

## What do school boards do?

“In and for each Province the legislature may exclusively make law as in relation to education.”  
Constitution Act 1867

The Alberta legislature through the School Act and regulations passed thereunder has delegated some authority for the governance of education to locally elected school boards. School boards are statutory corporations and, as such, have certain obligations to perform and certain powers to carry out their tasks.

The philosophy of school board governance is that government is most effective when it is close to the people being governed. Historically, community residents have elected trustees to boards to act for the legislature in their local schools.

The board practices leadership through governance in three main areas: fiduciary leadership; strategic leadership and generative leadership.

In its *fiduciary leadership* role the board focuses on its legal responsibilities as defined in the School Act, regulations and other legislation pertinent to children and youth.

The board provides oversight and stewardship to ensure:

- each student has the opportunity to achieve his/her potential
- children are safe at school
- the jurisdiction’s financial and capital resources are well managed
- that business is conducted in a legal and ethical manner

The school board’s *strategic leadership* role sees school boards looking into the future – conducting environmental scans of internal and external issues and trends. In this role, the school board reviews, revises or drafts the school jurisdiction’s mission, values, vision and goals. This role involves planning and making decisions about resources, programs and services that reflect long term priorities.

The school board’s *generative leadership* role is grounded in the notion that “it takes a whole village to raise a child”. It recognizes that governance should not exist in isolation but that it should engage the community. In its generative leadership role, the school board reaches out to involve the community in a dialogue about the needs of the community, its youth and the future. Moving beyond consultation, generative leadership suggests that school boards share direction-setting and sometimes decision-making with others. This role increases education’s profile as a fundamental community resource and it gives all citizens an opportunity to shape the direction that education takes locally.

## Role of the school board

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The school board, as a representative of the people, is a *decision-maker* and *direction-setter*. The board integrates information from many sources; processes that information; evaluates it and makes a decision compatible with the system's beliefs, values and goals. As it makes these decisions, the school board considers the interests of all the students in the jurisdiction – not just the interests of students from a particular school or area.

The school board is responsible for *setting the overall* direction for the school system. This is usually done through an annual strategic planning process. The board revisits its vision, mission, values and beliefs and identifies strategic priorities and goals for the system. The school board sets the annual budget which determines how resources are allocated to schools and programs. The school board also provides direction through its policy processes. These include *planning, developing, implementing and evaluating policy*.

The school board also *holds the system – and the board itself – accountable* for achieving its goals. The board creates this accountability by assigning roles and responsibilities for the desired results and creating a system to monitor and evaluate those results. The school board reports system and school performance to the public and to the provincial government.

The school board is an *advocate for public education and for the local school system*. As an advocate, the school board consults with its constituents; it provides advice with respect to education to MLAs and government as an individual board and collectively through the Alberta School Boards Association. School boards also *advocate for students*. The board assesses proposed policies based on what is best for the development of the whole individual. While schools cannot usurp the family's role, serving on a school board means partnering with parents to ensure children are provided with the best possible educational opportunities to become productive citizens who contribute to their communities.

The school board *selects a superintendent of schools, delegates administrative duties to the superintendent and evaluates the superintendent's performance*. The school board clearly outlines its expectations of the superintendent. In this context job descriptions must be based on outcomes or accomplishments rather than activities.

While legislation gives the school board the power to engage in a wide range of activities, it is most common for the school board to delegate operational tasks to the superintendent. School boards tend to focus on governing the system by setting performance targets and holding the system accountable for the desired results. It is critical that the school board creates the appropriate policies and procedures to ensure the appropriate conduct of the school system and the limitations of delegated responsibilities or powers. Ultimately the board is accountable.

## Relationship between the school board and the superintendent

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The relationship between the school board and the superintendent is the most important relationship in the school system. The school board and superintendent have different but complementary roles in many areas. Each party's success is greatly influenced by the other's success. Both parties must nurture this relationship. The school board must clearly establish the roles and responsibilities of the school board, the school board chair and the chief superintendent.

## No trustee can act alone – the school board is a corporate entity

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The school board is a corporation. If the school board chooses, it may delegate a trustee to perform specific duties as an individual; but only as an agent of the board and only as prescribed by the board, by board motion. In other words, the school board is ultimately responsible for the individual's action. With this exception, a trustee acting on his or her own has only the authority and privileges of an ordinary citizen.

## What is a trustee personally liable for?

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All authority delegated by the province is to the corporate school board; not to individual trustees. With the four following exceptions any action taken against the school board are against the corporate board – not individual trustees.

### Improper Use of Funds

If a school board uses money acquired for capital expenditures for unauthorized purposes, the trustees who were on the board when the board approved the improper application of the capital money, whether or not they are still trustees, are jointly and severally liable for the payment to the board of the amount of money applied to the unauthorized use (s.187 School Act).

### Non-Performance of Statutory Duties

Trustees who fail or refuse to perform statutory duties imposed by various statutes may be held personally responsible (e.g. s.112 of the Employment Standards Code could hold trustees jointly and severally liable for unpaid wages).

### Personal Gain

If a court declares a trustee disqualified from remaining on the board due to his/her personal gain from contracts with the board, the trustee may be ordered to pay the board any profits.

### Breaches of Common Law

Trustees may be held personally liable for breaches of common law such as acting in bad faith, in a discriminatory manner or in abuse of their powers. It must be noted that actions against such breaches are likely to be successful only where the evidence presented is clearly indisputable.

## When are trustees protected from liability?

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Trustees, employees of a board and school council members are not liable for any loss or damage caused by anything said or done or omitted to be done in good faith in the performance or intended performance of their functions, duties or powers under the School Act or any other enactment. This provision does not provide a defence to an allegation of defamation, nor does it affect the legal liability of the corporate board itself (s. 144.1 School Act).

## What is pecuniary interest?

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Section 80(1) of the School Act, R.S.A. 2000, c. S-3 defines the pecuniary interests of a trustee as “an interest in a matter that could monetarily affect” the trustee and those individuals for whom the trustee has a deemed pecuniary interest. A trustee has a deemed pecuniary interest to either a spouse or an adult interdependent partner. The trustee must refrain from discussion of, voting on, and participating in any way in issues that could monetarily affect both the trustee and either a spouse or an adult interdependent partner.

In applying the conflict of interest provisions, the pecuniary interest of the spouse or adult interdependent partner of a trustee that are known to the trustee, or of which the trustee should reasonably know, are deemed to be the pecuniary interests of the trustee. A person cannot have a spouse *and* an adult interdependent partner. However, due to the definition of spouse excluding a legally married spouse from whom the trustee is separated, a trustee could be legally married and also have an adult interdependent partner.

The Adult Interdependent Relationships Act addresses such relationships. A “relationship of interdependence” means a relationship outside marriage in which any two persons (i) share one another’s lives, (ii) are emotionally committed to one another, and (iii) function as an economic and domestic unit.

Two individuals, who are related by blood, can be in an adult interdependent relationship, though those individuals must enter into a formal Adult Interdependent Partner Agreement before this relationship can result in legal responsibility by one partner toward the other.

An adult interdependent relationship is similar to what used to be referred to as a common-law relationship – the primary difference is that the adult interdependent relationship can be opposite-sex or same-sex, whereas a common-law “marriage” was considered to be only opposite-sex.

## What do I do if a pecuniary interest arises?

When a trustee has a pecuniary interest in a matter before the board or any committee of the board or any commission, committee or agency to which the trustee is appointed as a representative of a board, the trustee shall, if present:

- immediately disclose the general nature of the pecuniary interest prior to any discussion of the matter;
- abstain from voting on any question relating to the matter;
- abstain from discussing the matter; and
- leave the room in which the meeting is being held until the discussion and voting on the matter are concluded.

In the event that the trustee was temporarily absent from the meeting when the matter was raised, the trustee shall immediately, upon returning to the meeting or as soon afterwards as the trustee becomes aware that the matter has been considered, disclose the general nature of the trustee's pecuniary interest in the matter. The trustee's abstention and disclosure of a pecuniary interest because of a conflict must be recorded in the minutes of the meeting. Please see section 83 of the School Act for specifics. Failure to comply with section 83 can result in the disqualification of the trustee. A trustee who has been disqualified is required to resign in accordance with section 85 of the School Act.

If a trustee refuses to resign in such circumstances, the school board may by resolution declare that person to be disqualified from sitting as a trustee and the seat on the board vacant. Or the school board may apply to the Court of Queen's Bench for an order determining whether the person is qualified to remain as a trustee or an order declaring the person to be disqualified from remaining as a trustee and the seat declared vacant. An elector of the district or division may bring a similar challenge.

## Bona Fide Error

If a court application is filed regarding the disqualification of a trustee for breach of the pecuniary interest provisions, a judge has the power to declare a person to be qualified as a trustee if he/she is of the opinion that the disqualification arose inadvertently or by reason of a bona fide error in judgment. This permits discretion in applying the literal and technical provisions of the Act in situations where a trustee innocently and in good faith does something for which he/she could be disqualified.

## Mandatory disclosure of personal interests

Each trustee is required to file with the board secretary a disclosure statement including:

- the full name of the trustee, the trustee's spouse or Adult Interdependent Partner and all of the trustee's children (whether over or under the age of 18);
- the place of employment of all persons listed in the first bullet;
- the name of all corporations, partnerships, firms, governments or persons in which the trustee has a pecuniary interest; and

- the name of all corporations, partnerships, firms, governments or persons in which any of the following persons have a pecuniary interest: the trustee's spouse or Adult Interdependent Partner, or any of the trustee's minor children (i.e. under the age of 18).

The board's secretary must then compile a list of all the names reported on the statements and provide a copy of this list to all trustees of the board and the officials and employees of the board that the board directs shall receive a copy. Remember "pecuniary" means "monetary" – so the last two bullets refer to the need for a trustee to name any of these entities in which he/she or the named family members have a monetary interest. This would include non-employment contracts with those various entities, as well as ownership interests.

**Note: Keep the Adult Interdependent Relationships Act in mind**

The board secretary should ensure that all new trustees are aware of the obligations under the Adult Interdependent Relationships Act before completing the personal interest disclosure. If there are any questions about whether a trustee might be in an interdependent partnership, the secretary would be well-advised to go through the definitions in some detail, and to seek legal assistance if required. Furthermore, the board secretary should ensure all new trustees are aware of this disclosure obligation soon after the election and, if possible, seek to have the disclosure forms completed and returned to the secretary at the time of the taking of the official oath of office.

### Who should receive copies of the disclosure forms?

Other than trustees, staff members who routinely attend board meetings ought to receive copies of the trustee disclosure forms. While it is true that the decision about pecuniary interest is ultimately a personal decision by the trustee, it is also true that the board as a whole and advisors to the board can and should work as a team to help ensure each individual trustee makes the best decisions. Advisors can do a better job if they have full information. Ensuring all trustees and select advisors have full information appears to be the intent behind this provision.

### Trustees with spouses or adult interdependent partners who are teachers

The only deemed interest of a trustee will be those of a spouse or interdependent adult. These issues have been considered by the courts and resulted in disqualification of trustees in certain cases.

### What about voting on collective agreements?

In Ontario, two trustees were disqualified because they voted on a teacher collective agreement. Both trustees had wives who were teachers and covered by different collective agreements with the board. The trustees participated in meetings and discussions and voted on the secondary teachers' collective agreement. Their wives were covered by the elementary teachers' collective agreement.

## Justice Robbins of the Ontario Supreme Court stated:

“The obvious purpose of the Act is to prohibit members of councils and local Boards from engaging in the decision-making process in respect of matters in which they have a personal economic interest. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has or is deemed to have any direct or indirect pecuniary interest. There is no need to find corruption on his part or actual loss on the part of the council or Board. So long as the member fails to honour the standard of conduct prescribed by the statute, then regardless of his good faith or the propriety of his motive, he is in contravention of the statute.”

In this case, a historical relationship was found to exist between settlements of the two collective agreements. The cases have consistently held that a collective bargaining agreement with one class of teachers will invariably affect a subsequent agreement with another class of teachers. The agreement is used as a negotiating lever likely to influence financial and other terms and collective bargaining agreements (*Benn v. Lozinski*). Such findings have placed trustees in a conflict of interest position by reason of being in the employment of a body that has an interest in a contract reasonably likely to be affected by a decision of the local board.

## What about voting on the budget?

Should a trustee vote on the board’s budget when the trustee’s spouse or adult interdependent partner works for another board?

One Ontario case ruled a trustee in such circumstances *could* vote on the budget because while the trustee had a pecuniary interest in the matter, he was not in a conflict of interest position because negotiations had concluded for the year in question.

In April 2009, in *Baillargeon v. Carroll*, Justice Kelly was asked whether or not the former chair of the Toronto Catholic District School Board was disqualified due to several allegations of conflict of interest.

The applicant alleged that trustee Carroll participated in, voted on and influenced a board discussion about several matters in which he had a pecuniary interest contrary to section 5 of the Municipal Conflict of Interest Act.

Trustee Carroll’s daughter was employed with the jurisdiction as a teacher. The pecuniary interest arose with respect to a board discussion about a budget proposal for the upcoming fiscal year which contemplated significant reductions in teaching staff. The board was dealing with a \$25 million deficit.

To balance the budget, staff proposed eliminating a number of elementary teaching positions with two categories of teacher layoffs. This action could affect trustee Carroll’s daughter as a teacher who would be laid off in order of minimum seniority.

Before the May 14, 2008 meeting which gave rise to the conflict of interest allegations, two legal opinions regarding the conflict of interest issues were obtained and provided to the trustees. The opinions made it very clear that any trustee would be in a conflict of interest if they participated in any discussion or voted upon board matters relating to or

affecting teachers if their child or a spouse was a teacher employed by the board. Part of the opinion obtained by the board on the budgetary issues raised by trustee Carroll's circumstances indicated:

"In our view, there is a real connection between the interests of trustees who are involved in budget discussions which may result in changes to the staffing models in schools across the board and family members of such trustees who are employed as teachers and/or support staff of the board. We understand that the level of staffing of teachers and/or support staff is, to a large degree, determined by the board's budget.

In the context of participation in budget discussions, if there is a chance that a determination of budget levels will impact on the level of staffing across the board, then a trustee whose family member is an employee of the board should disqualify himself or herself from discussing, voting or otherwise participating in these budget discussions. Involvement in these discussions may raise the appearance of a conflict of interest."

The opinions went on to discuss the significance of voting on the whole budget or a portion of the budget. In answering the question, "If a trustee declares an interest in a specific budget line, can the trustee then vote on the budget minus that specific line?" the legal advice was as follows:

"It depends on how the budget comes before the board. If the budget approval done is a stepped process so that the specific budget line, such as the teacher's salary component, is separated from the others, and the votes are held on each individual item or groups of items, then the trustee can vote on the budget except the excluded items.

On the other hand, if the whole budget comes forward for approval in one motion without any division or separate categories then the trustee cannot vote on it. Procedurally the trustee could move to have the question divided to separate out the component on which the trustee believes he or she has a conflict. The trustee also would have to consider any length between the budget item in question and the remainder of the budget."

There is no indication within the case report that the board was in negotiations with their teachers. This case provides further judicial guidance that voting on a budget, when a trustee has a pecuniary interest in a matter, can result in disqualification. The court found trustee Carroll to be in conflict on several matters including:

- Participating in the delegation and discussion of a statement by the union president regarding the budget and the union's position that there would be no teacher layoffs and program cuts. He also moved that this presentation be adopted.
- Introducing an item urging the board members to carry a \$5.2 million deficit contrary to staff recommendation and in violation of the Education Act.
- Actively participating in the discussion in favour of the budget deficit by advocating there be no program cuts.
- Voting to adopt a budget with a \$5.2 million deficit with no program cuts.
- Introducing a motion to reopen the budget discussion knowing that the deficit budget which had been approved might result in the need to lay off even more teachers as of January 1, 2009.

- Introducing a motion dealing with the proposal that he had previously made that the board stop hiring retired teachers for long-term supply positions and urging only that “new teachers be hired for such positions”.
- Introducing a motion that the board adopt a policy to pay the defence costs of trustees charged with conflict of interest under the Act (done at a time when he was aware that there was a possibility of a challenge to his actions).

The court found trustee Carroll’s actions inexcusable, finding that they could not be viewed as reasonable when judged against the objective standard of a reasonable person. The defence of an inadvertent error in judgment could not be advanced in light of the trustee’s prior experience, training, informational sessions and the fact that legal opinions had been given as recently as one week before the meeting in question.

The court reiterated the importance of conflict of interest legislation relying upon an oft cited case *Moll v. Fisher* noting, “This enactment, like all conflict of interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. The Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interests may be in conflict with their public duty. The public’s confidence in its elected representative demands no less.”

It is also interesting to note that the court ordered trustee Carroll make a payment of court awarded costs in the amount of \$46,420.11 to the applicant as a result of the applicant’s success in the matter.

Accordingly, trustees are cautioned that participating in negotiations and voting on the budget, in circumstances such as those described above, can place them in a conflict of interest position, given the large salary component of any school board budget. Likewise, voting on increases in budgetary matters in the event of a strike in the above-described circumstances has been found to place a trustee in a conflict of interest position. (See *Margolis v. Brown*).

### **An Alberta example**

Closer to home, we have the 2006 Alberta court decision in *Cheryl Howell v. The Board of Trustees of Grande Yellowhead Regional Division No. 35*.

Trustee Howell’s adult interdependent partner was a teacher employed by the school board. Her partner was eligible to participate in a retirement incentive program that the board was considering. Howell voted on board motions regarding this program and argued she did not have a pecuniary interest in the matter because her partner did not plan to take advantage of the retirement incentive program.

The court found Howell failed to follow the disclosure obligations under section 83 of the School Act thereby entitling the board to pass a motion disqualifying her. The court confirmed the importance of pecuniary interest legislation stating, “the Courts set a high standard of public trust. The public interest must be served with high moral standards. Not only must public officials not benefit from their decisions, they must not be perceived to benefit from their decisions.”

## Disqualification and voting

For some topics, there is an overlap between matters that cause automatic disqualification from trusteeship and matters that regulate voting. For example, a trustee is unable to vote on any matter in which he or she has a pecuniary interest whether indirect or direct. If the trustee is a party to a subsisting contract for the construction, maintenance or repair of real property over which the board has administration other than a contract for the provision of goods and services in an emergency, there is an automatic disqualification from trusteeship.

## Disqualification reasons

Section 82(1) of the School Act details the matters which cause a trustee of a board to be disqualified. A trustee is disqualified from remaining as a trustee of the board if that person:

- ceases to be qualified for nomination as a trustee under the Local Authorities Election Act;
- is an auditor or employee of the board for which he is a trustee;
- is a party to a subsisting contract for the construction, maintenance or repair of real property over which the board has administration other than a contract for the provision of goods or services in an emergency;
- beneficially owns more than 10 per cent of the issued shares of a corporation that has a pecuniary interest in a subsisting contract for the construction, maintenance or repair of real property over which the board has administration other than a contract for the provision of goods or services in an emergency;
- has a pecuniary interest in a contract with the board other than:
  - 1 a contract for the provision of goods or services in an emergency,
  - 2 a contract for the sale of goods or services to the board at competitive prices by a dealer in those goods or services incidental to and in the ordinary course of his business,
  - 3 a contract of employment with the trustee’s spouse or adult interdependent partner, child, parent or spouse’s parent or adult interdependent partner’s parent, or
  - 4 a contract approved by the board pursuant to disclosure;
- uses information gained through his position as a trustee of the board to gain a pecuniary benefit in respect of any matter in which he has a pecuniary interest;

- is a judge of a court or a member of the Senate or House of Commons of Canada or of the Legislative Assembly of Alberta;
- absents himself or herself, without being authorized by a resolution of the board to do so, from three consecutive regular meetings of the board, unless his absence is due to illness and he or she provides evidence of that illness in the form of a medical certificate respecting the period of his or her absence;
- is convicted of:
  - 1 an indictable offence punishable by imprisonment for five or more years, or
  - 2 an offence under section 123 of the Criminal Code (Canada) for which an absolute discharge or pardon has not been granted.

### What is a fiduciary duty?

The Supreme Court of Canada has defined fiduciary duty in relation to a corporation as a duty to act honestly and in good faith with a view to the best interests of the corporation: Peoples Department Stores Inc. (Trustee of) v. Wise.

The Supreme Court said:

... fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They 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.

Justice P.M. Clark dealt with a trustee's fiduciary duty to the school board in *The Board of Trustees of Calgary Roman Catholic Separate School District No. 1 v. Michael O'Malley*.

The court confirmed "the fiduciary duties are owed to the corporate body (the board) which is in turn, accountable to the Catholic ownership." Trustee O'Malley felt his duties were only to those who voted for him.

As reported by the court, O'Malley, without board authorization: attended and interfered in a ministerial student expulsion review hearing; interfered with ongoing labour negotiations; disclosed confidential information involving talks with the Alberta Teachers' Association to the detriment of the district; refused to keep confidential information such as legal opinions confidential; labeled trustee orientation sessions as "indoctrination sessions" and school council meetings as "shams" and commenced legal proceedings against his own school board on four separate occasions.

In reviewing O'Malley's actions and disqualifying him from office, the court stated:

"Mr. O'Malley thinks he can do what he wants, when he wants and how he wants, without regard to his colleagues or his fiduciary duties. His breaches of his fiduciary duties are numerous and his conduct cannot be described as anything but egregious. ...he has neglected his duties, he has breached his fiduciary duties and he has placed himself in an intractable conflict of interest by suing his own board four times."

It is important to not view as mere dissent, the disloyalty demonstrated by a blatant refusal to follow basic rules, and to abide by considered decisions made by a majority vote.