

ICD Seminar On Understanding the Dynamics of Agencies, Boards and Crowns in Canada

[Editor's Note: This report was prepared by Paul Cantor, Senior Advisor, Bennett Jones LLP; Board Chair, Public Sector Pension Investment Board; Board Chair, York University.]

Agencies, Boards, and Crown Corporations in

Canada: Government-owned agencies, boards and Crown corporations (ABCs) are used in Canada to achieve policy objectives such as commercial enterprises that can best be achieved outside the framework of government operations. Canadians are comfortable with the use of such entities, perhaps because they have been ubiquitous in Canada for so long.

According to Ms. Glenna Carr, Board Chair at Atomic Energy of Canada, there are more than 1,200 ABCs at the federal, provincial and municipal level in Canada. Ms. Carr recently chaired the ICD's cross-country network seminar "Understanding the Dynamics of Agencies, Boards and Crowns in Canada". The ICD seminar was held to explore the attributes of these entities. More than 700 people in ten cities across Canada participated in the first of three sessions being conducted by the ICD through the BCNtv satellite network.

Public Entities and Private Sector Companies

Compared: The common and distinctive features between ABCs and private sector companies were set out by Ms. Carr and by Mr. Chris Portner, one of the panelists, and a partner at the law firm, Oslers LLP. Mr. Portner compared directors' responsibilities in the private sector under the Canada Business Corporations Act (CBCA) and those of directors of ABCs under the Federal Financial Administration Act (FAA). He noted that the core duties and fiduciary responsibilities are virtually the same. These are to act honestly and in good faith with a view to the best interests of the corporation, and to use the care, diligence and skill that a reasonable person would exercise in such circumstances.

He then noted that ABCs are distinguished from private sector corporations by a number of factors,

of which he cited three. The first is that a disaffected government can remove the directors. The second is the government's ability to issue policy directives that the directors are legally required to implement. Thirdly, for federal entities governed under the FAA, ABCs must submit annual business plans. He noted that recently-enacted Alberta legislation, if proclaimed, would further enhance that government's ability to intervene in policy matters of its government entities.

In the session following the broadcast, the Edmonton participants listed four cases when the government might intervene in the business of the ABC. These are in times when public safety is threatened, in times of crisis, in case of mandate drift, or when there are questions about the conduct of board member(s).

The Origin of Policy: The most important governance distinction between public and private sector corporations is the government's role as the sole shareholder and its expectation that ABCs will conduct their operations within the framework of government policy. Mr. John MacNaughton, Chair of the Business Development Bank of Canada, and one of the panelists, postulated that ABCs operate in a "virtuous triangle" composed of (1) the mandate of the ABC, (2) the larger public policy framework in which it is established and (3) the political environment. Anyone serving on the board of a government enterprise must accept the ambiguity that is created by these three factors. An Ottawa rapporteur summed this challenge up by saying that "Governance cannot replace reality". The Toronto participants observed that, for ABCs, operating at "arm's length" actually means that the arm is not fully extended.

On the other hand, I would observe that there is a risk of oversimplification here in that not all ABCs are alike, and even among Crown corporations, the

enabling legislation often implies different extensions of the arm's length. While Mr. MacNaughton's theory might well apply to the underlying policy objective of the ABC, the real problem more often arises when the ABCs are sideswiped by operational policies or regulations intended to manage government, which are then extended to the ABCs. Such actions strain the purpose of creating ABCs.

For ABCs, the policy framework devolves from the enabling or supervising legislation and any directives government might issue. Thus it is the government, as shareholder, that determines the policy framework. In the private sector, the policy/strategy discussion is generated within the framework of board and management interactions. The shareholders are rarely involved.

Many of the regional groups discussed the resolution of differences between government wishes and ABC objectives. Calgary participants stressed the importance of open communication between the agency and its government sponsor. Both panelists and participants observed that board members must have a thorough and realistic understanding of what is expected of them. As one of the Ottawa participants noted, board members must be able to sense the political winds that blow across their ABC. Both the panelists and some of the regional groups stressed that board members must be ready to resign if differences cannot be resolved.

The Role of the Board Chair: In ABCs, the policy framework that devolves from government flows through the board to management. This changes the dynamic between the board and management generally, and in particular, between the chair and the CEO. In the private sector, it is the CEO who is the usual face of the organization. Only recently has the private sector board chair been called on to respond publicly to a relatively narrow range of issues, such as executive compensation.

The public sector board chair's role is more extensive and that is reflected by the government generally reserving the right to appoint the chair. This wider role was underlined in a survey of ABC board chairs conducted in preparation for this network seminar by two of the panelists, Bill Sheffield, currently a Director

of both Ontario Power Generation and Canada Post Corporation and Ron Robertson, a Managing Partner of the executive search firm Odgers Berndtson.

They found that the best ABC chairs have developed extensive networks in their sponsoring government department, from the minister on down. Vancouver participants observed that the chair carries the responsibility for preserving the arm's length relationship with the sponsoring agency. In the survey, experienced board chairs expressed the view that the need for good communications skills for public sector chairs, in both public and private forums, generally exceeds that in the private sector.

The networking relationship moves from important to crucial when government has reserved the right to appoint the President and CEO. In that case, the chair must use his or her persuasive powers to assure that both the government's and the board's needs will be met with the appointment. My experience in executive search underlines the need for agreement from all key stakeholders on a job description that identifies the specific leadership and management skills, as well as the technical skills, needed to do the job. To that end, Mr. Sheffield commented on the high competence level of the most senior human resource officers in the federal government.

Board Member Recruitment: The high level of human resource competency at senior levels in government is likely one of the reasons why the public sector boards have been more successful in recruiting diverse candidates to their boards than has been the private sector. The growing political involvement of Canada's racially-diverse community is an additional reason for this success. Mr. MacNaughton observed that recruitment of diversity candidates for ABC's sometimes generates more in depth discussion than is found in the private sector.

To that end, when I was an executive recruiter, I looked to political contacts to help find diversity candidates for private sector and not-for-profit boards, as well as for ABC appointments. For appointments to public sector boards, the political channels also assist in finding candidates who not only meet the skill requirements for the position, but at the same time are acceptable appointments to government.

A panelist observed that one does not necessarily have to be a hard-line supporter of the party in power to get a board appointment. Conversely, anyone opposed to the government policies reflected in the ABC's operations should not expect to be appointed to that board. As a senior member of the Prime Minister's Office once said to me: "Order-in-Council appointments are our appointments, not the board's".

Board Member Competencies: Whether in the public or private sectors, effective boards need to both know "when to act" and have the "will to act". In my executive search practice, we used the term "knowing when to act" to sum up the need for a wide range of technical competencies on the board. The ICD panelists and participants observed, and the survey results confirmed, that acquiring the knowledge needed to know when to act is achieved in both the private and public sectors by recruiting to fill in the gaps in the enterprise's competency grid. In the public sector, the competency grid is also the minister's best defence against political office-seekers pressing for ABC board appointments.

In our executive search practice, we found that ensuring that the board has the second attribute, "the will to act" is also vital. This is the element needed to convert knowledge derived from technical expertise into actual decisions to act. Recruiting board members who have the will to act cannot be found by parsing candidates' résumés. To compensate for this, board chairs should interview proposed candidates and speak to references to assess the probability of a will to act. One panelist noted public sector boards are no place for people with big egos. But board members must still have the will to take action when action is required.

Board Evaluation: The ABC board chair survey also reviewed board evaluation practices. The findings show that a majority of public sector boards have some form of board effectiveness review. The Halifax participants said that the evaluation should include a review of required competencies and the extent to which these were fulfilled.

The survey did not find any boards that conducted a process in which individual board members provide a confidential evaluation of the performance of their

peers on the board. This reflects a less developed practice than in the private sector. However, one participant at the Ottawa session reported that the Public Sector Pension Investment Board (PSPIB) does conduct written peer reviews. As the Chair of that Board, I find that the peer review is helpful in generalizing comments about individual performance in my interviews with each board member. It is also helpful in discussions with the PSPIB Nominating Committee on reappointments. At all stages in the process, it is crucial that confidentiality be maintained.

Risk Management: Risk management for ABCs is an important subject that is worthy of a full broadcast seminar. This seminar confined itself to risk exposure of the directors themselves. Mr. Portner noted that exposure to financial liability for ABC directors is quite low provided they fulfill their fiduciary duty. This is due in part to the indemnity provided for directors of federal ABCs under the Finance Administration Act, as well as protection under the entity's enabling legislation and its bylaws, plus any arranged contractual protection.

In contrast, Mr. Robertson observed that the reputation risk of serving on an ABC is quite high. Examples of entire board dismissals such as that at Ontario Power Generation were noted. The panelists observed that, in the world of politics, ABC directors are expendable.

Concluding Comments: All panelists subscribed to the view that ABCs play an important role in Canada's mixed economy. Ms. Carr, and Messrs. MacNaughton and Sheffield, all of whom serve on ABC boards, were unanimous in their view that the opportunity to serve on an ABC board outweighs the reputation risk and comparatively low pay earned on these boards. Mr. MacNaughton emphasized that one must be prepared to understand that the "virtuous circle", to which he had referred, circumscribes the framework for action. But as a member of an ABC Board, he observed that one has the opportunity to provide recommendations on what the policies should be. ABC directors can therefore assist government in responding to urgent matters such as the fallout from the recent financial meltdown, and to be a part of those solutions.