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## Corporate Secretary: Practising Law?

What can be said about the role of the Corporate Secretary that has not already been said? Clearly, the position of Corporate Secretary has evolved over the years and, in particular, since the corporate scandals of the 2000s and the most recent financial crisis. For some organizations, except, possibly, in the realm of holding corporations and some non-profits, gone are the days when the Corporate Secretary was a mere corporate record custodian, certifier of corporate organizational facts and note-taker. Bylaws, board mandates, shareholder agreements and other governance documents, not to mention job descriptions, may or may not fully describe the expectations that now often go with the role.

Today, in addition to the more administrative aspects of the role, it is not uncommon to expect the Corporate Secretary to fully understand the operational and legal structures(s) of an organization, be principled, manage corporate confidences, navigate through Board and management tensions, understand the organizational culture and dynamics, as well as its missions, goals and stakeholder responsibilities and be the builder or educator of the governance and corporate social responsibility (CSR) frameworks (increasingly, law-driven), or at least, the “gate keeper” for these areas. The actual role may have a variety of other responsibilities, including advising on compliance with industry-specific, corporate and securities legislation and regulation, shareholder agreements, constating documents and corporate and governance policies, mandates and resolutions, advising in relation to director and officer fiduciary duties and obligations, working with senior management and the Board and Committee Chairs to set Board and Committee Agendas and managing communication with the Board of Directors, board committees, senior management, shareholders and stakeholders. In addition, under several Canadian incorporation statutes, the Corporate Secretary or “Secretary” is a corporate officer<sup>1</sup>. Constatting documents or board resolutions may otherwise designate the “Secretary” an officer.

In light of this, it should not surprise you that many Corporate Secretaries are lawyers and that legal knowledge and experience can be an asset (in addition to mind reading, restraint, diplomacy and other very useful, non-legal skills!).<sup>2</sup> Many would argue that

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<sup>1</sup> See, for example, Canada Business Corporations Act, R.S.C. 1985, C-44, s. 2(1), definition of “officer” [my emphasis]: “officer” means an individual appointed as an officer under section 121, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices.

<sup>2</sup> This duality can create its own set of issues, including role confusion (lawyer/officer), potentially conflicting legal and professional duties and obligations, issues of legal privilege, etc.

Corporate Secretaries need not be lawyers, especially, today, when corporate budgets are severely constrained and lawyers' services are sometimes viewed as a luxury. No doubt there are some experienced and able non-lawyers that could fill some of the requirements of the modern Corporate Secretary, just like there are paralegals and other non-lawyers that carry out some of the other more ministerial or procedural, roles traditionally played by lawyers<sup>3</sup>, but, if you receive some remuneration for the role, beware of carrying on the unauthorized practice of law!<sup>4</sup>

Several provinces and territories in Canada contain some form of description of the practice of law (or what constitutes the unauthorized practice of law). These were likely drafted from a protection of the public/public interest perspective and perhaps, from a narrower view of the role of the Corporate Secretary? For example, in British Columbia, apart from *giving legal advice* and other, more obvious, examples, the "practice of law"<sup>5</sup> is stated to include:

...(b) *drawing, revising or settling*

*(i) a petition, memorandum, notice of articles or articles under the Business Corporations Act, or an application, statement, affidavit, minute, resolution, bylaw or other document relating to the incorporation, registration, organization, reorganization, dissolution or winding up of a corporate body, ...*

*but does not include*

*(h) any of those acts if not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed, ...*

At issue for non-lawyers is the breadth of their Corporate Secretarial role and whether they are carrying on the unauthorized practice of law. Some Provinces use variations, more or less expansive than the British Columbia example,<sup>6</sup> some expressly exclude as the practice of law actions by one or more of their employees or officers or agents of

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<sup>3</sup> Some under the supervision of lawyers; some not. See, for example, <http://www.lsuc.on.ca/with.aspx?id=433> for a description of the specific capacity of paralegals in Ontario to carry on certain legal or quasi-legal functions independently of lawyer supervision and the decision of the Benchers of the Law Society of British Columbia to work towards an incremental expansion of the role of paralegals, under the supervision of lawyers, to enhance the public's access to legal services, as reported in the Benchers Bulletin: no. 3 Fall, 2010.

<sup>4</sup> This is further complicated if you carry out the role in more than your home jurisdiction. Please note that the same issue may apply for lawyers who practice law in jurisdictions where they are not licensed or where they do not enjoy reciprocity.

<sup>5</sup> Legal Profession Act, S.B.C. 1998, c.9, s. 1(1), definition of "practice of law" and s. 15(1) which highlights that with some exceptions, only a practicing lawyer is entitled to practice law.

<sup>6</sup> See, for example, the Legal Profession Act, CCSM, c. L107, or Law Society Act, RSO 1990, c. L-8, An Act Respecting the Barreau du Quebec, RSQ, c. B-1, Law Society Act, S.N.B. 1996, c.89, Law Society Act, 1999, SNL 1999, c. L-9.1, Legal Profession Act, RSPEI 1988, c. L-6.1, Legal Profession Act, RSY 2002, c. 134, Legal Profession Act, RSNWT 1988, c. L-2, Legal Profession Act, RSNWT (Nu) 1988, c. L-2.

entities for their own purposes<sup>7</sup>, some expressly exclude corporate secretaries when they draw minutes or other documents authorized under federal and provincial laws.<sup>8</sup> There are other variations and nuances. 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.

As most legal regulator enforcement seems to be complaint-driven, who would ever complain? Possibly, few, if any would complain - until there is some form of harm or risk of harm and they do. What happens, then, could be interesting, especially in an environment where legal regulators, charged with the protection of the public, themselves, are increasingly sensitized to the public's need to have greater access to affordable services traditionally performed by lawyers<sup>9</sup>.

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<sup>7</sup> Legal Profession Act, RSA 2000, c. L-8, Legal Profession Act, CCSM , c. L107, Law Society Act, RSO 1990, An Act Respecting the Barreau du Quebec, RSQ, c. B-1, Legal Profession Act, SNS 2004, c.28, Legal Profession Act, RSPEI 1988, c. L-6.1.

<sup>8</sup> For example, see An Act Respecting the Barreau du Quebec, RSQ, c. B-1.

<sup>9</sup> For example, See footnote 3, *supra*.