

Good Governance and Canadian Universities: Fiduciary Duties of University Governing Boards and Their Implications for Shared Collegial Governance

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Abstract Using a legal framework, doctrinal analysis, critical legal analysis, and fundamental legal research and drawing upon legislation, case law, judicial, and scholarly commentary, this article defines the fiduciary duties of Canadian university governing boards given the unique features of the university as a legal entity. The legal analysis considers the Canadian university as a corporation, distinguishing it from other types of corporations, identifying the charitable, not-for-profit, public/private dimensions of universities in Canada, and significantly, considering the judicially recognized “community of scholars” and collegial features of universities. The article argues that all of these features shape the fiduciary duties of governing boards and have implications for shared collegial governance in Canadian universities.

Keywords Universities; Board governance; Fiduciary duties

Introduction

The Canadian university is a complicated legal entity that is fashioned by old and new statutes, case law, history, custom, and usage. Yet there is very little research documenting its unique legal nature and analyzing the resulting fiduciary responsibilities of the board of governors that flow from this status within a shared gover-

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nance context. Recent events in several universities across Canada provide evidence of confusion and misunderstandings about the fiduciary duties of the board of governors. In the absence of a full understanding of the university as a socio-legal-historical entity, with medieval roots and a unique role in society (Fallis 2007; Harris, 1976; Kerr, 2001), university leadership have mistakenly reached for legal principles governing modern, private business corporations to understand the scope and nature of their obligations. This approach fails to account for the institutional context of the university, and the legally recognized collegial, charitable, and not-for-profit dimensions of the university, which complicate our understanding of governing board fiduciary duties. Consequently, in a number of instances, Canadian university boards have imperilled the fiduciary duties they owe to the university and to the public, triggering non-confidence motions from within universities and external governance reviews from outside the university (see Canadian Association of University Teachers, 2015; CBC News, 2015; Curran, 2011; Goudge, 2015; Johnson, 2016; Murray, 2016; University of Concordia News, 2011; Winders, 2015).

This article presents data from a research project that examines governance issues in Canadian universities. It focuses on the fiduciary duties owed by Canadian (publicly funded) university governing boards. Publicly funded, secular universities dominate the university sector in Canadian higher education in terms of numbers of institutions, enrollment, funding, regulation, and policymaking. Unlike other jurisdictions, only a small number of private, mostly faith-based, universities exist in Canada. For this reason, this article's analysis will focus on publicly funded Canadian universities. Using a legal framework this article identifies distinguishing legal features of the Canadian publicly funded university and establishes the university as a unique legal entity. A central objective of this research is to identify the fiduciary duties of governing boards within this unique legal context, employing doctrinal and critical legal analysis and drawing upon relevant statutes, case law, judicial, and scholarly commentary. The article defines the legal concept of fiduciary duty in a university context and examines who boards of governors owe fiduciary duties to, what they owe fiduciary duties for, and in what form and to what standard of conduct. Finally, this article offers an analysis of some implications for shared collegial governance in Canadian universities.

Methods

This article employs doctrinal research, fundamental legal research, and critical legal analysis. Doctrinal methodology focuses on case law, statutes, and other legal sources of law in order to identify and explicate what the law is on a particular issue and to establish the legal principles that can be discerned from the legal sources. It has been described as lying "at the basis of the common law and is the core legal research method" (Hutchinson & Duncan, 2012, p. 85). The doctrinal method traces legal precedent and legislative interpretation through case law offering "a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation" (Hutchinson, 2014, p. 584). It necessarily involves:

an understanding of the rules of precedent between the court jurisdictions, the rules of statutory interpretation, the tacit discipline

knowledge such as the difference between civil and criminal jurisdictions, and various tests of liability, along with the acknowledged reasoning methods borrowed from philosophy and logic, such as induction and deduction. (Hutchinson, 2015, p. 131)

When purely applied, the doctrinal approach can be insular, in that it looks at the law within itself, and not within a broader context. It identifies what the law is at a given time. It does not consider what the law could or should be, nor does it critique the law. However, doctrinal research is a necessary starting point for any legal analysis, especially when the law in a particular area is uncertain, evolving, or complicated, as is the case with the fiduciary duties of university governing boards.

To counter the limitations of doctrinal research, this article moves beyond doctrinal analysis and includes critical legal analysis (Minow, 2013) to determine the implications of the body of legal principles on governance within the university, and where and how the legal principles apply in a university setting. This involves exposing “unstated assumptions, patterns or results, internally inconsistent structures or other tensions within a body of law or legal practices or institutions” and highlighting “the tensions, contradictions or paradoxes behind the surface of law or legal practices” (Minow, 2013, p. 68). This approach combines the scholarship from higher education on the university with legal doctrine to deepen the understanding of the complexity of university governance. In this respect, this approach includes non-doctrinal dimensions and is cross-disciplinary. This methodological approach, therefore, includes “fundamental research” (Arthurs, 1983, p. 68), understanding the law as a social, historical, philosophical, and political phenomenon.

In this project, establishing the doctrinal law involved researching and analyzing the constituting statutes of public universities across Canada and the provincial legislation governing the higher education systems. Relevant non-education, provincial, and federal statutes were also considered, such as the Canadian Constitution Act, (1982) and the Canadian Charter of Rights and Freedoms, (Part I, Constitution Act, 1982), as well as relevant corporate and not-for-profit legislation. To this was added case law (that is, judge-made law) on university governance, corporate governance, charity governance, university autonomy, and the fiduciary duties of university/corporate/charity governing boards. To round out the data sources and analysis, various reviews of governance at universities across Canada were considered. Major commissions, reports, and task forces on university governance by government, non-governmental organizations, and constituents within the higher education sector were also analyzed where they addressed or established legal interpretations or precedents in law on university governance.

The legal status of Canadian universities

Canadian publicly funded universities are constituted as independent, autonomous, not-for-profit corporate entities by either a primary piece of provincial or federal legislation, royal charter, or royal proclamation. In this respect universities are unlike private business corporations, which are typically created in Canada through the filing of articles of incorporation by an individual or an organization where there is minimal ministerial discretion to refuse incorporation if the statutory requirements

are met.¹ By stark contrast, Canadian provincial governments control and regulate the establishment of publicly funded universities fairly closely through parliamentary legislatures. This means that in order to establish a university that will receive public funding, a parliamentary bill has to be prepared, debated, and passed in the legislature, with all its checks and balances. Public funds are set aside in a provincial governments' budget to support the operating costs of the university. In this regard, universities are treated, in their creation, regulation, and at law, as special purpose corporations with explicit public, teaching, research, and service missions.

Unlike private business corporations, public universities have no shareholders, no owners, and no share capital. They are, instead, constituency-based. Akin to not-for-profit corporate organizations, they have a board of governors (instead of a board of directors), and are made up of a membership base who elect/appoint its board. This arrangement offers representation on the board for the internal membership, and it offers oversight with external members. It also signifies that the board is accountable to and owes duties to the membership/constituent base. In a not-for-profit organization these arrangements are usually spelled out in the constituting statute of the organization (Bourgeois, 2002a, 2002b; Carter & Prendergast, 2011).

Notwithstanding these legal features, it is important to note that Canadian universities have a dual governance structure and multiple governing boards (both an academic senate and a financial board). Governance arrangements within universities vary by province and by institution—typically one must look at the constituting legislation of the specific university, and the provincial legislation governing the higher education system in which the university is located, to determine the exact governance structures, the constituents of the university, and the governing boards and their roles, responsibilities, and the scope of their respective authority. However, the dominant model of university governance across Canada is bicameralism, where academic policy and educational matters are the authority of a senior decision-making, senate-type body (made up of a majority of internal members and faculty) that runs parallel to a board of governors (made up of a majority of members external to the university) responsible for the management of finances and administrative functions (Jones, Shanahan, & Goyan, 2004).² Both of these governing boards in the university include elected representatives from the collegium, internal to the constituents of the university (i.e., faculty, staff, and students).

Once established by government, however, Canadian universities enjoy high institutional autonomy, and university senates and governing boards have considerable independence from government in their management of day-to-day internal and academic affairs. Government and the courts are loath to intervene in internal matters and disputes within the university (Davis, 2015a; Shanahan, 2015a). This principle of autonomy and non-intervention, while not enshrined in statute, is widely recognized in case law by the highest courts in Canada (*Harelkin v. University of Regina*, 1979; *Harrison v. University of British Columbia*, 1991; *Kulchyski v. Trent University*, 2001; *McKinney v. University of Guelph et al.*, 1990). Yet there is a tension between the university's independence and the quasi-judicial nature of its boards (senate and governing board) on the one hand, and its concomitant responsibilities to its immediate members (students, staff, and faculty) as well as its service to the public on the

other hand. The Supreme Court of Canada has captured the complicated autonomous, yet public service and trust-like nature of the university thusly:

While a university, incorporated by a statute and subsidized by public funds, may in sense be regarded as a public service entrusted with the responsibility of ensuring the higher education of a large number of citizens, as was held in “Polten”, its immediate and direct responsibility extends primarily to its present members and, in practice, its governing bodies function as domestic tribunals when they act in a quasi-judicial capacity. The Act countenances the domestic autonomy of the university by making provision for the solution of conflicts within the university. (*Harelkin v. University of Regina*, 1979, p. 594)

The legal autonomy of universities is a double-edge sword. It shrouds (but does not completely protect) university board and senate internal decision-making from external review, making internal and external accountability processes even more critical. University boards have the power to make policies and codes that govern their own conduct and decision-making. They also have the power to act as quasi-judicial tribunals reviewing their own decisions on university academic and non-academic matters. But with this public grant of autonomy and self-governance, come enormous responsibility and a profusion of duties. In all of their decision-making and conduct, university boards are held to the highest legal standards. They cannot act with impunity. Their decisions and conduct can be ultimately reviewed by courts and government by way of: judicial reviews of board/senate decisions; government reviews; law suits for negligence or mismanagement; malfeasance in a public office; or breach of contract among other legal avenues (*Freeman-Maloy v. Marsden*, 2006; Fridman, 1973).

At the same time, over the years Canadian universities have become captured by developing case law and statutory frameworks, beyond their own constituting legal documents, which they are compelled to follow and which impact the duties and obligations of governing boards. Legally, Canadian publicly funded universities are considered at common law to be charities, and they are typically registered as charities with the federal government. Beyond favourable income tax implications, the charitable status of the publicly funded university in Canada heightens and extends the duties of governing board members, especially around dealings with the charitable property of the university (Davis, 2015a).

With the passage of the Canadian Charter of Rights and Freedoms in 1982, case law has evolved in Canada around the public-private nature of the university in the context of the applicability of the Charter to universities. In the United Kingdom and the United States, publicly funded universities have long been considered as quasi-public institutions (Farrington & Palfreyman, 2006). Since the Supreme Court of Canada found the Charter of Rights and Freedoms only applies to government action or the action of government agents (*RWSDU v. Dolphin Delivery Ltd.*, 1986), many assumed it did not apply to the Canadian university with its legally autonomous status. However, Canadian case law over the last three decades has altered this understanding, and has established that, in certain instances when carrying out government policies, programs, or missions, universities *may* be considered by the

courts as agents of the government, and in these instances, the Charter of Rights and Freedoms will apply to their actions (*Eldridge v. British Columbia [Attorney General]*, 1997; *Pridgen v. University of Calgary*, 2012; Shanahan, 2015a). This public-private legal status of the university impacts on the nature and extent of the duties university governing boards owe to the university's constituents (i.e., students, staff, and faculty) in any given situation.

If the university governing board is found at law to be acting in a governmental capacity in a particular instance, its actions may attract Charter scrutiny, and the governing board must uphold the rights and freedoms afforded to individuals under the Charter in its conduct and decision-making. In other circumstances, the actions and relationships of Canadian universities are considered at law as private in nature and governed by contract or tort law. For instance, *Eldridge v. British Columbia [Attorney General]*, 1997, sets out the test for whether the Charter should apply to a private entity. In this case, the Supreme Court confirmed that if a private entity is acting under a statutorily granted authority, its actions will be subject to Charter scrutiny, and it will be deemed to be included in the definition of "government." An autonomous entity will attract Charter scrutiny in the "implementation of a statutory scheme or government program" (para 44). Since provincial governments have exclusive authority over public education under the Constitution, which they delegate to universities through provincial legislation, the argument can be made that the Charter captures universities in their delivery of public education. Hence, the Charter has been found to apply to university student disciplinary proceedings (*Pridgen v. University of Calgary*, 2012). However, by contrast, the Supreme Court has found that human resources policymaking is an internal management activity and a private matter between the university and the employee. Therefore, mandatory retirement policies within collective agreements of universities did not infringe on the Charter rights of universities employees (*McKinney v. University of Guelph et al.*, 1990).³ Nevertheless, there is considerable uncertainty as the multifaceted relationship between the university and its constituents is determined on a case-by-case basis and governed by multiple areas of law. This creates confusion for university boards. Davis observes, Canadian universities "exist uncertainly on the line between a public and private institution" (2015a, p. 61).

In addition to being considered special purpose, not-for-profit, quasi-public, charity, and a corporation, the Canadian university is also recognized by the Supreme Court of Canada as a collegium or "community of scholars." The Supreme Court of Canada has stated, "The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy..." (*Harelkin v. University of Regina*, 1979, p. 594). This is judicial recognition, at the highest level, of the university collegium in Canada and its import cannot be understated. Significantly the Supreme Court clearly notes that the university's legal status as a corporation does not supplant its collegial nature. Its corporate structure does not have paramountcy over its collegial structure. Its corporate structure exists alongside its collegial structure and processes. In fact, historically in Canada and the United States, the university's collegial structure predates its corporate structure (Fallis, 2007; Kerr, 2001). The tradition of collegial decision-

making in the university distinguishes its governance arrangements from the boards of directors of modern, private business corporations in Canada (see University of Western Ontario, 1996).

As collegiums, university-constituting statutes in Canada create university governing bodies (boards and senates) designed for democratic constituency representation rather than corporate strategic management. Historically, the trend in Canada has been toward increasing the democratization of university boards. This is evidenced in the Duff–Berdahl Report (1966) recommendations, which have led to changes over the last few decades in Canadian universities and their governing statutes around the composition of governing boards and senates to include elected representatives from various constituents within the university. This particular feature of Canadian universities can be problematic, as government higher education policy in Canada has increasingly required universities to strategically manage resources and to strategically plan for the future.⁴

Each of these features of the Canadian publicly funded university (i.e., special purpose, not-for-profit, quasi-public, charitable, corporation, and constituency-based collegium), which are recognized at common law and/or in statutory law, influences the shape and machinations of the university as an institution. Universities are subject to federal and provincial statutory and case law, corporate law, not-for-profit law, the law of charities and trusts, contract law, tort law, as well as being subject to the equitable prerogative jurisdiction of the courts as a charity or trust. All of this is grafted onto the traditional “community of scholars,” with its historical customs, traditions, core principles, and practices recognized by case law (*Harelkin v. University of Regina*, 1979, p. 594). These features shape the nature and scope of the fiduciary duties of university governing boards. Where and how fiduciary duties apply, to whom they are owed, for what, and to what standard of care—and what all of this looks like in a university setting is unique and legally complicated, crossing multiple areas of law. The second half of this article will untangle some of these considerations in applying the law of fiduciary duty to university governing boards in Canada.

Fiduciary duty defined

Fiduciary duty is a doctrine originating in trust. It requires that one party, the fiduciary, act with absolute loyalty toward another party, the beneficiary or cestui que trust, in managing the latter’s affairs. (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24. P.274, para 22)

A fiduciary relationship is a legal relationship of trust between two people (or between a person and a group/class of people) called the fiduciary and the principal/beneficiary. The fiduciary is a type of trustee and acts for the benefit of another who is the principal/beneficiary (Shanahan, 2017). It is one of the highest duties created in law. For the purposes of this analysis it is worth emphasizing that the fiduciary duties emerge from a relationship between two people (*Alberta v. Elder Advocates of Alberta Society*, 2011). In Canada it has been long established by the Supreme Court that in a corporate setting the board of directors owes a fiduciary duty to the corporation (*Canadian Aero Service Ltd v. O’Malley*, 1974). By extension,

the board of governors of a university, as fiduciaries, owes a fiduciary duty to the university as a corporation and owes a fiduciary duty as trustees to the university as a charitable organization.

General fiduciary duty

Fiduciary responsibilities can be set out in the constituting statute of a university or other legislation governing the sector, and it can also be imposed by the common law. At common law the general requirements for the imposition of a fiduciary duty on a relationship is set out by the Supreme Court of Canada in *Alberta v. Elder Advocates of Alberta Society*, 2011. The hallmark principles include an express or implied undertaking of loyalty by the fiduciary to act in the beneficiary's best interests. The relationship involves the unilateral exercise of power or discretion by the fiduciary that affects the beneficiary's legal or practical interests where the beneficiary may be vulnerable to the person holding the discretion or power. The law of fiduciary duties protects against the abuse of power in certain types of relationships or circumstances (*Alberta v. Elder Advocates of Alberta Society*, 2011).

There are two aspects to the fiduciary duty: a duty of loyalty and a duty of care. Some legal commentaries on fiduciary duties add on the duty of obedience that flows from these two duties of loyalty and care. In the university setting the statutory and common law duty of care owed by governors and officers of the university has been summed up by the Association of Governing Boards of Universities and Colleges (2014) in the following way:

The **duty of care** generally requires officers and governing board members to carry out their responsibilities in good-faith and using that degree of diligence, care and skill which ordinarily prudent person would reasonably exercise under similar circumstances in like positions. Accordingly, a board member must act in a manner that he or she reasonably believes to be in the best interests of the institution.

The **duty of loyalty** means that the board member must not act in their own individual interests, or the interests of another person or organization, but rather must act in the interests of the university and its' not-for-profit or charitable purposes. They must act reasonably and in good faith and not out of expedience, avarice or self-interest.

A third fiduciary duty, which is arguably an element of the duties of care and loyalty, is the **duty of obedience**. This is the duty of board members to ensure that the college or university is operating in furtherance of its stated purposes (as set forth in its governing documents) and is operating in compliance with the law. (pp. 2)⁵

Board members have a duty to act in good faith toward members of the university and a duty to consult member constituents of the university and they also have a duty of disclosure (although it is less clear to whom and for what).⁶ The duty of care involves being informed, showing up for meetings, voting, and apprising oneself of the policies and operation of the organization. If one draws on the scholarship of the private business corporation to understand this ideal, Dr. Roger Barker (2016)

contends that at minimum, “This incorporates the expectation that a director will maintain an awareness of the company’s activities and financial position, monitor its policies and actions, and investigate developments where appropriate. Ignorance of corporate affairs or failing to act in adverse circumstances is not acceptable” (p. 253). Barker’s comments suggest that external board members sitting on university governing boards must learn about the university as a unique institution, its history, customs, and practices. Therefore, importing erroneous principles from the private corporate business world or elsewhere would be unacceptable.

The English courts have always considered loyalty to the company as a fundamental duty of corporate directors, and this has been understood in terms of directors not acting “for any collateral purpose” (*Re Smith and Fawcett Ltd*, [1942, p. 306] as cited in Barker, p. 252). The duty of loyalty of board members in a university setting includes avoiding or declaring personal conflicts of interests with the university’s interests, representing the organization in a positive manner, and observing confidentiality. The duty of confidentiality is not a gag order on board members on all board discussions and deliberations. Meetings of Canadian university boards are generally open, and notice of meetings is supposed to be given to the constituent members of the organization and the public. *In camera* meetings are held only if the matter at hand involves personal confidential information or sensitive material relating to the university.⁷

The duty of obedience flows from the duty of care and loyalty and involves making sure the university is operating according to its purposes as reflected in its constituting legislation and governing documents as well as operating both legally and ethically within the law and any other applicable internal and external rules (Association of Governing Boards of Universities and Colleges, 2015). It is not a duty of obedience of the board member to the board per se, nor is it a solidarity clause with other board members, as potentially a board member may find themselves in a situation where they must disobey the board if the university or board is breaking the law or if the board is acting against the university’s best interest. Moreover, a director on a governing board is obliged to ensure their board colleagues are following the law relevant to the corporation. However, loyalty has been interpreted to mean that directors/boards of governors must comply with legislation as well as the corporation’s governing documents (i.e., charter, constituting legislation, by-laws, etc.), which may include following governing board policies around conduct (Carter & Prendergast, 2011).

Taken together the duty of loyalty and obedience mean university governors must carry out their duties according to the law, being loyal or true to the mission and purposes of the university, independently and without self-interest, putting the interests of member constituents as a whole above their own or the interests of the executives of the corporation. The governing board members must execute their responsibilities associated with the administration and management of the university property/assets (pecuniary and non-pecuniary, such as reputational assets, goodwill, and also standing in the community) all the while protecting the interests of the principals.

Fiduciary duty of a trustee

Complicating an already confusing landscape, in certain instances university boards

of governors may be found to be acting as trustees; that is, in a guardianship role over the assets of a charity. The trustee has the highest duty of care for a fiduciary created by law. In these instances, acting as a trustee, director/board of a charitable corporation have additional duties, including ensuring the charitable purposes of the corporation are carried out and acting gratuitously for the charity. Furthermore, they have duties to the beneficiary of the charity/trust that, in the Canadian university setting may be considered to be the public and the constituent members of the university that is the “community of scholars” (*Harelkin v. University of Regina*, 1979) that makes up the university. This standard includes acting with the care and the diligence of the prudent person protecting the charity’s property from risk or loss and excessive administrative expense. The protection of charitable trusts is reflected in the inherent equitable jurisdiction of the courts to intervene in the governance of charities in order to monitor and regulate charities where funds or property have been mismanaged (Carter & Prendergast, 2011; *Ontario Society for the Prevention of Cruelty to animals v. Toronto Humane Society*, 2010).

Fiduciary duties of a not-for-profit board

Generally, the board of directors of a not-for-profit is accountable to the members of the organization for managing and supervising the activities and affairs of the corporation. Under federal not-for-profit legislation, not-for-profit directors are not automatically considered trustees at law for any property of the corporation, unless the not-for-profit is also a charity and a trust has been explicitly created, as in the case of universities (*Canada Not-for-profit Corporations Act* (NFP) Act, 2009, s.32). University boards of governors are also captured by not-for-profit legal principles, which are expanding in Canada. Boards of membership-based, not-for-profit corporations, such as universities, have duties to constituent members, that, in certain instances, may be defined as fiduciary duties, in addition to myriad duties and obligations captured by contract and employment law (Burke-Robertson, 2002; Carter & Prendergast, 2011; *Ontario Public Guardian and Trustees v. AIDS Society for Children [Ontario]*, 2001; *Pathak v. Hindu Sabha*, 2004). In membership-based non-profit corporations, such as universities, there are persons entitled to elect or appoint the board of governors/directors. These elector members are typically those persons for whose benefit the corporation operates. In a university this is the collegium (that is the staff, students, and faculty), which elects senate representatives on the board of governors. It also includes the public who, through the government, appoint members of the board from the larger community (Jones & Skolnik, 1997).

Recent not-for-profit legislation in some provinces and at the federal level focuses on enhancing not-for-profit member rights and remedies, making them akin to shareholders rights in a for-profit corporation. The new not-for-profit legislation has clear implications for the duties and decision-making of university boards. This suggests that, going forward in Canada, not-for-profit boards may need to consider in their decision-making stakeholder member interests to a greater degree than before. Moreover, external members of Canadian university boards are volunteers, who carry out the university mission and operations according to the university constitution

and by-laws. This feature shapes the dynamics of governing a university as a not-for-profit corporation, making it different from governing boards of a for-profit entity (Amundson, 2002).

The fiduciary standard of care

Identifying the appropriate standard of care for university governors (that is, the level at which they must execute their fiduciary duties) is challenging because the law governing them is a mix of the law on charities, law on trusts, the law of not-for-profits organizations, and the law of corporations (Bourgeois, 2004; Carter & Prendergast, 2011; Cullity, 2002). In addition, in a university landscape, these areas of law can be layered with contract and labour law, as well as principles of natural justice. Moreover, the university as an organization is judicially recognized as a collegium/community of scholars and a public service type of organization akin to a foundation. Each of these areas has different legislation and case law governing it, with different standards of care.

The typical standard of care for directors of not-for-profit corporation under federal not-for-profit legislation is the objective standard of the “reasonably prudent person” (*Canada Not-for-Profit Corporations Act*, SC 2009, c 23, s.148). That is to say that directors and officers are required to exercise at least the level of care, diligence, and skill that a reasonably prudent person would exercise in their decision-making in similar circumstances. In Canada some constituting university statutes set out the specific duties of the board and the standard of these duties. University governing boards may also rely on the standards of conduct spelled out in ancillary regulations, by-laws, or policies created by the university officers or the governing board itself. If the university statute is silent on the standard of care or the university is exempt from the provincial not-for-profit legislation, then the common law standard applies. The common law standard for boards is a higher, more subjective standard than the statutory standard, and it requires that a director’s actions be at the standard of the reasonable prudent person with the same expertise, skill, and knowledge. This means if a board member is a financial executive with extensive board experience, the board member will be held to that standard in decision-making, not to the standard of the ordinary person.

The 1928 American case of *Meinhard and Salmon* (164 N.E. 545 [N.Y.1928]) sets out in absolute language and high moral tone the uncompromising fiduciary standard of care, defined by Judge Cardozo as “the duty of finest loyalty” and “stricter than the morals of the marketplace”:

Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of individual loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. ... A loyalty that is undivided and unselfish. The rule of undivided loyalty is relentless and supreme.

Scholarship suggests that, in theory, the fiduciary duty attempts to offer clarity to the problem of complexity and multiple, conflicting interests in relationships. However, it is less clear what this standard actually means, or looks like, in terms of real-life practice (Anderson, 1978; Minow, 2016; Thompson, 2008). One legal scholar suggests “The punctilio phrasing provides a standard rather than a rule, a clear statement as to tone and direction, but little in the way of specific guidance for resolving hard questions” (Thompson, 2008, p. 21).

Finally, the lofty ideals of Cardoza’s statement of the fiduciary standard are practically limited and watered down by the “business judgement rule,” which makes it very difficult to find directors liable for a breach of fiduciary duty if they have followed the usual procedures in their business in making a decision. Courts are less likely to second guess, even if their decisions and judgement are wrong and cause injury (Minow, 2016). In effect the business judgement rule lowers liability and the standard of care in that directors/boards of governors will not be held liable for mistakes made after an honest and good faith evaluation of a decision if adequate scrutiny of issues is done before making decisions. While the business judgement rule may or may not be available to boards of governors of Canadian universities as charities, given the higher fiduciary duty required of trustees of charities, it does provide the principle of diligent scrutiny of decisions as a standard for directors and boards of governors (Carter & Prendergast, 2011).

Analysis: Key issues in governance

To whom is the fiduciary duty of care owed in the university context

It is well established that governing board members of universities in Canada are considered fiduciaries at law. However, it is less clear to whom the duty is owed in a university context. Generally, in not-for-profits and charitable corporations, such as universities, the boards of governors owe fiduciary duties to the “corporation”; trustee fiduciary duties to the named beneficiary of the trust (the public and any donors) when dealing with charitable property; and trustee duties to the members/constituents of the charitable not-for-profit organization. Contemporary legal commentary and case law on private business corporations suggests that the fiduciary duty of a governing board is owed holistically to “the corporation,” not the shareholders and not separately to each individual members or stakeholder groups (Carter & Prendergast, 2011; *London Humane Society (Re)*, 2010 ONSC 5775, [2010] OJ No 4827 (Ont Sup Ct J) at para. 19). However, it is not clear if and how this line of scholarship and case precedents applies to a university context given its hybrid features as a charitable, not-for-profit, corporate collegium.

What is the corporation? Who is the corporation?

At law the corporation is a legal construct. It is considered a person—an independent legal entity that can hold property, be sued, and holds the same rights and obligations of a person in law. The corporation is separate and distinct from shareholders and other constituents within the corporate organization (including the board). This legal fiction allows the activities of a corporation to be captured by regulation in the same way a person is captured by laws. It also allows the fiduciary duty that exists between

two people to exist between the board and the corporation. In a corporate context, directors of governing boards are the “fiduciary” and the corporation (as a legal “person”) is the “principal” to whom the duty is owed (Welling, 1991). As a legal person the corporation is a separate and distinct entity, the interests of which may, or may not, align with the membership of the organization.

This legal understanding complicates the relationship between the corporation as an organization and the shareholder/constituents of the corporation, especially in the university context. The view of the university as a singular corporate “person” runs counter to the historical structure and nature of the university as a collegial, self-governing community of scholars—two core ideals of the Western university. Furthermore, the legal construct of the corporation as a singular homogeneous legal person presents particular difficulties in understanding the fiduciary duties of governing boards within the contemporary context of the university as a “multiversity,” with a complex, diverse environment where there are, by the very nature of the university, many competing interests (Fallis, 2007; Kerr, 2001). Owing a fiduciary duty to all of the constituents at once presents problems in defining the duty of loyalty. Minow tells us “Accountability to everyone is accountability to no one, and it is impossible to apply the fiduciary standard without a clear understanding of who the beneficiary is” (2016, p. 245). And this may be part of the challenge in applying the law in this area to universities—a legal construct has been grafted onto the structures of the university and it does not quite fit.

Who is the corporation? Who is the university? While commentary is clear that the governing board owes a fiduciary duty to the corporation, is less clear from statute and case law if the university and the corporation are one and the same thing. The constituting statutes of the universities in Canada are inconsistent and offer various answers to these questions. For example, under the statute constituting Western University (*An Act respecting The University of Western Ontario*, Bill Pr14, 1982, as revised by Bill Pr37, chapter Pr26, S.O., 1988 at section 1 and 8.), the “university” is defined vaguely and the corporate body is, perplexingly, defined as the governing board and not the university.

s.1 (m) “University” means The University of Western Ontario, but does not include any college affiliated with the University.

s.8. The Board of Governors of the University is hereby continued as a body corporate by the name “The Board of Governors, The University of Western Ontario.”

If, indeed, the board of governors at Western University is the corporate body, under corporate law principles board members would owe a fiduciary duty to themselves, and they would be both fiduciary and beneficiary/principal at one and the same time. This conception defies the principles of trust and fiduciary law and, frankly, makes no sense legally.⁸ By contrast in Alberta, the *Post Secondary Learning Act* (*Post-Secondary Learning Act*, SA 2003, c P-19.5 s 11(2) and s 16(2)) tells us that both the governing board and the senate of universities are each individual corporate bodies. This means there are two corporate entities within Alberta’s universities, and neither are the university as an organization. Whereas in British Columbia, the *University*

Act R.S.B.C. 1996, c. 468 (Consolidation 2017) s.3(4) clearly states that each university is a distinct corporation.

University statutes and case law complicate and confuse the discussion of who owes whom a fiduciary duty within the university setting. It is clear that the legal principles of corporate law, charitable trusts, and fiduciary duties do not map onto the governance of the university very well. This raises the question of whether it is possible to apply the fiduciary standard without a clear understanding of who is the beneficiary and who is the corporation, who is the university and who is the charity.

What does the “best interests” of the organization mean?

And who gets to decide?

It is difficult to determine what are “the best interests” of the university. Some define “best interests” in terms of financial sustainability, for others it is about academic quality and rigour, for others it is about productivity, efficiency, accountability, and transparency, and others again it is about upholding democratic principles. All of these ideas emerge in the university landscape and are consistent with the various missions and objectives of the university embedded in constituting statutes, yet each of them may be defined differently depending on the location within the university.

This case law suggests that in determining “best interests,” one group’s interests cannot supersede another group’s interests, and that the governing board must make balanced decisions protecting the interest of the whole entity itself. However, the institution’s interests in the university setting are by its very nature heterogeneous. The university in form and structure is fragmented into faculties and departments; it has flat collegial self-governance structures and hierarchical, managerial, bureaucratic, and administrative structures. Academic work is both horizontally and vertically fragmented, which challenges governance and leadership (Jones, 2013). Clark Kerr (2001) in his book *The Uses of the University* describes the modern university as a “multiversity” (p. 1–7). George Fallis (2007) takes this metaphor and describes contemporary universities as sprawling conglomerates providing liberal undergraduate, graduate, and professional education that is responsible for society’s research enterprise. Fallis (2007) argues that contemporary Canadian universities have multiple missions, including teaching and research, but also that contemporary universities are fundamentally institutions of democracy and part of their mission and role in society is their contribution to democratic life.⁹ The fiduciary obligation expressed in corporate case law requires that the board of governors protects the best interests of the university as a holistic organization. This notion negates everything we know about the modern university, its evolution over the last century and the nature of academic life, scholarship, and activities. Just as the notion of the corporation as a person is a legal fiction, the notion of the university as a homogenous entity is an analytic fantasy. In such a diverse environment there is no singular interest and it is difficult to determine who speaks for whom, which challenges the application of the fiduciary standard to governing board decisions.

The role of university governing boards: Guardianship or representative constituency?

In Canada the university governing board typically appoints the president, manages,

and is accountable for the financial aspects of the university.¹⁰ It is made up of ex-officio members (the chancellor and the president and vice chancellor of the university), internal members, external members, and honorary members. Typically governing board membership includes students elected from the student body; representatives of the senate elected by the university senate; members of the non-academic university staff; representatives appointed or elected by alumnae; and members broadly reflective of the community at large appointed by the government or the governing board itself, as set out in board by-laws or regulations (Jones & Skolnik, 1997). Whereas the largest group on the governing board is the external public constituents appointed by the board or government, by contrast the academic governing body (senate) is made up of a majority of internal faculty members. Nevertheless, the governing boards of publicly funded Canadian universities do contain representatives from a large number of internal constituents, including faculty and student constituencies.¹¹ Glen Jones and Michael Skolnik noted in their 1997 study that it “is clear that Canadian universities have placed a high value on attempting to ensure that both internal and external interests are taken into consideration” (p. 293) in their decision-making. They also note that this high representation of internal members on university governing boards is “the factor that most differentiates Canadian boards from their American counterparts” (p. 293). Recent scholarship suggests that, historically, American universities followed the Scottish model, where a lay board is responsible for college governance, whereas Canadian universities followed the English model and gave faculty the majority of the governance responsibility in the form of a strong senate and faculty representation on boards (Galick-Moazen, 2012).

The constituting statutes of Canadian universities explicitly design the governance of the university boards for representation of the university’s members. Therefore, some of the internal members sitting on the governing board come to the position with an automatic dual loyalty, as they are elected to the governing board precisely to represent the interests of their constituent group within the university. In this respect it has been argued that the university governance and decision-making functions in the manner of a parliament, a representative democracy, and follows the parliamentary rules of order (CAUTb, 2018). This democratic structure is consistent with the core role and mission of the publicly funded university in Canadian society as a democratizing institution (Fallis, 2007).

The membership of governing boards is significant to the discussion of fiduciary duties as there is a potential for conflicts of interest when members are from multiple constituencies—and this potential for conflicts may be greater in a Canadian university context than in an American university context given the larger proportion of internal board members. It is also significant because American legal commentary on the fiduciary duties of university governing boards should perhaps be referred to with caution in the Canadian university context because the actual composition of Canadian university boards and American university boards are different.

At the same time Canadian universities place a high value on collegial, democratic decision-making, and this principle of governance is recognized by the case law. It is this feature of governance that distinguishes the Canadian university governing boards

from private sector corporate boards and from many American university boards. From this perspective, constituency representation is crucial and most desirable. Herein lays the source of considerable tension in Canadian university governance: What is the role of the board of governors in a Canadian university? Is it the role of a guardian of a trust or is it the role of constituency representation? Or is it, can it be, both?

The guardianship view of the board of governors emphasizes the university as a public trust and draws on charity law. This view is closer to the American view of a university board of governors as trustees, and indeed the American scholarship refers to university board members explicitly as trustees (Engel & Achola, 1983; Floyd, 1995; Kaplin & Lee, 1995; Kerr & Gade, 1989). While this view emphasizes the highest fiduciary duty of the governors toward the university, it is less collegial and may occur at the expense of institutional autonomy and self-governance. It emphasizes the university's charitable nature, which allows for greater intervention by the courts into university governance in cases of mismanagement and allows for greater remedies for aggrieved constituent members. Courts will exercise their prerogative jurisdiction over a charity if the board of governors is acting in a way that may jeopardize the charity's assets (whether they are property, resources, or reputational assets). The trustee view also places high demands on board reporting and accountability for public funds. This governance arrangement usually has external, lay, public constituents as the dominant and majority group on the board of governors, as evident in America.

By contrast the constituency representation view places a high value on balance between internal and external representation and interests. This perspective is closer to the Canadian governance arrangements, which have high numbers of internal members elected to their boards (Jones & Skolnik, 1997). This approach emphasizes collegial decision-making and faculty input into governance. It values and defends the autonomy of the university, eschewing external interference from the government or courts as a self-governing professional body. This view is also reflected in the Canadian Supreme Court case law on the nature of the university (see *Harelkin v. University of Regina*, 1979) and is also evident in the university constituting statutes themselves, which require that governing board membership include elected representation internal to the university.¹² This principle of organizational democracy is also consistent with the Canadian trend on the laws of not-for profits, as seen in the changes to the federal *NFP Act*, 2009, which increases not-for-profit members' access to information and enhances their rights, their legal remedies against errant boards, and provides for a greater role for members in the governance of their corporation. However, representative boards have the potential for more conflicts. Members of Canadian university boards come to the board with divided loyalties: to constituents that elected them, as well as to the corporate person of the university.

Tension between the guardianship view and the constituency representation view of university governance has existed for decades in Canada. Both views are reflected in the case law, statutes, and commentary on university governance. Regardless, the question of whether the board should function representatively and responsively to university constituencies impacts on the shape of governing board fiduciary duties. The contradictions between these competing views are reflected in statements of fiduciary duties in higher education, especially around issues of the

duty of loyalty. For example, a recent governance review at Western University seems to advocate both a guardianship and representative view of governance, going so far as to suggest that board members must check their identity at the door once they become members of the board:

It would be contrary to this fiduciary responsibility to have “representatives” of particular constituencies voting at the direction of their organizations. Regardless of how someone gets to the Board table, or who put them there, once a person becomes a Board member, his or her loyalty must lie with the best, long term interests of the university... (Report of the Governance Review Task Force UWO, 2015, p. 4)

This same report goes on to contradict itself:

The Act determines the membership of the Board and provides for members to be elected from faculty, staff and student constituencies and those internal members of the board bring the views and concerns of their constituents to the table. (Report of the Governance Review Task Force UWO, 2015, p. 4)

A recent report from the Canadian Association of University Teachers (2018b) captures the essence of the contradiction in a university setting:

In the case of the academy, such appointments are not made to persons who happen to be academic staff, but made because they are academic staff. To subsequently obstruct or interfere with a representational member consulting or canvassing the academic staff community they are to represent cannot be acting in the best interests of an institution as it is contrary to the university governance model itself. Recognizing representation, but denying representational rights, undercuts collegial governance and the representational framework on which it is based. (p. 5)

Conclusions: Implications for shared governance—“Fraught with history and traditions”¹³

Mapping the corporate legal framework onto the university is fraught with tensions, difficulties, and disconnects. Although the nomenclature may be the same, the university in form or function is not a typical corporation. It is, legally, a unique, hybrid organizational type. This may explain the confusion and contradictions evident in the field of higher education around the fiduciary duties of governing boards. Indeed legal scholars have observed that,

The reasons that the letter of the law is not necessarily followed in the academy can be attributed to the unique historical rights and traditions inherent to a community of scholars. (Davis, 2015b, p. 200)

For various reasons entrenched in the history of academia, the expectations of faculty and the practice of universities do not follow the prescriptions of the law. (Davis, 2015b, p. 211)

Moreover, philosophically there are at least two different views that are active in Canadian board governance. From a charitable corporation perspective, conflicts of interests are undesirable and must be avoided. Whereas from a “community of scholars” collegial perspective, conflicts of interest are inevitable and a desirable part of the culture, history, and tradition of academic life, essential in the creation and testing of knowledge, protected by the principles of academic freedom, and a fundamental feature of the university. Legal commentators have also observed that in addition to the general conflict of values and priorities between universities and corporations, there is a difference in the way universities operate in policies, procedures, and practices that are incongruent to business practices with the for-profit sector. Conduct and obligations that are common in, and reasonable for, an industry setting would be untenable in an academic setting. For example, practices around confidentiality and non-disclosure play out very differently in the two settings and this can influence what governing boards believe is appropriate for decision-making (Lowe & Lennon, 2015). The area of confidentiality and non-disclosure is particularly relevant here, as the trend in Canada among governing boards is to include such obligations in their codes of conduct. Jeffrey Lowe and Christopher Lennon (2015) highlight the different cultural environments:

Unlike a business corporation, which often has obligations of confidentiality built directly into the employment agreements of its personnel, postsecondary institutions typically encourage at least a subset of their personnel—namely faculty, graduate students and other researchers ... to share ideas and publish findings. Moreover the category of personnel likely to come into access confidential information in an academic community are much more diverse than in a commercial operation ... The culture and practice of postsecondary institutions is simply not one where commitments of confidentiality are easily implemented. (p. 216)

In summary, the legal framework for university governance in Canada is extremely complex and layered. The nature of the university as an organization and its legal status are determined by myriad old and new statutes and case law, as well as medieval and modern forms and protocols mixed together. Its governance and legal status encompasses the law of corporations and the law of charities and trusts. To this must be added historical academic customs and the institutional practices of the collegium (whether or not enshrined in statute, but recognized in case law), together with current policies and by-laws within individual universities as well as across the higher education community, which have become the established conduct (usages) of the university. This can result in “paradoxes [that] can make university governance a difficult proposition” (Davis, 2015b, pp. 57–58) and inconsistencies in the application of the law. In fact, a number of legal scholars have commented on the unique nature of the university as a legal organization making the application of the black letter law in several legal areas (governance, intellectual property, spin-off companies, and confidentiality agreements, to name a few) uncertain and more honoured in the breach than in the observance (Shanahan, Nilson, & Broshko, 2015).

The law on fiduciary duties has implications for shared collegial governance and decision-making in universities. The law on fiduciary duties provides a legal standard, but not a clear statement or rule that can be easily applied in all decisions. It offers little guidance for resolving hard questions. Moreover, the publicly funded, charitable, collegial multiversity in Canada is a unique entity and context with a public mission, purpose, and stakeholders. This influences the nature of the fiduciary duties of governing boards and to whom they are owed. This is by no means a dilution of the standard but a more complicated standard. Furthermore, the autonomy of university governance and decision-making is exercised within a larger political context and within broader societal structures and values. In Canada, the Charter of Rights and Freedoms has changed the legal landscape of the university and impacted university decision-making and board governance. The Charter has increased our awareness of individual rights and freedoms. There is an increased expectation for the protection of these rights within society, including within the university (Dickinson, 1988; Hannah & Stack, 2015). The case law on the applicability of the Charter to universities has altered our understanding of the nature of university autonomy. It layers our understanding of the relationship between universities, governing boards, and their constituents. Inevitably, this influences the shape of governing board fiduciary duties.

Board members need to be aware of and appreciate the complexity of this working environment. In their decision-making they would do well to consult broadly and diligently scrutinize all issues and concerns brought forth from the various constituents making up the university. Transparency in board decision-making is also crucial. Internal and external accountability structures and mechanisms must be put in place and followed. Assiduous attention to due process and fairness goes a long way to establishing good faith in decision-making. In this context, the roles of faculty in Canadian universities, in faculty associations, and on senate within the dual governance structure of the university, are critical to the proper functioning of the university governance model in ensuring that board fiduciary duties are met. Both avenues into governance provide a check and balance on the board of governors within a particularly insulated decision-making environment, where the courts and government have allowed Canadian universities high institutional autonomy, shielding boards' decisions and conduct from review and oversight. Ultimately engaging the shared collegial governance structure of the university will enable boards to better navigate the complicated leadership space and will strengthen decision-making.

Notes

1. In fact the new federal Not-for-profit Act (2009) provides for incorporation as of right, whereby the approval of the minister is not required, and allows for electronic filing. Approval of the incorporation is automatic if the statutory requirements are met. Corporate by-laws are not included in incorporation package and are not reviewed by Corporations Canada staff.
2. The nomenclature varies across Canadian universities as to the name of the senior academic decision-making body and the senior financial/administrative body. Typically, they are called the senate and the governing board, respectively, but not exclusively. This can cause confusion in the literature and in the field. Also, some universities are organized in a unicameral structure (e.g., University of Toronto) while others have opted for a tri-cameral structure (e.g., Queens University). Regardless, one can see in each of

the unicameral, bi-cameral, or tri-cameral structures in Canadian universities the presence of a senior academic and a senior financial and/or administrative decision-making body. For the purpose of clarity within this article, these bodies are referred to as the “senate” and the “governing board.”

3. The case law varies based on the facts in each case. For example, booking space for non-academic extracurricular activities at the university has been found to be non-governmental activity (*Lobo v. Carlton University*, 2012). Likewise, standards and grading are within university discretion and are non-governmental (*Jaffer v. York University*, 2010; *King v. Ryerson University*, 2015; *Lam v. University of Western Ontario*, 2015). There is extensive case law that sets out the educational relationship between universities and students as governed by an implied private contract to educate, provide appropriate instruction, and offer the educational services needed to obtain the credential that may include providing housing, co-op placements, parking, library services, and computer facilities in exchange for student fees. (See Hannah & Stack, 2015, for an extensive review). Patrick Gilligan-Hackett and Pamela Murray (2015) review the case law governing university-faculty relationships, observing that the law of contract provides the primary foundation for the employment relationship between faculty and the university. Nevertheless all of this is qualified by Charter case law and the determinations of whether, and when, a university is acting as a governmental actor.
4. In the province of British Columbia, for example, the provincial government has introduced mandate letters for universities that match the university’s planned targeted programs and priorities with budget allocations for the coming fiscal year. Similarly, in Ontario, the provincial government has Strategic Mandate Agreements with each university that requires it to provide the government with strategic planning information on priorities and targets with funding attached. See Shanahan (2015b) for a discussion of strategic federal funding programs and Shanahan (2015c) and Shanahan (2015d) for a discussion of the range of provincial regulatory mechanisms around funding, quality, and accountability employing strategic planning requirements.
5. Note that this is an American association. Nevertheless the Canadian equivalent, Canadian University Boards Association (CUBA), directs its member universities to the American website for this information, and many Canadian university governing boards are members of this American organization and so are perhaps guided by this statement and other comments on the site. While this statement about fiduciary duties is consistent with the Canadian case law on fiduciary duties generally, the organization’s additional commentary on what this statement means in practice for governing boards’ conduct is not consistent with Canadian case law on the collegium and representativeness of governance arrangements in Canadian universities. That is to say, their explication of duties reflects the American landscape, which has a different mix of private and public universities. This is one of the limitations of policy borrowing from other jurisdictions, especially around law and governance.
6. One important theme that does come up in the case law and in contemporary business law commentary and practice is that disclosure to shareholders, beneficiaries, and membership is part of one’s fiduciary duty. “Disclosure and the substance of fiduciary duty have long been intertwined in American corporate and securities law” (Thompson, 2008, p. 23). That is to say that a fiduciary must disclose risks, opportunities, and conflicts to the beneficiary’s interests. In other words, disclosure can be part of the duty of loyalty. This is relevant to the university context.
7. For example see University of Toronto’s Act (1971), which sets out openness of governance meetings:

Section 2(18) The meetings, except meetings of committee of the whole, of the Governing Council shall be open to the public, prior notice of the meetings shall be given to the members and to the public in such a manner as the Governing Council by by-law shall determine, and no person shall be excluded therefrom except for improper conduct, but where intimate financial or personal matters of any person may be disclosed at a meeting the part of the meeting concerning such per-

- son shall be held in camera unless such person requests that such part of the meeting be open to the public. 1971, c. 56, s. 2(16–218).
8. Western University's Act is not the only university statute that conflates the board with the corporation. See also *University of Toronto Act* s. 2(1), which calls the University of Toronto's governing council a "corporation." And also under the University of Ottawa Act (*The University of Ottawa Act*, S.O. 1965, C.137), the board of governors are named as the body corporate.
 9. For an exhaustive review of models of universities in scholarship that have emerged over Western-European history see Raymond P. Kybartas' (1996) *Ideas of the University: Towards a Classification System Based on Ideal Types*. Using a historical-philosophical lens and a Weberian "ideal type" method, Kybartas classifies six university models that he argues represents the range of potential university types including: the liberal university; the research university; the economic university; the social university; the transformational university; and the radical university. These are not mutually exclusive types and can be combined in various models. Clark Kerr (2001) and George Fallis (2007), both economists, academics, and former university administrators, present a new conceptualization of the contemporary Anglo-American multiversity that emerged in the second half of the twentieth century, as sprawling, diverse, complex conglomerates that incorporate elements of these ideal types. Although they concede that the central task of the contemporary Anglo-American university continues to be undergraduate education, they argue the contemporary university has many tasks and roles in a post-industrial society, which this article argues complicates the responsibilities of leadership.
 10. This typically reads in statutes as "management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board, and the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University" (*York University Act*, 1965, s.10).
 11. Jones and Skolnik's 1997 study on Canadian governing boards reported a third of the members of governing boards who participated in their study were from internal constituencies. Faculty and students made up than a quarter of members on average. Fewer than a quarter are appointed by government.
 12. For one example see s.19 of *British Columbia's University Act* R.S.B.C. 1996, c. 468 (Consolidation last updated by the Office of the University Counsel on 28 June 2017).
 13. See Davis, 2015a, p. 66.

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