WORKING ON THE HIGH WIRE

The role of corporate secretary increasingly is falling to lawyers. It can be a tricky balancing act.

It's astonishing to think that it has been a decade since the Enron debacle exploded out of the boardroom and into the consciousness of government and the investing public. Corporate governance concerns animated significant efforts in the United States to engage in the most substantial overhaul of corporate law since the 1930s (in both the *Sarbanes-Oxley Act* of 2002 and its later progeny, *Dodd-Frank*), as well as in Britain and elsewhere. While the details of the new roles, rules and penalties for corporate directors and senior officers have largely been settled, the ethical consequences for everyone else connected with the boardroom are still not entirely clear.

Sarbanes-Oxley and subsequent amendments to professional conduct rules for lawyers in Canada and the United States reconfirmed the responsibilities of corporate lawyers to their organizations. And Securities and Exchange Commission prosecutions of lawyers in the first five years after Enron made clear they were increasingly seen as "gatekeepers" for their organizations with quasi-public reporting responsibilities.

Only recently has similar attention been paid to the corporate secretary. That attention is long overdue: Both the Ontario Bar Association's February Institute and the Canadian Corporate Counsel Association's Spring Conference meeting featured panels on the role of the corporate secretary or compliance officer — hats often also worn by general counsel. The wearing of these multiple hats, and the transformation of the role of corporate secretary over the past decade

as scrutiny of board governance has increased, raise additional ethical issues for lawyers operating in what is already a minefield.

As Canadian corporate governance expert Carol Hansell sets out in her excellent primer, *What Directors Need to Know: Corporate Governance*, the corporate secretary brings knowledge and specialized expertise that serves as an important resource to the board and to the organization as a whole. Beyond organizing board meetings, preparing and ensuring distribution of meeting materials, keeping minutes and maintaining responsibility for corporate records and necessary filings, the role is an important part of the management team. No longer a mere custodian of records or simple note-taker, the corporate secretary is often a repository of organizational history and culture, a bridge between management and independent directors, and a front-line player in responding to regulators, investors and other stakeholders.

Despite the bevy of legal reforms, though, the office of corporate secretary is not defined by statute in Canada. There is no statutory requirement under either the *Canada Business Corporations Act* or the *Ontario Business Corporations Act* to even have one, although both statutes include "secretary" in the definition of "officers" whom the board of directors might designate under their general powers to delegate management responsibilities. The function may or may not be combined with the role of general counsel, and may or may not be occupied by a lawyer. Increasingly, lawyers are being recruited for the role, whatever the label attached to the position, even if they are not functioning solely — or at all — in a legal capacity.

A sampling of recent advertisements for openings illustrates this wide variation in approaches. The Bank of Canada's February 2012 search ad for a general counsel and corporate secretary, for example, notes that the person chosen will "report to the Senior Deputy Governor, serve as a member of the Bank's Executive, and provide legal, business and strategy advice to the Bank's senior management on all legal issues. With the support of your legal team, you would guide the development of policies and procedures to secure the Bank's compliance with its statutory and legal obligations." Other recent ads for "compliance officers" and "corporate secretaries" are targeted at lawyers, although they articulate responsibilities that do not include the provision of legal advice (and are accompanied by lower compensation levels accordingly). Clearly, though, having legal training, knowledge and experience can be seen as an asset in fulfilling the role.

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Part of the difficulty that sometimes emerges, then, is whether the corporate secretary is functioning as a lawyer, and even if not, whether members of the board or the organization expect that they are dealing with that individual as a lawyer *qua* lawyer, rather than as just another management employee. This has a whole series of ethical and regulatory consequences.

First off, as Law Society of British Columbia bencher Rita Andreone pointed out in a 2011 article, several provinces and territories have statutes defining the "practice of law" that may sweep in the functions performed by corporate secretaries unless those functions are specifically excluded. The B.C. *Legal Profession Act*, in particular, contains an expansive definition that could put many offside. As Andreone notes: "Not all of what a typical Corporate Secretary does is necessarily caught by the practice of law restrictions, but care should be taken as some parts of the role may routinely fall within the restrictions, especially where it goes beyond mere minute-taking, certifications, record-keeping and pure maintenance tasks."

Second, when a lawyer is functioning as corporate secretary, it is easy for the roles to be blurred — one minute you are a member of the management team responsible for the proper functioning of the meeting, the next you are sought out to provide legal advice. What do you record in the minutes, if anything? This will have an impact, in particular, on privilege but also in respect of liability insurance: Lawyers are not covered when not engaging in the practice of law. Corporate secretaries may be sued for negligence or breach of fiduciary duty in their capacities as officers.

Another conundrum that often emerges relates to the reporting relationships for corporate secretaries. Should the person report to the chief executive officer or the chairman of the board? If the corporate secretary is also general counsel, might his or her independence in providing governance advice and direction to the board be compromised because he or she is separately reporting to the CEO or CFO (and being annually reviewed and having compensation set by those individuals instead)? Even where an individual maintains strictly segregated lines of communication, the perception — either by the board or by management — that they have been somehow compromised could affect their ability to function effectively.

Finally, and most importantly, understanding the role in which a corporate secretary is functioning has key consequences for privilege, especially if that person is also a lawyer. In 2004, the Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)* said: "Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities,

each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered." The Saskatchewan Court of Queen's Bench had considered this issue in *Potash Corp. of Saskatchewan v. Barton* (2002), observing that, "when corporate counsel works in some other capacity, such as an executive or board secretary, information is not acquired in the course of the solicitor/client relationship and no privilege attaches."

Most corporate counsel already have a keen appreciation of the challenges of preserving privilege when their company clients seek both legal and business advice from them in the course of any given day. Ensuring that correspondence or e-mails are segregated and redacting legal from business advice are a start; simply slapping "privileged and confidential" on a document is not enough. And the worst time to find out that you've managed it incorrectly is after the fact.

Where a corporate secretary has legal training but isn't functioning as a lawyer is even more important. Even if the corporate secretary is also general counsel, whenever he or she is playing an executive role that is not necessarily a legal role, the safest course is to assume that he or she should not be providing legal advice in that capacity. This means operating under the assumption that privilege will not apply.

Canada hasn't been immune from corporate scandal: Bre-X, Live-Ent, Nortel Networks and YBM Magnex are but a few examples. And the scandals keep coming. The recent collapse of what was once Canada's largest publicly traded forest products company, Sino-Forest, serves as a reminder of the importance both of the decade of reforms and the need for continuing vigilance. The RCMP and the Ontario Securities Commission are continuing to investigate, and U.S. investors launched a class action lawsuit in January. The February report of an independent committee of the Sino-Forest board into allegations of fraud at the company noted that its investigation had been hindered by missing and incomplete corporate records and documentation.

In the context of any regulatory or police investigation, one might expect that the actions of a corporate secretary will come under close scrutiny. Whatever the lessons emerging from this new case, it's clear that the days of corporate secretary as glorified record-keeper are long gone. Appreciating the ethical quandaries that come with the new expectations is the first step in more properly valuing the role and responsibilities that now come with the position. END

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