it conducts itself.

Minutes should be readily available for members of the University and wider community to read.

Article 6.06 provides that open meetings may be streamed so that members of the public can watch the proceedings from another location.

Most institutions have observers attend in the same space, but this provision hides exclusion of the public behind logistical concerns. Governance language should not anticipate isolation and exclusion of the constituents who have representation on the board.

Article 6.10 provides that where there is a disruption by an observer, the Chair has the power to declare a short recess or to adjourn the meeting and may declare that the continuation of the recessed or adjourned meeting shall be in camera.

Most universities do not have language about removing someone from the meeting, and continuing a meeting in camera. This kind of language can be open to misuse in order to reduce openness and transparency.

McMaster University

Number of faculty on board

7/36

Source of faculty on board

Statutory: The *McMaster University Act*, Section 8, requires three members from the senate and four elected from the teaching staff.

Fiduciary duty provisions

In the *By-laws*, fiduciary duty is defined in the Preamble to Appendix H (*Statement of Expectations*) as “[t]he duty of a Board member is to act honestly, in good faith, and in the best interest of the University rather than in the interest of any advocacy or interest group or other organization including a group or organization that may have appointed or elected her or him to the Board.”

Article 2 of the *Statement of Expectations* repeats the requirement to hold the University’s best interests paramount to the interests “of any other group or organization of which he or she may be a member or that he or she may represent.”

This articulation of the fiduciary obligation conflicts with the representational University Governance Model.

It sets up a false dichotomy between community interests and the University’s interests. As discussed in Appendix A to this report, the two interests are not mutually exclusive, and it is entirely in keeping with the fiduciary obligation at law to take into account constituent interests — particularly when such interests are statutorily required to be represented on the board.

Conflict of interest provisions

Articles 7 and 8 of the *Statement of Expectations* are concerned mostly with misuse of information, private interests, and interests connected to contracting with the University.

The focus is appropriately on misuse of office and private interests. This language does not single out internal members and their constituencies.

Conduct & communications restrictions/ Code of conduct

Article 6 of the *Statement of Expectations* contains language encouraging debate, but ensuring that board members do not speak publicly on behalf of the board.

Academic freedom requires that dissent be permitted within board deliberations and in public. Arguably, this language strikes a balance between encouraging consensus and permitting public dissent, but it is not exemplary.

Nature of meetings

Section 14 of the *McMaster University Act* mandates open meetings, except when discussing confidential or matters specific to an individual.

Contrast the statutory requirement for open meetings with the following powers to close meetings to the public:

- Section 8(2) of the *By-laws* allows the Chair to permit recording of the meetings.
- Section 8(6) of the *By-laws* allows the Chair to eject anyone for disrupting the meeting, and then declare that the meeting continue as a closed session.
- Section 8(7) stipulates that nominations to the board and board elections take place during closed sessions.
- Section 8(8) allows a majority of the board to declare a meeting closed.

There should be clear criteria for when to render meetings closed. Disruptions are likely to occur during meetings where the board is deliberating contentious and important issues, which will affect students, staff, and the public. While the disrupters may be ejected from the meeting, that power should not then trigger the ability to close the meeting to non-disrupting observers and interested groups.

University of Ottawa

Number of faculty on board

2/27

Source of faculty on board

Statutory: Section 9(d) of the *University of Ottawa Act* requires two members appointed by the senate, from its teaching staff membership.

Fiduciary Duty Provisions

Section 6.3.2 of the *Governance Framework* document outlines a duty of loyalty: “Board members are required to put the interests of the University ahead of any other personal or stakeholder interest.”

CAUT notes the choice of words — stakeholder interest is specifically mentioned, whereas the statement is silent on corporate, commercial, or contractual interests that may affect a member’s decision. It is wholly antithetical to the University Governance Model to target internal constituents. There is no inherent conflict between the interests of the University’s internal stakeholders and the best interests of the University.

Conflict of interest provisions

The *Code of Ethical Conduct*, in Sections 2(a)-(c), defines a conflict of interest as being in a position of undue influence sufficient to “impair, influence or appear to influence the objective exercise of his or her official duties.” This includes being in a position of “adverse interest” by having a claim against the University.

The threshold of being in “adverse interest” due to having a claim against the University is arguably overbroad. It is reasonable to expect a board member whose company or spouse is suing the University to be conflicted out of discussions. Currently phrased, however, it could catch representational members who have, or are involved with, a grievance or some other kind of administrative complaint against a particular manager or policy. Moreover, the board would still have other members and its own counsel in order to independently assess that information and perspective.

Section 6.3 of the document *Governance Framework* states that governors are expected to vote “according to their individual consciences rather than as representatives of any particular interest group.”

Although phrased in a general manner, the choice of the words “interest group” (rather than company or

corporation or professional affiliation) indicates the potential to target representational board members' responsibility to represent their constituents. This language is in direct contrast to other provisions that acknowledge the board being a representational or stakeholder board.

Conduct & communications restrictions/ Code of conduct

Section 7 of the *Code of Ethical Conduct* requires that all materials received as a board member be kept confidential.

This kind of language is overreaching. Appropriate language would be to have only certain topics or classes of materials rendered confidential. Overreaching language like this interferes with representational members' abilities to consult with and report to their constituents.

Section 10 contains language very close to a respectful workplace policy for board members and meetings. Section 10(e) states that members must "refrain from publicly expressing personal opinions concerning the merits of any decision taken by the Board."

Both provisions appear to impose a board solidarity requirement and conflict with the University Governance Model and academic freedom for the faculty members of the board.

Nature of meetings

The document *Policy on Video Recording, Broadcasting and Picture Taking during Board of Governors Meetings* prohibits recordings of any kind, but seems to indicate that meetings are open to the public. It also contains language that meetings are to be free from intimidation. The latter portion of this section, which speaks about intimidation, is excessive. Such provisions can infringe upon the academic freedom of faculty board members.

The language of Section 6.3.2 of the *Governance Framework* requires that board members keep confidential all "board deliberations."

It is unclear whether or not confidentiality applies to all deliberations, even those conducted during open sessions, which would be an inherent contradiction.

Other

Section 6 of the document *Governance Framework* contains multiple instances of acknowledgement that the University board is a stakeholder board. It states that the University is "accountable to many stakeholder groups and organizations including students, faculty and staff, alumni, government bodies, funding agencies, and the general public."

Section 6.3 encourages governance and oversight by stating, "The Board is expected to scrutinize these proposals and challenge management's assumptions."

As written, these provisions are consistent with the fiduciary duty, as discussed in Appendix A. Section 6 supports the idea that the board should hold all members (not just representational ones) to the same conflicts standards. While it is good to see governance described as more than a mere formality, this language contrasts with provisions approaching board solidarity, mentioned above.

Queen's University

Number of faculty on board

2/25

Source of faculty on board

Statutory: The *Queen's University Royal Charter of 1841*, Section 14(b) provides for two faculty board members. The process for selecting the individual faculty members is set out in *By-law* No. 1. Sections 4.1 and 4.2 of *By-law* No. 1 stipulate that the two

faculty members on the board must be nominated from and elected by the faculty.

Fiduciary duty provisions

Section II of the *Queen's University Board of Trustees Code of Conduct* defines the fiduciary duty as one of best interests, good faith, honesty, etc.

Conflict of interest provisions

By-law No. 1, Section 4.12 prohibits faculty members from concurrently being a part of the faculty association executive, or the senate.

Academic staff who serve on the senate or on their faculty association executive should not be categorically barred from serving on the board, in the absence of specific evidence that such concurrent service would be a conflict of interest.

Section VI of the *Code of Conduct* allows internal members to participate in discussions about employment or tuition, but not to vote.

This is an example of an appropriate voice-vote distinction.

Conduct & communications restrictions/ Code of conduct

Section V of the *Code of Conduct* provides that members should respect a board decision, once it is made, and that the Chair or designate are to handle any media enquiries.

This language comes close to requiring board solidarity. The statement that the Chair or designate are to handle media enquiries implies that board members may dissent in public from a board decision, as long as they are clear that such opinion is their own, and not that of the board. It would be better to make the ability to dissent explicit in the *Code of Conduct*. Doing so would help protect the academic freedom of the faculty members on the board.

Confidentiality is covered by Section IV of the *Code of Conduct*. The provisions state that board members must not share information received with anyone else.

This provision may interfere with faculty members' abilities to represent, consult with, and report to their constituents.

Nature of meetings

By-law No. 3, Section 4 states that regular meetings should default to open to the public. Section 13 requires that members of public obtain a ticket to attend.

It is good to see open, public meetings mandated in the *By-laws*, but members of the University community whose representation is required on the board should have a right to attend.

University of Toronto

Number of faculty on board

12/50

Source of faculty on board

Statutory: Section 2(1)(d) of the *University of Toronto Act* requires 12 members of Governing Council be elected from the teaching staff.

Fiduciary duty provisions

Section 2(3) of the *Act* stipulates that members "shall act with diligence, honesty, and good faith in the best interests of the University."

As discussed in Appendix A, this is one of the rare examples of a fiduciary duty expressed in the University's governing statute in a manner consistent with the University Governance Model.

The document *Fiduciary Responsibilities of Members of the Governing Council* contains a direction that the "interests of the University" should not be confused with

the specific interests or agendas or constituencies/stakeholders inside or outside of the University.

CAUT maintains that the fiduciary duty must be read in the context of collegial governance with the representation mandated by statute. These interests can be appropriately and legally considered when conceptualizing the best interests of the University as a whole. It is appropriate that interests that are external to the University are also mentioned. Other institutions only use this kind of language against internal interests or constituencies.

Conflict of interest provisions

Page 3 of *Principles of Good Governance* states that while a governor may “be informed by concerns of his/her individual constituency, it is the absolute duty of a governor to do what he/she can to ensure that all the constituencies in the future will also be well-served.”

The placement of this language within a document about good governance principles is helpful because it makes constituent interests an integral part of the University’s best interests as a whole — rather than promoting a false dichotomy like many conflict of interest policies at other institutions.

Conduct & communications restrictions/ Code of conduct

The document *Expectations and Attributes of Governors and Key Principles of Ethical Conduct* repeats the fiduciary obligation in Section 1 and specifically includes academic freedom as a key value, in Section 3.

It is important that academic freedom is highlighted for council members. Unfortunately, the rest of the language used in the document resembles respectful workplace policies, which can undermine academic freedom.

Nature of meetings

Section 2(18) of the *Act* requires that meetings be open to the public.

By-law No. 2, Section 33 requires that committee meetings default to open, except when in-camera.

This level of open meetings is rare. Open committee meetings are consistent with the University Governance Model.

Page 1 of the document *Principles of Good Governance* states that the Governing Council must be seen to be accountable through transparency.

Highlighting values of accountability and transparency is consistent with the University Governance Model.

Trent University

Number of faculty on board

2/26

Source of faculty on board

By-law: *Special Resolution III.1* provides for two faculty members on the board.

Fiduciary duty provisions

Section 6 of *By-law* No. 1 states that board members shall “act honestly and in good faith with a view to the best interests of the University and each member of the Board and each officer of the University shall exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

This language is in keeping with the fiduciary duty, as it is generally understood in law. It is worth noting that the

statement of fiduciary duty does not go beyond that to specifically exclude constituents, communities, or groups. Thus, in the way it is written, it is not contrary to the University Governance Model, but the fiduciary language must contend with quite restrictive conflicts of interest language.

Conflict of interest provisions

Special Resolution IV.7, in the part entitled “Expectations for Conduct,” requires that governors will subordinate their personal interests and those of any particular constituency to the best interests of the University.

Constituency interests are not inherently adverse to the University’s best interests. Language such as this provision perpetuates the false dichotomy that the two sets of interests are mutually exclusive. As discussed in Appendix A, constituency interests can legally form part of the interests of the whole. When constituencies are mandated to be represented, as in university governance, those interests should be considered by the board.

Conduct & communications restrictions/ Code of conduct

Special Resolution IV.1 designates confidential matters. These include personnel, finance, real property, legal, contracts, and other things for which disclosure would be against the best interests of the University.

Although it is good that there is direction regarding confidentiality, it would be better if the language made it expressly permitted for representational members to consult with their constituency on certain issues that relate to them, and, if there were clear language, that board meetings default to open to the public.

Special Resolution IV.7 contains rules for board member conduct. There is language that debates should be “constructive, clear, and respectful.” Subsection (j)

creates a board solidarity rule, where governors are required to maintain solidarity in support of a decision.

Board solidarity is also required in *Special Resolution III.6*, “Responsibility 5.” It states that a governor may speak his or her mind at meetings, but must support majority decisions, and report any concerns to the Chair or President for their decision.

Board solidarity is contrary to academic freedom, which includes the right to criticize the University. The board is statutorily empowered to make decisions on behalf of the University. Failure to achieve consensus does not undermine the board’s authority. Forcing dissenters to be silent does, however, undermine democracy and the representational University Governance Model.

Nature of meetings

Special Resolution IV.9 allows for meetings to be observed, and observers may apply to address the board, but disruption may result in expulsion, after a warning.

It is good that there are clear rules for accessing meetings, addressing the board, and that there is a warning issued before expulsion from the meeting. There should be openness and transparency in university governance vis-a-vis the board and constituencies mandated to be represented.

Other

Special Resolution III.8 contains diversity requirements for the board: no less than 40% from each gender, 30% of the board must be from Central Ontario, and one governor must identify as disabled, racialized, or Aboriginal.

Trent is unique in this regard. Since governance across all sectors in Canada is typically a very non-diverse space, it is good to see concrete targets to produce change. More universities should set gender and diversity targets in order to ensure board composition is representative of the students, staff, and communities they serve.

University of Waterloo

Number of faculty on board

7/36

Source of faculty on board

Statutory: Section 11 of the *University of Waterloo Act* provides for seven members elected by the Senate and from the faculty members of the Senate.

Fiduciary duty provisions

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Conflict of interest provisions

By-law 1, Article I.6 provides that internal members are not in a conflict by virtue of their employment. It states,

It is desirable and appropriate for faculty and staff Governors to participate fully in Board discussions and vote on the issue under consideration unless their personal interest in the issue differs substantively from the general interest of their faculty and staff colleagues, in which event they shall declare a conflict ... such members may take part in discussions and vote upon matters related to global remuneration or benefits, terms of employment, and rights or privileges of UW employees established in a collective fashion for an employee group.

This provision specifies that “[i]t is desirable and appropriate” for internal members to participate as a constituency. The constituency focus is heightened by the rule that the member should declare a conflict and withdraw if his or her opinion is different from the rest of her colleague’s within her constituency.

By-law 1, Article I.4 allows a two-thirds majority on the board to declare a member in a conflict of interest, even when that member did not consider or declare it herself.

This provision could be a useful tool to deal with members with connections or affiliations to companies

contracting with the University, but it is open to abuse. Provisions such as Article I.6 and Article I.4, directly above, should be applied together. On its own, a provision such as Article I.4 could be used against representational members’ participation in certain board decisions.

Conduct & communications restrictions/ Code of conduct

CAUT did not find any provisions that are inconsistent with the University Governance Model in Article E.13 of *By-law 1*.

Nature of meetings

Section 27(1) of the *Act* mandates that board and committee meetings be open to the public, except when financial or personal information is being discussed. This is repeated in *By-law 1*, Article D.5.

It is important for transparency and accountability that board and committee meetings default to open. It is rare to find open committee meetings. Open committee meetings are consistent with the University Governance Model.

University of Western Ontario

Number of faculty on board

4/31

Source of faculty on board

Section 9(e) of the *University of Western Ontario Act* requires four faculty members: two elected by the faculty and two elected by the Senate.

Fiduciary duty provisions

The document *Responsibilities of Board Members* (1997) requires that members maintain an overriding loyalty to the entire University rather than to any part of it or constituency within it.

This language is anti-representational. It does not fit with the University Governance Model, and it fosters

the false dichotomy that the interests of the whole are inherently opposed to the interests of internal constituencies.

The document *Report of the Governance Review Task Force*, dated November 19, 2015, contains another expression of the fiduciary duty. At page 2, it states, “the fiduciary responsibility requires that each governor act independently, with due diligence and with good faith in the best interests of the institution.” At page 4, it takes that notion further: “it would be contrary to this fiduciary responsibility to have ‘representatives’ of particular constituencies, voting at the direction of their organization.”

As discussed in Appendix A, there is nothing in the law that would prohibit the inclusion of constituent interests or concerns in the fiduciaries’ formulation of the best interests of the University. This is especially so, considering that representation of certain groups is required by the statute. Statements such as this mischaracterize the fiduciary duty.

Conflict of interest provisions

Section 17(3) of the *Act* requires board members who are also employees to refrain from taking part in discussions and votes that affect their remuneration, benefits, etc., except for the President and Vice-President.

It is unfortunate that such over-reaching conflict of interest language that targets representational members is entrenched in the statute. There is no need to require representational members to abstain from participation in discussing certain matters because they are University employees. Appropriate language would create a voice-vote distinction. The exclusion of the President and the Vice-President is particularly problematic in contrast to the purported restrictions on employee board members.

Conduct & communications restrictions/ Code of conduct

The *Responsibilities of Board Members* document contains a requirement for board solidarity. It states that members should speak their minds at board meetings, but support policies and programs once established.

CAUT considers board solidarity provisions to be a violation of the academic freedom of faculty members who serve on their boards.

The *Responsibilities of Board Members* document requires that board members exercise “proper restraint” in criticism of colleagues and officers.

This provision resembles respectful workplace policies. Although couched in terms of respect and co-operation, these policies amount to a tyranny of forced civility that could stifle debate and create a chilling effect for the academic freedom of the faculty board members.

Nature of meetings

Section 31 of the *Act* requires that meetings should be open. This is repeated in *By-law* No. 1, Section E.3(a). It is consistent with the University Governance Model to have open meetings, where constituents and community members can attend and observe.

York University

Number of faculty on board

2/27 (although required to come from the Senate, there is no requirement that they be faculty or teaching staff)

Source of faculty on board

By-law: Article VII.1(b)(i) of the *Protocol for Composition of the Board of Governors* requires that two members of the board come from the Senate.

Fiduciary duty provisions

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Conflict of interest provisions

Conflicts of interest are required to be declared by Article VII, Section 8 of the *By-laws*. Conflicts of interest are described in the *Undertaking and Guidelines for Conflicts of Interest for Members of the Board of Governors* document that board members must sign.

The focus is on financial dealings and misuse of office and resources.

It is appropriate that conflicts, according to the University's description, are confined to misuse of resources or office and placing outside financial or political interests ahead of those of the University.

Conduct & communications restrictions/**Code of conduct**

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Nature of meetings

Article IV, Section 16(i) states that meetings shall be open to the public. It provides that the meeting minutes shall be available to the public, by appointment with the Secretary of the board. The public may be excluded from the meetings, when discussing labour relations, personnel, nominations to the board, and confidential government policies.

It is appropriate for the University Governance Model that meetings default to open, since that enables members from the represented constituencies to attend.

7 | Quebec

Bishop's University

Number of academic staff on board

3/15

Source of academic staff on board

By-law: Section 1.2.2 of the *Statutes of Bishop's University* provides for three members of faculty elected by the Faculty Council

Fiduciary duty provisions

Section 1.1 of the *University Statutes* states that board members shall “fulfill their obligations with impartiality, collegiality, independence, loyalty, transparency, accountability, prudence and diligence, the whole in keeping with the University’s best interests.”

This language is consistent with the fiduciary duty within the University Governance Model, as discussed in Appendix A.

Conflict of interest provisions

University Statutes, Division II, Section 5 covers conflicts of interest for the Board of Governors. Section 5.1 defines a conflict as “a direct or indirect interest in a body, enterprise or association that places the Board member’s personal interests in conflict with the University’s interests.”

Section 5.2 requires that each member sign an undertaking regarding conflicts of interest, annually.

Section 5.3 requires that “[a]ny Board member who has a direct or indirect interest ... that places the Board member’s personal interests in conflict with the University’s interests must disclose it in writing to the Chair of the Board of Governors and abstain from participating in any discussion or decision.” The Board member must also withdraw from the meeting for the discussion and vote.

Section 5.4 provides an exception for the Principal, Vice-Chancellor, and for any internal member who “may participate in a Board discussion about general measures relating to the conditions of employment within the institution that would also apply to the Board member.”

This conflict of interest language appropriately targets personal interests, rather than one’s connections and affiliations writ large. The specific exception for internal members’ participation during discussions relating to employment and internal matters is language to follow. It is important that board members who represent internal communities be allowed to provide information before a decision is made. It is precisely for that reason that such communities are mandated as represented on the board.

Conduct & communications restrictions/ Code of conduct

University Statutes, Division II, Section 4 requires that the Board of Governors “respect the confidentiality of information received in the performance of his or her duties, as well as the confidentiality of all deliberations ... which deal with personal situations, and more generally, of all the deliberations that take place in closed sessions.” Governors are prohibited from using information obtained as part of the Board for personal benefit.

This is a good example of restrained and targeted confidentiality language that clearly exempts information that is available to the public.

University Statutes, Division II, Section 11 requires public disclosure of certain information (e.g. audit fees, ministry compliance).

Mandated public disclosure is important to maintain transparency and accountability. This is unlike other institutions, which mandate confidentiality of all or most information, despite their use of public funds.

Other

Section 8 enshrines academic freedom, specifically including the right to criticise the University in a “lawful and non-violent way.”

Unlike many institutions, Bishop’s specifically acknowledges that the board must respect the collective agreements in place and the principle of academic freedom for its academic staff. Section 1.1 is reproduced below:

The Board of Governors shall respect the provisions of any collective agreement in place from time to time at the University and, in the event of any conflict between the provisions of these Statutes and any such collective agreement, shall interpret the Statutes and the collective agreement in a harmonized manner, to the greatest extent possible. The Board of Governors shall exercise its powers in a manner consistent with the University’s mission, namely, teaching at the university level, research and service to the community. Members of the Board of Governors shall fulfill their obligations with impartiality, collegiality, independence, loyalty, transparency, accountability, prudence and diligence, the whole in keeping with the University’s best interests.

Concordia University

Number of academic staff on board

6/25

Source of academic staff on board

By-law: Article 25 of the *By-laws* of Concordia University requires five full-time and one part-time faculty to be on the board. These members must be nominated and elected by their respective faculty.

Fiduciary duty provisions

The *Statement of Governor’s Responsibilities* defines the fiduciary duty as “acting with decorum, loyally, honestly, and in good faith with a view to serving the best interest of the University.”

The *Statement* requires that Governors maintain an overriding loyalty to, and serve the best interests of, the University as a whole — rather than to their constituency or any other part of it.

This language creates a false dichotomy between the interests of the University’s communities and the University as a whole. This assumes that only the administration or management can define the best interests of the whole university — to the exclusion of a definition proffered by others, whose interests are mandated to be represented on the board. Thus, this language is in conflict with the University Governance Model.

Conflict of interest provisions

Code of Ethics, Section 9 provides that internal members must withdraw from discussions or votes regarding negotiations and collective agreements, but that they may still express an opinion, generally relating to conditions of employment.

This language draws an appropriate distinction between voice and vote. Internal members can provide relevant information to the board, but are restricted from voting on the matter.

Conduct & communications restrictions/ Code of conduct

Article 15 of the *By-laws* applies confidentiality broadly to “the proceedings of meetings, as well as any information or documents obtained at those meetings, as stipulated in the *Code of Ethics*.”

Code of Ethics, Section 10 stipulates that confidentiality survives the member's term, applies to all information or documents obtained as a member, and covers the deliberations that took place in any closed sessions.

The language on confidentiality should be more focused on misuse of information for personal benefit or to harm the University. As it is currently worded, this language interferes with internal members' ability to consult and report to their constituency.

Code of Ethics, Section 1 contains an expectation that board members foster the University's mission and honour the principles of collegiality and fairness.

Academic freedom and respect for the collective agreements should be included in this kind of values statement.

The *Statement of Governor's Responsibilities* requires board solidarity — members are allowed to speak their minds at meetings, but to support policies and programs once adopted by the board.

This provision conflicts with the representative nature of faculty on the board by hindering their ability to consult, report, and criticize with their faculty constituency. Board solidarity rules are a violation of academic freedom for the faculty on the board.

Nature of meetings

The *Statement of Governor's Responsibilities* requires Members' interactions to be "collegial and respectful of any contrary opinions expressed."

This language is vague and could be used against dissenters during meetings. It resembles respectful workplace policies to the extent that it seeks to regulate behaviour.

Université Laval

Number of academic staff on board

4/25

Source of academic staff on board

Statutory: The *Charte de l'Université Laval*, Article 7.1 requires four members of the teaching staff on the Conseil d'Administration. Article 71 of the *Statuts de l'Université Laval/University Statutes* states that they are to be elected.

Fiduciary duty provisions

All Quebec university board members are subject to section 322 of the *Civil Code*, which sets out a statutory fiduciary obligation. It requires that a director act with prudence, diligence, honesty, loyalty, and in the interests of the beneficiary legal person (university for our purposes).

Conflict of interest provisions

Article 7.5 of the *Charte* sets out conflict of interest rules, which require that any member who has a direct or indirect interest in an enterprise or contract that may be at odds with the interests of the University to declare that conflict and remove themselves from the discussion and vote. This rule applies to internal members, except students, who must leave the room during discussions and votes on any matter affecting working conditions.

This rule is repeated in Section 74 of the *Statuts de l'Université Laval*.

Appropriate language would adopt the voice-vote distinction to allow the representational members to fulfil their role as representatives by allowing their participation in discussions, but requiring them to recuse themselves from the vote.

Conduct & communications restrictions/ Code of conduct

Section 4 of the *Code d'éthique et de déontologie des membres du Conseil d'administration* applies confidentiality to all information (written and verbal) and discussions. The only exemptions are for what is officially designated as public, what is already publicly available, and when disclosure is required by law.

Section 7.2 of the *Code* prohibits board members from using or sharing information obtained from their role for the benefit of themselves or any other person or group. It also repeats the requirement that members who represent internal constituencies must not participate in any discussions or vote about contracts, collective agreements, or policies.

This level of confidentiality is overbroad. The University uses public funds for a public purpose, yet their discussions, minutes, and what information they used in order to use those funds are kept from the community. The prohibition on sharing information interferes with representational members' ability to represent their constituents.

Nature of meetings

Section 70 of the *University Statutes* allows that meetings may be public or private. Appropriate language would be to require public meetings as the default practice.

Other

Section 76(3) of the *University Statutes* allows for removal of internal board members by a majority vote of their respective constituency.

This is unique in Canada. The ability for the constituents to "recall" their representative on the board further

entrenches the fact that university governance is representational and democratic.

Section 10 of the *Code d'éthique et de déontologie* sets out the process for filing and investigating an allegation of a breach of the code by a board member.

It is preferable to have complaints handled by a committee rather than by the Chair, as is the case here. There should be an explicit right for counsel or a representative to speak. Procedural fairness is important, and the language should reflect that. There should be an express right to counsel or representation, and notification upon the receipt of a complaint.

McGill University

Number of academic staff on board

4/23

Source of academic staff on board

By-law: Sections 1.1.1, 1.1.6, and 1.1.7 of the *McGill Statutes* require two Senate members and two academic staff members. All are elected by their respective constituencies.

Fiduciary duty provisions

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Conflict of interest provisions

Sections 4.1 and 4.2 of the *Code of Ethics and Conduct* define conflicts of interest as actual and perceived, and the provisions are mostly concerned with financial dealings and misuse of University resources or position.

Unlike other institutions' conflicts of interest language, this provision focuses appropriately on financial dealings and the misuse of one's office.

Conduct & communications restrictions/ Code of conduct

Sections 1.6 and 3.1 of the *Code of Ethics and Conduct* provide that confidentiality applies to information received while on the board and to deliberations of the board. This confidentiality extends past the person's term on the board.

This level of confidentiality is at odds with democratic concepts of openness and transparency. Confidentiality should be limited to personnel, proprietary, some financial, and legal matters — it should not cover all deliberations and information received.

Section 6.5 of the *Rules of Order and Procedure* create a presumption that the following kinds of matters be considered in closed sessions: recommendations for appointments, promotion and tenure, human resources, budget, finance and property, collective bargaining, internal board procedures and policies.

The inclusion of human resources, budget, finance, and collective bargaining in this list of closed session topics hinders academic staff representatives from consulting with and reporting to their constituents.

Nature of meetings

CAUT did not find any provisions inconsistent with the University Governance Model.

Other

The *Key Facts about the Board of Governors* provides that the public can attend open sessions, but no recordings are permitted.

Section 2.5 of the *Code of Ethics and Conduct* guarantees that internal board members may participate in activities associated with their roles.

Section 2.5 is language worth emulating, since it reflects the University Governance Model.

Section 9 provides that an ad-hoc committee shall be struck, where breaches of the *Code of Ethics and Conduct* are alleged. The three members of this committee will be nominated by the Nominating and Governance Committee of the board.

This is a good contrast to other universities, where the Chair is often the sole arbiter of breaches. This method is more procedurally fair to the board member(s) involved.

Université de Montréal

Number of academic staff on board

5/26

Source of academic staff on board

Statutory: The *University's Charter* (found at 1967, 15-16 Eliz. II, chap. 129) requires five members elected by the University Assembly, which has a predominantly academic membership.⁷

Fiduciary duty provisions

All Quebec university board members are subject to Section 322 of the *Civil Code*, which sets out a statutory fiduciary obligation. It requires that a director act with prudence, diligence, honesty, loyalty, and in the interests of the beneficiary legal person (university for our purposes).

Conflict of interest provisions

Article 2.2 of the *University's Conflict of Interest Regulations* defines a conflict of interest to include those that are real, potential, and/or apparent.

7. As of February 2018, the Quebec legislature was considering changes to the *University's Charter*. These changes would dilute the strength of faculty representation on the board, reduce the role of the University Assembly, and increase executive — as opposed to collegial — management of deans and departments. CAUT joined with SGPUM to oppose these changes.

The *Board Code of Conduct*, Article 7 sets out other conflict of interest rules. The language is mostly concerned with financial transactions or misuse of University position for personal gain.

This language reflects CAUT's position that conflict of interest provisions at all universities should focus on commercial and personal financial dealings, as well as misuse of office or information gained. Universities should not create conflicting loyalties for representational board members.

Article 7(e) of the *Board Code of Conduct* provides that board members who have an employment or collective bargaining interest in a matter may comment on working conditions or collective bargaining as it applies to a group within the University, but they must recuse themselves from the vote.

This provision creates an appropriate voice-vote distinction, where the representational members can still participate in the discussions.

Conduct & communications restrictions/ Code of conduct

Article 6 of the *Board Code of Conduct* stipulates that confidentiality applies to all information received as a board member, and that this confidentiality survives the board member's term, but does not apply to information already publicly available.

Appendix A, Chapter 2, Section 6 provides that the confidentiality rules do not prohibit a board member from consulting with his or her constituency, or from reporting to them, unless doing so is prohibited by law, or they are directed not to by the board.

Taken together, these confidentiality provisions are quite flexible. They create clear rules and allow for an exception to enable representational governance. More

universities should create a similar exemption in their confidentiality rules for board members.

Appendix A, Chapter 2, Section 7 requires that board members act independent of political or constituency opinions or concerns.

This language is at odds with the representational nature of university governance, and with the law on fiduciary duties. Constituency concerns form part of the best interests of the whole organization/body, as discussed in Appendix A.

Nature of meetings

Internal Regulation 2.5.1 states that Council meetings are closed, except for persons who are specifically invited to attend.

The University Governance Model requires openness and transparency vis-a-vis the board and the constituents mandated to be represented. Meetings, therefore, should not be closed.

Université de Sherbrooke

Number of academic staff on board

6/26 (5 + 1 possible external)

Source of academic staff on board

By-law: Article 22 of the *University Statutes* provides for five academic staff members and at least one other person who is external to the University, nominated by educational organizations, and from the university education sector. The academic staff are elected by the University Assembly, according to Article 23 of the *University Statutes*.

Statutory: A great deal of power to change the composition, policies, and procedures of the University's governance and governing bodies is vested in the

Conseil d'Administration, according to Section 2d of the *University Charter* (found at *Lois du Québec 1978*, chap. 125).

Having the composition capable of being changed by resolution of the board opens the University up to abuses of power, process, and reduces accountability. University governing bodies should not be allowed to function like corporations, which can decide their own membership and rules based on the prevailing loyalties and culture.

Fiduciary duty provisions

All Quebec university board members are subject to section 322 of the *Civil Code*, which sets out a statutory fiduciary obligation. It requires that a director act with prudence, diligence, honesty, loyalty, and in the interests of the beneficiary legal person (university for our purposes).

Academic freedom is enshrined in Part 1, Article 2. It specifically includes the right to information, activity, and dissent.

Every university should specifically enshrine the right of its academic staff to academic freedom as encompassing dissent, even when they serve on governing bodies, as is proper under the University Governance Model.

Conflict of interest provisions

Annexe II to the *Code de déontologie des membres du conseil d'administration* provides examples of conflicts of interest, which include an internal member recusing herself when the matter being discussed is pay or pensions.

The language could be clarified to provide a voice-vote distinction, where the representational member can give information but not participate in the decision.

Conduct & communications restrictions/ Code of conduct

The *Code de déontologie* requires that any members making public statements clarify that they are not speaking on behalf of the board.

This kind of language strikes a balance between having an official spokesperson for the board, and allowing members to freely express opinion and dissent in public, which is in keeping with the University Governance Model.

Nature of meetings

Article 3.4 of the *Règles et pratiques relatives aux réunions de l'Assemblée de l'Université* and Article 3.4 of the *Règles et pratiques relatives aux réunions du Conseil d'administration* stipulate that meetings for both bodies are closed to the public.

Meetings of the governing bodies of any university should be conducted in an open environment in order to strive toward transparency and accountability.

Other

Article 6.3 of the *Code de déontologie des membres du conseil d'administration* sets out a detailed process for investigating and deciding complaints of breaches of the *Code*. The board member has a right to make representations.

It is appropriate and fair that the process for removal of a board member specifically includes the right to make representations.

8 | Atlantic Canada

Acadia University

Number of faculty on board

3/37

Source of faculty on board

Statute: Section 10(e) of the *Act Respecting Acadia University* states that the faculty appoint their three members.

Fiduciary duty provisions

By-law 5.1 defines the duty as one of honesty and good faith with a view to the best interests of the University.

This language is consistent with the fiduciary duty within the University Governance Model, as discussed in Appendix A.

Conflict of interest provisions

By-law 5.5 states, “where the matters for discussion involve terms of employment, promotion, or termination, the Member must withdraw from the meeting.” There is an exception, however, for student members, who may vote on tuition. The board is allowed to review a conflict situation to allow a member to remain for discussions but not vote.

Better language would draw the appropriate distinction between voice and vote — by specifically allowing for internal members’ participation in the discussions without special dispensation from the board.

Conduct & communications restrictions/ Code of conduct

By-law 6.5 provides that confidentiality applies to the substance of board deliberations and proceedings. Collective bargaining and personnel matters are presumptively in camera.

A blanket confidentiality rule interferes with the ability of faculty board members to consult with their constituents in a meaningful way, thus reinforcing the democratic deficit between appointment by faculty and the ability to act as a representative on the board.

Nature of meetings

By-law 6.4 requires that meetings default to closed.

Closed meetings as a matter of course are not the norm at most Canadian universities. The effect of closed meetings and the prohibition on reporting the substance of certain discussions hinders the representational model inherent to this university board.

Other

By-law 15.2 stipulates the composition of the governance committee. It requires “at least one representative from each of the following 4 constituent groups that appoint members to the Board: Associated Alumni, Convention of Atlantic Baptist Churches, Faculty, and Students.”

The requirement that different constituencies be represented on the committee that oversees governance, board resources, and nominations further promotes the University Governance Model.

Dalhousie University

Number of faculty on board

2/25, as well as an observer from the Dalhousie Faculty Association

Since these two members are drawn from the senate, there is the possibility that they could be managers or administration.

Source of faculty on board

By-law: Section 3.1(c) states that two members must be appointed by the board, nominated from the Senate, and approved of by the Governance and Human Resources Committee.

This is a comparatively low proportion of members drawn from the faculty, and the approval of three different bodies poses a high level of vetting of candidates. The process for becoming a faculty representative on the board should be simplified to a fair, democratic election. The board should accept who the faculty choose to send.

Fiduciary duty provisions

Article 1.1 of the *Code of Conduct* requires that board members act in “the best interests of the University rather than in the interests of any other person, entity or constituency.”

Article 1.4 of the *Code of Conduct* goes further: “Loyalty to the interests of the University supersedes any loyalty to an interest group.”

This language goes beyond what the fiduciary duty requires by creating a false dichotomy between a member’s constituency and the University as a whole (see Appendix A for a discussion of best interests). This presents an interference with the University Governance Model.

Conflict of interest provisions

Article 1.5 of the *Code of Conduct* defines a conflict of interest as “potential or actual divergence between personal interests and those of the University.” An example is given: “[an] employee of the university and such a Member’s promotion, terms of employment, or termination of employment are being discussed.”

Article 1.5.4 requires that a member will “absent herself or himself without comment from the vote and deliberation. The member may be asked to withdraw from the meeting completely, where terms of employment are being discussed.”

This example unfairly targets internal members. The requirement to remove oneself without comment is excessive and interferes with the University Governance Model. Appropriate language would incorporate an exception for a representational member that provides for the appropriate voice and vote distinction — that is, voice participation and opinion on issues that affect those members but recusal from the vote.

Conduct & communications restrictions/ Code of conduct

By-law 6.13.2 requires that personnel, student, collective bargaining, and other matters, as determined by the board, are in camera matters.

Appropriate language would allow for representational members to consult with their constituents on certain matters.

Article 1.7.3 of the *Code of Conduct* specifies that “Members will make no formal or public evaluations of the President or staff outside of the official process.”

This is in conflict with academic freedom and the ability to criticize the University. In addition, it is the board’s role to hold upper management accountable. Part of that may involve public statements about performance. There is no legal requirement that the members of the board must get along, if they are going to assess management and hold them accountable, which is an essential part of good governance.

Article 1.7.4 instructs representational members to “direct employees of the university to use the appropriate reporting lines to bring their concerns to the board.” This specific direction to representational members interferes with the University Governance Model. It ignores the fact that the representational members are on the board in order to represent the perspective and concerns of their constituent communities. Other staff at the University should feel comfortable raising concerns with their chosen board representatives. As discussed in Appendix A, collegial governance should involve a community of interests — rather than creating hierarchy amongst the University’s internal communities.

Nature of meetings

Article 1.3 of the *Code of Conduct* requires that members “be guarded in their comments and avoid attacks on other people’s reputations.”

This is excessive language that forces civility onto proceedings that can evoke passionate responses. For the faculty on the board, this requirement infringes on their academic freedom.

Other

Article 2.1 allows the Chair of the board to suspend a member for breaches of the *Code of Conduct*.

It is anomalous for the Chair to have this kind of power to act without the intervention of the board. This kind of power could have a chilling effect on what representational members say or do, since chairpersons may be more aligned with the administration. The absence of a formal due process prior to suspension could amount to a denial of natural justice.

Memorial University of Newfoundland

Number of faculty on board

0/30

Source of faculty on board

Statutory: Section 31 of the *Memorial University Act* specifically disqualifies any teaching staff of the University or an affiliated college or institution from being on the Board of Regents.

By-law: Section 18 requires that any board member who becomes “entitled to receive remuneration from the University” shall vacate his or her position on the board.

Memorial is an outlier for being the only university reviewed — and possibly the only one in Canada — where there are no faculty or staff representatives on the board.

Fiduciary duty provisions

Section 33 of the *By-laws* states that the best interests of the University supersede the interests of any other person, entity, or constituency.

This language perpetuates the false dichotomy between internal constituency interests and the University as a whole. If there were faculty and staff representatives on the board, then this provision would interfere with their ability to represent those communities.

Conflict of interest provisions

There is a separate board policy for conflicts of interest. That document defines conflicts as “a potential divergence between personal interests and obligations to the Board.” This policy includes real, perceived, and potential conflicts. Members are prohibited from participating in any “activity or decision” involving a real, perceived, or potential conflict of interest.

This language is overbroad. Perceived and potential conflicts of interest should be declared, and then assessed on a case-by-case basis. As discussed in Appendix A, it is not necessarily a conflict of interest or a breach of fiduciary duty to participate in a decision where a board member may benefit.

Nature of meetings

Section 52 of the *By-laws* provides that board meetings may be open to the public.

The use of permissive language is unfortunate for transparency and accountability. CAUT is aware of recent controversies with respect to student board members that might have been prevented if meetings were mandated to be open and public.

Other

Sections 34(viii) and 34(xi) of the *By-laws* require that members of the board maintain confidentiality and accept and defend academic freedom.

While it is good that academic freedom is recognized, it is unlikely that non-university community members will fully grasp what that means for internal policies, practices, and funding. It is likely that board members from outside the University sector will understand academic freedom as institutional autonomy — rather than the right of the faculty to teach, publish, and criticize.

Section 54 of the *By-laws* states that persons who wish to attend a board meeting must apply to the board secretary.

CAUT believes that no interested party should have to apply to attend non-in-camera sessions of a university's board meetings. Democracy is a skill best practiced in public.

Mount Allison University

Number of faculty on board

2/24

Source of faculty on board

Statutory: Section 9 of the *Mount Allison University Act* requires two faculty members be elected or appointed by the faculty.

Fiduciary duty provisions

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Conflict of interest provisions

By-law 94-1, Section 3(9) requires board members to disclose conflicts of interest, which are defined as being a party to a contract with the University, or being the director of a corporation with such a contract.

It is appropriate for conflict of interest language to focus on financial conflicts rather than conceptual or ideological ones, which would be the case at most universities that specifically mention “groups” or “constituencies.”

Conduct & communications restrictions/

Code of conduct

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Nature of meetings

By-law 94-1 is silent on whether meeting must be open or closed, which undermines transparency and accountability.

According to their website, the board only meets three times per year. This is a low number of opportunities to hold the executive accountable, since most of the business is conducted behind closed doors by the Executive Committee.

Other

Section 16 of the *Mount Allison University Act* creates an Executive Committee, which is dominated by administration, and, according to section 16(4), can exercise all powers of the board, except to enact by-laws. By concentrating this level of power and oversight in a body that is weighted in favour of administration, this provision undermines the University Governance Model and limits opportunities to hold the executive accountable.

University of New Brunswick

Number of faculty on board

6/34

Source of faculty on board

Statutory: Section 23(1)(m) of the *University of New Brunswick Act* provides for six faculty members: two elected from the St. John Campus and four elected from the Fredericton Campus.

Fiduciary duty provisions

Section 4.1.2 of the document *Conflict of Interest for Members of the Board of Governors* states that board members “have a responsibility only to the best interests of the University. Any Member must function as a Member of the Board or Committee as a whole and not as a spokesperson for a constituency.”

It is not a breach of fiduciary duty as a board member to take into account constituency interests, especially when those interests are required by statute to be part of the board’s membership. University governance is collegial and representational by design.

Conflict of interest provisions

Section 3.16 of the *Conflict of Interest* document describes a conflicting private interest as including a professional affiliation or other involvement outside the board.

This definition is very broad, and the conflicts of interest provisions should contain a specific exemption for representational members. Constituency interests should be considered by the board, as part of the University Governance Model.

Section 4.1.14 states that where there is a conflict of interest, the member “shall withdraw from the portion of the meeting in which the matter is being discussed or considered and shall abstain from voting and shall not seek to influence decision-making in any way.”

This language may be appropriate for members drawn from outside the University, or without some particular involvement in education, but for representational members, it is overly broad and unduly onerous. These members should be allowed to participate in the discussions. Appropriate language would create a voice-vote distinction.

Conduct & communications restrictions/ Code of conduct

Section D.1 of the *UNB Board Charter 6.1* states that board members are expected to support the “vision, mission, and strategic plan of the University, as adopted by the Board, regardless of opposition during the debate.”

Board solidarity provisions that silence dissent are a violation of academic freedom for the faculty on the board.

Section D.4 of the *UNB Board Charter 6.1* describes a policy of respect and civility.

Forced civility provisions are a violation of academic freedom, legally vague, and can be often tools used by the majority to suppress dissent, opinions, or behaviours of which they disapprove.

Nature of Meetings

Section 19 of the *Rules of Order and Procedure* state that the board may have open meetings and reserves the right to hold closed meetings.

Open meetings should be required as the default process. Mandatory, rather than permissive, language should be used. The University Governance Model depends on openness and transparency, where constituents themselves are allowed to attend and observe.

St. Francis Xavier University

Number of faculty on board

4/31

Source of faculty on board

Statutory: Section 7(1)(j) of Bill 50, *An Act to Amend and Consolidate the Acts Relating to St. Francis Xavier University*, requires four members be elected by the faculty.

Fiduciary duty provisions

CAUT did not find any provisions that are inconsistent with the University Governance model.

Conflict of interest provisions

Section 1, Article 1 of the *By-laws* defines a conflict of interest as an existing or reasonably foreseeable financial or other interest that impairs or appears to impair independence and judgement in favour of the University.

Section 2, Article VII(p) requires that a conflicted member refrain from participating in the vote or deliberations.

Although this language seems reasonable in that it does not specifically mention faculty or staff as being in a form of conflict, the term “other interest” could be interpreted to cover things like a health and safety complaint against the University. In such situations, it could benefit the

board’s decision-making abilities to hear from that member. Appropriate language would create a voice-vote distinction for representational members.

In the *Conflict of Interest Policy* (general – not specific to the board), a conflict of interest is defined in terms more related to a personal interest. Appendix A lists examples of conflicts. These are mostly financial or about misuse of University resources or information.

It is good that there are no specific examples of conflicts that target representational members — as is the case with language at other institutions.

Conduct & communications restrictions/ Code of conduct

CAUT did not find any provisions that are inconsistent with the University Governance Model.

Nature of meetings

CAUT did not find any provisions that are inconsistent with the University Governance model.

Other

St. Francis Xavier University has some of the shortest governance structures examined in this report. Their provisions are silent on confidentiality or whether meetings should be open or closed.

Glossary of Terms

Academic freedom: The right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service; freedom to express one's opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative university bodies. These rights are rights of the academic staff member and cannot be impinged by serving on a board of governors.

Anti-representational: Language that seeks to restrict the ability of representational board members to consult and represent their group within the university.

Best interests: Many board policies require a board member to represent the best interests of the university. The best interests doctrine underlies the fiduciary duty owed by all board members to the university as well, but like the broader concept of fiduciary duty, best interests has to be defined in the context of the University Governance Model adopted through statute, policy and practice. There is often a false dichotomy created by provisions that distinguish interests of the university from that of the constituent groups the university is mandated to include on the board. It cannot be in the best interests of the university to frustrate its governance model. This is discussed further in Appendix A.

Board meeting procedures: Includes procedures relating to closed meetings or reporting on meetings that could restrict the ability of board members to represent the constituency, which is the reason behind their presence on the board.

Board solidarity: Governance provisions, where all board members are required to express support for a decision, even if it is against their constituents' interests, or they were against it in deliberations. Interferes with the University Governance Model.

Codes of conduct: Provisions that purport to regulate the behaviour, decision-making, and communications of members of a board of governors. Such codes or provisions may conflict with the University Governance Model.

Conflict of interest policies: Provisions that prohibit certain forms of dealing, self-dealing, communication, participation in decisions, decision making, and use of university resources.

Constituency: A group within the academic community (academic staff, students, alumni, etc.) such that forms the basis for a governor's appointment or election to the board.

Democratic deficit: Refers to rules that prevent observation and accountability to university constituents, or a situation where a representative board member is restricted or prevented from consulting with the constituents that make up the group for which representation is provided by statute and governance documents.

External members: Board members from outside the university.

Fiduciary duty: Acting in good faith in the best interests of the university in the context of the University Governance Model. That is, recognizing the representational nature of the board, facilitating and not impairing the ability of academic staff representatives to

fulfill their representational obligations and exercise of academic freedom.

Forced civility: Unlike statutory or policy protections in respect to discrimination and harassment, for example, civility provisions impose restrictions often based on subjective assessment that may be used to silence dissenting voices and suppress vigorous debate. It is contrary to academic freedom to regulate faculty board members' comments or behaviour beyond what is required by law.

Representational members: Board members from the university's internal communities — e.g. faculty, students, and staff.

University governance model: CAUT's "Policy Statement on Governance" reflects the historical development of collegial governance, which requires the active participation of academic staff on governing boards that are primarily composed of community representatives. University compliance with this model is measured in this report.⁸

Voice-vote distinction: Recognizing the distinction between "voice," having input as a representational member, but not a "vote" where it may be entirely appropriate to deny voting rights on a board matter that affects personal or professional interest of the member. Retaining voice allows input from a representative perspective, which adds value to the discussion while respecting both the representational role as well as the academic freedom of an academic staff member.

8. CAUT's "Policy Statement on Governance" can be found at <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-governance>.

CAUT Legal Advisory

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.

The Canadian Association of University Teachers (CAUT) holds the view 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:

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 members¹

1. *Harekin 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 2019 paper, “Fiduciary Duties of University Governing Boards: Implications for Self-governance and Collegial Decision Making.”

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 re-examination 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

It is one of the highest, most rigorous duties in law.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.

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?

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 v. Wise*, *infra*, 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.

6. [1987] 2 S.C.R. 99, para. 60.

7. 2011 SCC 24.

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.

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 2017 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 the 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

8. This is often a property interest. *Supra*, para. 36.

9. CAUT Report on Board of Governor Structures at Thirty-One Canadian Universities, May 2018.

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).

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 that 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 20} 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.

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.²¹ 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."²² At the federal level, this more holistic view of how to define the best interests of the corporation is now codified in section 122(1.1) of the *CBCA*.²³

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.²⁴ 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

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.

20. In 2019, the *CBCA* was amended to include a non-exhaustive list of whose interests can form a part of the "best interests" of a corporation. Section 122(1.1) now includes employees, consumers, government, and the environment as valid interests to consider.

21. Directors are permitted to consider other interests reflecting the Courts' deference to their business judgement. See *Peoples v. Wise*, infra, at paras. 63-65; also see para. 42.

22. Ibid.

23. Although informative, the federal *CBCA* has no legally binding effect on corporations and universities that are not incorporated through the federal regime.

24. As can be seen from the 2017 *CAUT Governance Review*, 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.

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: 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 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.²⁵ 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.²⁶ Where express representation of interests is provided for in a university

25. *Kidder v. Photon Control Inc.*, 2012 BCCA 327, paras. 57-62.

26. *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011] 2 SCR 175, para. 150.

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.^{27 28} 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.

- 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.”²⁹ 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.³⁰ 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 do carry this statutory role is contrary to the *Act*.

- The University of Sherbrooke has its objects defined by statute as higher learning and research.³¹ 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.

27. 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.

28. Section 122(1.1) of the *CBCA* is explicit that the list of interests is non-exhaustive.

29. *York University Act*, 1965, s. 4.

30. *University of New Brunswick Act*, 1984, Acts of New Brunswick, ch. 40, s. 6.

31. *Loi concernant l’université de Sherbrooke*, Lois du Québec 1978, ch. 125, article 3.