



Ruling

Category: Corporate Governance

NOTICE*

Subject: Directors of Federally Regulated Entities – Agent of a Crown corporation

No: 2009-01

Issue: The issue was whether a person could be a director of both a federally regulated entity¹ and a Crown corporation.

Background: Under the *Insurance Companies Act* (ICA), an agent of Her Majesty in right of Canada or in right of a province is disqualified from service on the board of directors of an insurance company. A director of a federal insurance company was approached to become a director of a Crown corporation and the insurance company inquired whether this appointment would disqualify the director from serving on its board.

Considerations: In the absence of an express statutory declaration, the issue of whether a person can be considered an “agent of the Crown” is an administrative law question that requires a review of the legislation governing the relevant Crown corporation. In this context, the principles governing the issue of agent of the Crown were laid out by the Supreme Court of Canada in *R. v. Eldorado Nuclear Limited*, [1983] 2 S.C.R. 551 at 573 as follows:

At common law the question whether a person is an agent or servant of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over the performance of his or its duties. The greater the control, the more likely it is that the person will be recognized as a Crown agent. (...) The question is not how much independence the person has in fact, but how much he can assert by reason of the terms of appointment and nature of the official.

Therefore, in certain circumstances, a director of a Crown corporation may be an agent of Her Majesty in right of Canada or in right of a province if the government can exercise a substantial degree of control over the director. Such a circumstance would include when a director is appointed to hold office during pleasure, i.e., where the government has the discretion to terminate the appointment or remove or suspend the director at any time. It would also include circumstances where the director must ensure the implementation of a directive of the government to the Crown corporation.

¹ For the purposes of this Ruling, it encompasses a federally incorporated insurance, trust or loan company, a bank, a bank holding company and an insurance holding company.



In the case of federal Crown corporations, subsection 89(1) of the *Financial Administration Act* (FAA) provides that the Governor in Council, on the recommendation of the appropriate Minister, can give a directive to a “parent Crown corporation”, i.e., a Crown corporation that is wholly owned directly by the Crown. The Crown wholly owns directly a corporation if the Crown holds all issued and outstanding shares of the corporation, or the Governor in Council appoints all the directors of the corporation. Examples of such federal Crown corporations include: Atomic Energy of Canada Limited, Canada Post Corporation, Via Rail Canada Inc., and Canada Mortgage and Housing Corporation. Furthermore, subsection 89.1(1) of the FAA provides that the directors of a “parent Crown corporation” to which a directive is given shall ensure that the directive is implemented in a prompt and efficient manner.

Conclusion(s): OSFI concluded that a director of a federally regulated entity may also be a director of a Crown corporation provided that being a director of the Crown corporation does not result in the person being an agent of Her Majesty in right of Canada or in right of a province.

Legislative References: Paragraph 168(1)(g) of the ICA provides that a person who is an agent or employee of Her Majesty in right of Canada or in right of a province is disqualified from being a director of an insurance company.

Table of Concordance:

Section Description	BA	TLCA	ICA	CCAA
Directors – Disqualified Persons	160(g) 750(g)	164(g)	168(1)(g) 797(g)	N/A

The table of concordance makes cross-references to similar provisions of other federal financial institutions legislation that may be of relevance to the reader.

* Rulings describe how OSFI has applied or interpreted provisions of the federal financial institutions legislation, regulations or guidelines to specific circumstances. They do not negate the need to obtain any necessary approval of the transaction under the relevant federal financial institutions legislation. Rulings are not necessarily binding on OSFI’s consideration of subsequent transactions as these transactions may raise additional or different considerations. Legislative references in a Ruling are not meant to substitute provisions of the law; readers should refer to the relevant provisions of the legislation, regulation or guideline, including any amendments that came into effect subsequent to the Ruling’s publication.

