LAWSON LUNDELL LLP

BARRISTERS & SOLICITORS

1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

www.lawsonlundell.com

DIRECT LINE: (604) 631-9198
DIRECT FAX: (604) 641-2817
hjmurdoch@lawsonlundell.com

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VIA E-MAIL

Mr. Darrell Thomson
Special Projects
BC Medical Association
Suite 115, 1665 West Broadway
Vancouver, BC V6J 5A4

Dear Mr. Thomson:

**British Columbia Medical Association**

You have advised us that the BCMA directors will be considering the following motion at their next board meeting:

> That the BCMA Board of Directors be entitled to express dissenting views as individuals to their members, as well as representing the position of the BCMA on policy considerations and recommendations.

You have asked whether this motion raises any legal issues regarding compliance with duties of directors, relevant law or policies of the BCMA and, if it does, what liability would flow from that and what consequences or penalties apply or are available.

You have also asked whether board members are entitled to attend Executive Committee meetings.

**Brief Answers**

***Directors Expressing Dissent***

Directors have a fiduciary duty always to act in the best interests of the Association as a whole. This duty requires directors to respect the confidentiality of matters discussed at board meetings and to act consistently with decisions reached by a majority of the directors. It therefore follows that acting or speaking out inconsistently with a Board decision, for example by expressing a dissenting view, constitutes a failure to carry out the duty to act in the best interests of the Association. In this area, there is no distinction between acting "as a director" and acting "as an individual".

If a breach of fiduciary duty is established, the Director will be liable for any damages that can be proved to flow to the Association. This does require a court proceeding, however, and difficult obstacles can arise in establishing a breach of duty in court and particularly in establishing actual damages that flow from that breach. An alternative to going to court is for the Board (by policy) or the BCMA (by the Bylaws) to establish penalties for breach of directors' duties, such as breaching confidentiality or acting or speaking against a Board decision. There is no law on what penalties a Board may set. However, based on the power and duty of the Board to manage or supervise the management of the affairs of the BCMA and the duty of the Directors to act in the best interests of the BCMA, the Board has the power to pass a motion to censure a Director or remove a Director from a Board committee for such misconduct. Whether the Board has the power to impose greater or escalating penalties, such as a fine or suspension or removal from the Board, or whether the power to remove a director from a committee extends to a statutory committee if he or she is not a Board appointee, is less clear and may require amendment of the Bylaws.

***Attendance at Executive Committee Meetings***

Directors (or other members) of the BCMA may attend meetings of the Executive Committee only at the invitation of or with the permission of the Executive Committee. Present day best practices suggest, however, that guests should be permitted at meetings only where they have a significant contribution to make, and only for the period of time at the meeting when their contribution is needed.

**Detailed Discussion**

***Duties of Directors***

Section 25(1) of the *Society Act*[1] states that:

> 25(1) A director of a society must
>
> (a) act honestly and in good faith and in the best interests of the society, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person,
>
> in exercising the powers and performing the functions as a director.

There is very little case law that examines the content of these duties for directors of societies. However, the language and form of section 25 of the *Society Act* are nearly identical to those describing the duties of directors in the Canadian corporate context. As an example, section122 of the *Canada Business Corporations Act*[2] states that:

> 122(1) Every director and officer of a corporation in exercising the powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and

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[1] R.S.B.C. 1996, c. 433.

[2] R.S.C. 1985, c. C-44, hereinafter "CBCA"

(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances."

The only real difference between the two sets of provisions is the arguably *higher* standard set for directors of societies in section 25(1)(a). Directors of societies must act "in the best interests of the society", whereas directors of corporations must only act "with a view" to the best interests of the corporation.

The general duty set out in the *Society Act* and in the *CBCA* is often referred to as the fiduciary duty, or duty of loyalty. This duty was established in the common law before legislation enshrined it, and has been upheld in the case law time and time again. The Supreme Court of Canada examined and re-affirmed this duty recently in *Peoples Department Stores Inc. (Trustee of) v. Wise*[3]. The unanimous decision of the Court in *Wise* clearly described the content of a director's fiduciary duty:

> [Directors] must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. *They must maintain the confidentiality of information they acquire by virtue of their position*. Directors and officers must serve the corporation selflessly, honestly and loyally.[4] *[Emphasis added.]*

Although these duties are described in corporate terms, the applicability to the duties of the directors of societies is obvious. BCMA Directors must act in the pursuit of the objects of the Association, which include the advancement of the welfare of all members of the medical profession in British Columbia and the promotion of the integrity and honour of the medical profession[5]. They must avoid conflict with the Association as a whole, and avoid using their position as a Director to gain any personal benefit. They must maintain confidentiality and serve the Association as a whole honestly, selflessly and loyally.

An aspect of this fiduciary duty to act only in the best interests of the organization is the duty of a director to avoid any conflict of interest with the organization; a director's personal interest or the interest of any other entity with which the director is involved must not be brought into conflict with the interests of the organization. This common law rule, now found in section 25(1)(a) of the *Society Act*, was set out in the classic case of *Aberdeen Railways v. Blaikie Bros*[6]. In this case, the House of Lords held that in the corporate context, a director could not enter into an engagement with the company wherein he had a personal interest that had even the *potential* to conflict with the interests of the company. The question of whether or not the contract was actually fair to the company did not matter in the overall disposition of the case.

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[3] [2004] 3 S.C.R. 461, 2004 SCC 68, hereinafter *Wise*.

[4] *Wise, supra*, at para. 35.

[5] Constitution of the British Columbia Medical Association, 2(a) and 2(c)

[6] (1854) 1 Macq. 461 (HL)

Another aspect of the fiduciary duty to act only in the best interests of the organization is the duty of directors to exercise their powers for a proper purpose and not for a "collateral", or some other, purpose. In *Re ASI Holdings Inc.*,[7] two directors who acted to retain their control over a company were found to be in breach of their duty to act for a proper purpose. Although the directors alleged that their decisions were also meant to protect the company from further liabilities, the judge decided that the evidence showed that their primary purpose was to retain their control and that their collateral attempts to act in the interests of the company were not sufficient to meet their duty to the company.

The Supreme Court of Canada in *Wise* commented on both duties. The Court remarked that the directors had met their fiduciary duties with respect to absence of conflict or improper purpose not only because they acted in the interests of the company but also because there was an "absence of evidence of a personal interest or improper purpose"[8]. This suggests that if there had been a personal interest or an improper collateral, or other, purpose, the directors may have been found in breach of their duties to the company, even if they could argue that they were also acting in the best interests of the company.

The duties of directors established by statute and case law cannot be abrogated or diminished by an organization passing bylaws, rules or policies that are contrary to those duties. The principles described above are in fact reflected in several Board documents, including the Code of Conduct for BCMA Directors and the document entitled Directors' Responsibilities. The Code of Conduct is clear that every director "must consider the interests of all Association members when carrying out the business of the Association" and that all directors owe their first duty to the Association, ahead of any personal or professional interests or affiliations. More specifically, the Code recognizes that the President is the primary spokesperson for the Association (the Bylaws state this too, in Bylaw 8.1(c)) and that communication of the views of individual members of the Board may be contrary to the proper operation and best interests of the Association. The Directors' Responsibilities document requires directors and officers "to refrain from engaging in personal activities that would injure … the Association" and lists "using their position of trust and confidence to further their private interests" and "the appearance of a conflict of interest" as examples of prohibited conduct.

***The Proposed Motion***

The motion proposed for consideration at the next Board meeting seeks to permit individual Directors to express dissenting views on decisions reached by a majority of the BCMA Board. How is the content of the fiduciary duty of directors described above instructive? The Court in *Wise* mentions with approval an Ontario case, *820099 Ontario Inc v. Harold E. Ballard Ltd.*[9] In *Ballard*, the court addressed a conflict between majority and minority shareholders and observed[10]:

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[7] (1996) 28 B.L.R. (2d) 74

[8] *Wise, supra* at para. 41.

[9] (1991) B.L.R. (2d) 113, hereinafter *Ballard.*

[10] *Ibid.* at p.171.

> It seems to me that while it would be appropriate for a director to consider the individual desires of one or more various shareholders... in order to come up with a plan for the operation of a corporation, it would be inappropriate for that director (or directors) to only consider the interests of certain shareholders and to either ignore the others or worse still act in a way that is detrimental to their interests. The safe way to avoid this problem is to have the directors act in the best interests of the corporation (and have the shareholders derive their benefit from a "better" corporation).

Whether a Director sides with the majority or the minority in a Board decision, the Director must continue to act in the best interests of the BCMA as a whole, and cannot seek to represent his or her own views or the views of a certain group of members in derogation of that duty. A duly reached decision of the Board represents the Board's determination of action that is in the best interests of the Association. A declaration outside of the BCMA boardroom of disapproval of that decision undermines the actions of the Board and may diminish the Board's credibility, and is therefore inconsistent with acting in the best interests of the BCMA. Such expression may also reveal a conflict of interest, particularly where the Director has clear personal or professional interests in the opinion being expressed. Further, one must ask: for what purpose is the dissent being made? An individual Director may argue that a public dissent that is clearly in her personal or professional interest is also "in the best interests of" the Association. However, action in the best interests of the BCMA must be the *primary* purpose, and not one merely incidental to an improper private or other purpose of the Director.

Even the wording of the motion (suggesting that a Director in the minority on a decision would be expressing an opinion to "their members" rather than to "the members") indicates a motivation to serve a certain group of members that supersedes the commitment to the entire membership of the Association. The Supreme Court of Canada decision in *Wise* is clear that, in order to act in the best interests of an organization, a director must work to create a better organization, and must not "favour the interests of any one group of stakeholders". The wording of the motion shows a clear intention to address a subgroup of members with whom the Director feels a certain connection and express disapproval of the larger body's actions. The Director's actions in expressing disapproval can therefore not be seen as benefiting the membership as a whole.

***Consequences for Director Misconduct***

A director who breaches his or her fiduciary duties to the Association could be held legally liable for any damage caused to the Association as a result of that breach. Further, courts tend to impose less stringent standards of proof of damage in cases of breach of fiduciary duty than for a tort or breach of contract[11]. Practically speaking, however, it may be difficult to show a quantifiable damage to the BCMA as a result of a Director's expression of disapproval of a Board decision. However, the Board has the power under the Society Act and the Bylaws to manage or supervise the management of the affairs and business of the Association and also has a duty to act in the best interests of the Association. It would be fair to conclude, in appropriate circumstances, that if a Director is speaking out against a Board decision, the best interests of the Association require the Board to take action. However, what action the Board may take aside from legal action, without an amendment of the Bylaws being necessary, is fairly limited. The

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[11] In Philip H. Osborne, *The Law of Torts* (Irwin Law: Toronto, 2000) at p. 377-378.

BCMA Board has narrow grounds available to it for the suspension and expulsion of members (which would indirectly affect the status of a Director), none of which grounds would apply to a Director breaching Board confidentiality or speaking against a decision of the Board. Only the members may remove a director from office (although pursuant to Bylaw 10.1(b)(iii), a director automatically ceases to be a director if he or she fails to attend 2 consecutive Board meetings without acceptable reason). Fines may be imposed only if authorized by the Bylaws (it is not clear that Bylaw 2.2(b) could be read to allow the Board to impose fines for misconduct). The Board does, however, have the power to censure a Director for misconduct and to remove a Director from a committee. This latter power likely would not extend to permit the Board to remove a Director from a statutory committee if the Board did not appoint that Director to that committee.

***Attendance at Executive Committee Meetings***

The Bylaws do not specifically state who may attend meetings of the Executive Committee (or of the Board or other committees). Bylaw 19 states that where the Bylaws are not specific, the most current edition of *Robert's Rules of Order Newly Revised*[12] shall govern all procedural matters at meetings. Although *Robert's Rules* is not specific as to who may or may not attend Executive Meetings, it does state that the

> members of the organization who are not members of the board or committee, and sometimes non-members, may be invited to attend, perhaps to give a report, but they are not *entitled* to attend.[13] [Emphasis added by *Robert's Rules*].

There is no indication that Directors should be treated any differently than regular Association members in this respect.

Several other authorities also support this custom as a present-day best practice. One set of Canadian rules of order for society meetings[14] states that "only directors may attend board meetings"[15]. A motion passed by majority vote would be sufficient to permit experts, consultants or others to attend[16]. *The Complete Handbook of Business Meetings*[17] suggests that persons who are not directors should only be invited to a Board meeting if they have a significant contribution to make to the meeting. This same rule applies, by extension, to meetings of the Executive Committee. In addition, Bylaw 7.5(b) requires the Executive Committee to report its actions to the full Board.

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[12] Sarah Corbin Robert *et al.*, eds., *Robert's Rules of Order Newly Revised*, 10th ed. (Cambridge: Perseus Publishing, 2000), hereinafter *Robert's Rules*.

[13] *Ibid.* at p. 93.

[14] Hartley R. Nathan & J. Glyde Hone, eds., *Wainberg's Society Meetings including Rules of Order*, 2nd ed. (CCH: Toronto, 2001).

[15] *Ibid.* at p. 71.

[16] *Ibid.*

[17] Eli Mina, *The Complete Handbook of Business Meetings* (AMACOM: New York, 2000)

The Executive Committee may, if it wishes, adopt a policy regarding attendance by other Board members or members of the Association. Making a general rule allowing attendance on request, whether by a Director or by a regular member, is not, however, consistent with present-day best practice.

***Conclusion***

A Director who speaks outside of a Board meeting against a decision of the BCMA Board will almost always be in a position of breaching his or her fiduciary duties as a director. Doing so will not be in the best interests of the Association and may reveal a conflict of interest, conflicting loyalties or an improper purpose. A Director who breaches his or her fiduciary duties may be held personally liable for any damage to the BCMA that results. Absent amendments to the Bylaws, the Board has limited powers to penalize Directors for misconduct.

The general rule regarding entitlement to attend meetings is that only members of the body that is meeting are entitled to attend. Others may attend only at the invitation or with the permission of those who are entitled to attend. Therefore, only Directors are *entitled* to attend Board meetings and only members of the Executive Committee are *entitled* to attend meetings of the Executive Committee. We understand that the Board presently has a policy allowing any member to attend Board meetings (other than *in camera* sessions). It is open to the Executive Committee to adopt a similar policy, addressing attendance by other Directors (or members). However, best practices are that non-Executive Committee members should be allowed (or invited) to attend meetings only if they have an important contribution to make.

I would be pleased to discuss these issues further.

Yours very truly,

LAWSON LUNDELL LLP

(Signed) *H. Jane Murdoch*

H. Jane Murdoch

HJM/LZS