

## The Role of the Chair of the Board of Directors

By **André Laurin**\*

### OVERVIEW

- The **role** and **duties** of a Chair are **not defined** and circumscribed **in incorporating statutes** (federal and Quebec) except in the case of Quebec government-owned corporations and then, only in part.
- The **legal obligations and liability** of a Chair **do not differ** from those of other directors.
- The **case law** provides **few reference points** or clear indications for assessing the particular liability of a Chair.
- A Chair's fulfilment of his or her obligations is assessed by taking into account the specific tasks and powers entrusted to the Chair; thus, **in some circumstances, expectations** in that regard are **higher** than those applied to other directors.



- According to certain recommended governance practices, in the cases of reporting issuers, NPOs and certain private for-profit corporations, the Chair should be a person other than the CEO and should **not have an "executive" role**.
- The Chair is the **coordinator of the board** and usually does not have any authority separate from that of the board vis-à-vis management.

- Generally, **the two main features of the position** are:
  - to ensure that the Board fulfills its mandate; and
  - to be the interface between the board and management, on behalf of the board and in accordance with directives issued by the board and the powers delegated by it.
- Many of the **comments** expressed in this newsletter **also apply** to board committees, pension committees and other kinds of committees, with the necessary adjustments.

### Introduction

Boards of directors have been at the centre of the public debate on corporate governance in recent years. This heightened focus on boards has provoked questioning and reflection on the role and liability of the Chair.

**Firstly**, this newsletter **reviews the legislative, regulatory and jurisprudential framework** of the Chair's role. It **then** provides a **description of that role** in light of prevailing best practices and the author's experience. Although this article takes into account the legal framework,

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it goes beyond such framework. Lastly, it relies upon and complements several other newsletters published by the author on various aspects of corporate governance. ([www.laverydebilly.com/htmlen/Publications.asp](http://www.laverydebilly.com/htmlen/Publications.asp))

## **1. Context and legislative, regulatory and jurisprudential framework**

### **Vital role and rise in performance standards**

The Chair has a vital role in a company. That role and the attendant responsibilities have assumed **greater importance with the rise in performance standards applying to boards of directors** and, hence, to their members. The adoption of rules and guidelines governing reporting issuers, or directives in the case of certain government-owned companies, the publicity given to exemplary corporate governance practices and the frequency of lawsuits against directors have all contributed to raising standards.

**In the front line of standards** applicable to reporting issuers and certain government-owned corporations are numerous disclosure, control and compliance **rules**. Considerable importance is also given by those standards to the **notion of independence**.

Secondary effects of the rules include a heavier administrative burden and increased costs for reporting issuers and, in some respects, projection of a negative image of governance in some circles. However, the **rules should not be confused with good corporate governance and compliance should not be confused with integrity**. The first are the means, occasionally excessive, whereas the second are worthy objectives that companies should strive to achieve.

The **criterion of independence** should **not** be established as an **absolute** and principal **value**. Subject to the advisable separation of powers between management and the board in many cases, that criterion of independence should not give way to the criteria of expertise, experience, credibility, legitimacy and integrity. Moreover, the possibility of some occasional conflicts of interest should not, for that reason alone, automatically result in the conclusion that a director is not independent.

Yvan Allaire, Chair of the Institute for Governance of Private and Public Organizations and his co-author Dr. Mihaela Firsirotu have aptly summarized, in one short sentence, the limits on the use of the criterion of independence *“The concept is meaningless when measurable and elusive when meaningful”* (our translation).

### **Gradual elimination of the combined roles of CEO and Chair**

For many years and in many companies, the President and CEO was also the Chair. Combining the two roles was very common among **US reporting issuers**, but less so among their **Canadian counterparts**. The most recent statistics published by the Risk Metrics Group indicate that 45% of American reporting issuers no longer grant the positions of CEO and Chair to the same individual (approximately 36% of “Standard & Poors - 500 companies” according to Corporate Library, a Portland, Maine research group). Canadian reporting issuers combine the positions much less frequently. According to a report by Patrick O’Callaghan and Associates, published in December 2006 in partnership with Korn/Ferry International, 79% of the largest Canadian reporting issuers in 2005 had a Chair or independent leader of the board who was not the CEO.

Combining the two positions is still a widespread practice in **private for-profit companies**, and, of necessity, will continue in most cases given the reality of such companies, their management and their share ownership structure. Indeed, in the case of such companies, the shareholder or the main shareholders are very often the company’s executive officers and therefore directly control the company.

In the case of **NPOs**, combining the two positions has been, and still is, the exception rather than the rule.

Our **comments** are therefore especially **relevant** in the case of **reporting issuers, NPOs and certain private for-profit corporations** (i.e., those with several shareholders but no unanimous shareholders’ agreement or, if they have such an agreement, those that have opted to separate the roles).

One **argument** advanced by the **proponents of separation** can be summarized as follows: the less most or all shareholders or members are involved in the day-to-day management of the company then the stronger the preference to separate the roles should be. Indeed, separation is aimed at enabling the shareholders or members to properly oversee management and its day-to-day management of the business. The ability to exercise independent judgment is another ground for arguing that the roles should be separated.

## Relative silence of corporate laws regarding the Chair and the particular responsibilities of the position

The *Canada Business Corporations Act*<sup>1</sup> and the *Companies Act (Quebec)*<sup>2</sup> do not address the responsibilities of the Chair. The *Act respecting the governance of state-owned enterprises (Quebec)*<sup>3</sup>, which governs corporations owned by the Government of Quebec, requires that the Chair be independent from management and confers certain specific tasks on the Chair without however stipulating a specific mandate or providing a full description of those tasks.

The **guidelines** adopted by the Canadian Securities Administrators, which are incorporated in National Policy 58-201 - Corporate Governance Guidelines and are intended for Canadian reporting issuers, contain certain specific recommendations or guidelines:

*“3.2 The chair of the board should be an independent director. Where this is not appropriate, an independent director should be appointed to act as “lead director”. However, either an independent chair or an independent lead director should act as the effective leader of the board and ensure that the board’s agenda will enable it to successfully carry out its duties.*

*3.5 The board should develop clear position descriptions for the chair of the board and the chair of each board committee. (...)”*

(Emphasis added)

For the most part, **case law** has not directly addressed the specific obligations and responsibilities of the Chair. However, one Australian decision<sup>4</sup> has established that given his central role as the coordinator of the board’s activities, the performance of a Chair should be assessed in light of the expectations and powers related to that role.

*“The Commission wishes to demonstrate that it is usual practice in listed companies that the chairman be responsible to a greater extent than any other director for ensuring that the board is familiar with the financial circumstances, position and performance of the company, and ensuring the performance of the board of its supervisory duties.” (p. 12)*

(Emphasis added)

This Australian decision is similar to Canadian and U.S. decisions that have analyzed the responsibility of an individual director in light either of the **position held** (e.g., Chair or member of an audit committee) or the director’s knowledge or **special professional expertise** (e.g., lawyer-director regarding a legal issue or financing specialist regarding a financial assessment or the conditions of a financing agreement).

Thus in *Standard Trustco v. The Ontario Securities Commission*<sup>5</sup>, the commissioners held as follows:

*“173 However, in our opinion the members of the audit committees should bear somewhat more responsibility than the other directors for what occurred at the board meetings on July 24, 1990, not because there was a greater standard of care imposed on them, but rather because their circumstance were different. As members of the audit committee, they had a greater opportunity to obtain knowledge about and to examine the affairs of the company than non-members had. As a result, more was expected of them in respect of overseeing the financial process and warning other directors about problems.” (p. 30)*

(Emphasis added)

In the U.S., in the *Emerging Communications* case<sup>6</sup>, the Court expressed its view as follows:

*“[\*144] Hence, Muoio possessed a specialized financial expertise, and an ability to understand ECM’s intrinsic value, that was unique to the ECM board members (other than, perhaps, Prosser). Informed by his specialized expertise and knowledge, Muoio conceded that the \$10.25 price was “at the low end of any kind of fair value that you would put” and expressed to Goodwin his view that the special committee might be able to get up to \$20 per share by Prosser. In these circumstances, it was incumbent upon Muoio, as a fiduciary, to advocate, that the board reject the \$10.25 price that the special committee was recommending. As a fiduciary knowledgeable of ECM’s intrinsic value, Muoio should also have gone on record as voting against the proposed transaction at the \$10.25 per share merger price. Muoio did neither. Instead he joined the other directors in voting, without objection, to approve the transaction.” (p. 35)*

(Emphasis added)

<sup>1</sup> R.S.C. 1985, ch. C-44.

<sup>2</sup> R.S.Q., c. C-38.

<sup>3</sup> R.S.Q., c. G-1.02, ss. 4, 28 and 29.

<sup>4</sup> *Australian Securities and Investments Commission v. Rich*, 44 A.C.S.R. 341.

<sup>5</sup> 6 B.L.R. (d) 41, 15 O.S.C.B. 43.

<sup>6</sup> 2004 Del. Ch. LEXIS 70.

A director's **fault** and fulfilment or non-fulfilment of his or her obligations is **assessed on the basis of the director's mandate** and according to stated expectations and the obligations imposed on him or her by law (**care and loyalty**). Failing specific legislative provisions, the courts compare the degree of care, diligence and expertise applied by a director to that of a reasonably prudent person in similar circumstances or, in other words, to recognized practices. Moreover, section 122(1) b) of the *Canada Business Corporations Act* expressly refers to that **comparison**:

"122 (1)  
[Duty of care of directors and officers]

*Every director and officer of a corporation in exercising their powers and discharging their duties shall*

*a) act honestly and in good faith with a view to the best interests of the corporation; and;*

*b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances*"

(Emphasis added)

Hence, the Chair's potential liability will be considered in light of the obligations imposed on each and every director, and **by taking into account**, among other things, the **specific responsibilities and powers** conferred on the Chair, and by considering how a prudent Chair would or should have acted in the circumstances.

Thus, while case law provides scant direct jurisprudential clues, it does provide some indices for assessing the particular responsibility of a Chair.

## **2. Role suggested by best practices**

Except in certain exceptional circumstances, there are **two (2) main aspects** to the Chair's role in most companies where the roles of Chair and CEO are separated:

- the coordination and leadership of the board, and
- the interface between the board and management.

### **Coordination and leadership**

While under most incorporating laws, the board is responsible for managing the company, the actual **day-to-day** management is **usually delegated to the company's executive officers**, with the board retaining a supervisory ("*nose in fingers out*") role in relation to that management and certain priority matters.

The Chair's primary role is to use his talents and skills and devote reasonable time, effort and energy to **facilitate optimal board efficiency and performance** and ensure that the board functions properly and carries out its mission.

The following are the **items that should be part of all board charters or mandates** in almost all kinds of companies:

- promotion of a corporate culture of ethics and integrity, internally and externally in its business relations and transactions;
- supervision of management;
- orientations and strategic plan;
- definition of roles and expectations (board, management, president);
- succession planning (management and board);
- budget and financial statements;
- controls and policies (e.g., code of ethics);
- corporate governance and nominations;
- risk management;

- performance assessment and remuneration (executive officers and the board);
- disclosure and quality of information.

Obviously, the **responsibility for overseeing management** involves reports, **asking questions and verifying**. Directors should not blindly or complacently rubberstamp management proposals and actions; they must monitor, query and verify. However, it must be borne in mind that they must clearly devote a substantial part of their energy to **bringing added value** to the company and to helping management formulate and achieve the company's strategic plan.

In other words, and to take up a theme dear to Yvan Allaire, referred to earlier in this newsletter, they should not limit their role to the "fiduciary" aspect but should be major contributors to creating value.

In coordinating the performance of the board's mandate, the Chair is thus called upon to **promote the allocation and contribution of the individual talents and skills** of directors on the basis of the objective to create value. Thus, the various aspects of the Chair's task discussed in the following pages should be viewed in light of this comment.

**To further performance of the board's mandate, the Chair should**, with "the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances", among other things, **do the following**:

- (1) ensure that the directors:
  - receive relevant and necessary **training and information** in a timely manner;
  - can obtain **answers** to their questions;
  - can obtain **material assistance** (tools and documents) and **expert assistance**, and
  - can **express their points of view and** therefore ensure that a substantial part of the **time allotted** to meetings is reserved for their **questions and comments**;
- (2) ensure that every **component of the board's mandate is the subject of decisions, actions and follow-up** at board meetings, according to a schedule and work program; thus, the Chair should prepare board meetings (including, more specifically, draw up the agendas, obtain the documents that must be submitted, or have them prepared, and plan, select and arrange for the presentations that will be made to the board) and verify that previous board queries and decisions have been followed up;
- (3) **conduct and lead** formal and informal **board meetings** so as to elicit each director's viewpoint and foster the formulation of solutions and the making of decisions (**be a "consensus builder"**);
- (4) between meetings, **enquire about the directors' concerns** regarding the company and its activities and management, the effectiveness of the of the board and the performance of the other directors;
- (5) help **new directors** have a speedy **learning curve**;
- (6) **coordinate the assessment** of the efficacy and performance of the board in conjunction with the committee responsible for governance and collaborate in the assessment of that performance by the other directors and by management;

- (7) ensure that **complaints**, comments and suggestions of any significance from shareholders or members are collected and communicated to the board and that any **infringement of the rights of shareholders or members** brought to the Chair's knowledge is promptly rectified or, failing rectification, communicated to the board;
- (8) ensure that **meetings** of shareholders or members are duly convened so that the shareholders or members can exercise their rights at and with respect to such meetings and **chair** those meetings unless that role is entrusted to a professional;
- (9) ensure that every board **committee fulfils its mandate**, carries out its work program and duly reports to the board;
- (10) monitor directors' **compliance with company policies** applicable to them, unless that task is entrusted to a board committee;
- (11) support the CEO in **representating** the company in the community, and
- (12) according to guidelines established with management or validated by the board, be responsible for a **part of the company's official communications** in certain circumstances.

### **Interface between the board and management**

The principles of good corporate governance that favour separating roles and management accountability to the board or, in other words, proper checks and balances, do not diminish the **importance of teamwork between management and the board in achieving the company's objectives**.

The **board chair is at the centre of these two dynamics** requiring board participation.

**On the one hand**, as we have seen, it is the Chair who must prepare and coordinate the board's work and ensure that management respects its decisions. In that capacity, he should, for example:

- **communicate** the **board's** requests, **expectations** and comments to management;
- **obtain** the desired **reports** for the board (regular reports on specific matters and on implementation of decisions);
- **obtain information** from management concerning any important matter that the board or a board committee should be made aware of;
- with the management and executive compensation committee, **monitor the career development of key executive officers**, the **succession plan**, the performance of other executive officers and the management team dynamics, and assess the performance of the CEO so that informed reports and recommendations can be submitted to the board;
- on a regular basis between meetings, **conduct a review with the CEO** of the company's outlook and of management's more immediate **concerns**, challenges, problems and major projects (financing, acquisitions etc);
- ensure that **management submits all matters** within the **board's competence** to the board for its consideration.

**On the other hand**, in addition to his or her official role and responsibilities, the Chair, usually, and in practice, is expected to act as the **adviser** and often the confidant of the CEO and sometimes of other members of management. Thus, for example, the CEO may on occasion want to discuss his personal frustrations or concerns with the Chair or seek his or her advice on a specific project or particular problem.



In a teamwork context, the **role of sage and adviser** is not only **normal and healthy**, but also essential. However, in fulfilling that role, the Chair must be **prudent** and avoid failing in or neglecting his official role and responsibilities. Specifically, he must not weaken or impair his responsibilities and role in assessing the CEO's performance.

### Exceptional circumstances requiring more direct involvement

Some situations can and, in certain cases, should, provoke more direct involvement by the board and, accordingly, by its Chair.

The following is a non-exhaustive list of such **situations**:

- the occurrence of **events that could adversely and materially affect** the company's profitability, shareholders' equity, ability to pursue its goals and mission, or its reputation;
- **insolvency** of the company;
- major **acquisition** plans;
- decisions that could affect the **rights of shareholders or of company members** as such;
- any initiative by a third party aimed at acquiring a substantial part of the company's securities or assets (**takeover bid** or otherwise);
- more generally, any situation where the **personal interests of members of management** could **conflict** with those of the company or of all its shareholders or members;
- any major **change** in the company's strategic or business **plan**;
- any **whistle-blowing**, allegation or clear **indication** of a **significant infringement** of a rule of law pertaining to securities

or aimed at protecting the company's shareholders or its members;

- any **whistle-blowing**, allegation or clear **indication** of a **violation** by the company of any other rule of law that could have **serious consequences** for the company;
- the **CEO's** resignation or dismissal or **inability** to act for any reason whatsoever.

In such circumstances, the Chair should clearly ensure that the **board** is promptly and fully **informed** and that it **controls** the formulation of solutions or corrective measures, makes the decisions it considers appropriate and oversees the decision implementation process.

In such a context, the board should, in many of such cases, give a **specific mandate to the Chair** or to another director or to a board committee, giving the Chair, director or committee a larger and more direct role than normal, so that the board, through the intermediary of the Chair, director or committee, exercises real control over compliance with the decisions and over the management of the exceptional circumstances in question.

### Pitfalls to avoid

The reasons underlying the notion of separation of the duties and powers of the Chair and the CEO and a clear allocation of mandates between management and the board ("*nose in fingers out*") also suggest certain pitfalls that a Chair should avoid.

Thus the **Chair should ideally avoid**:

- becoming involved in **routine or daily management**;
- **intervening** with management team members who report to the CEO or with other employees **except to ask questions**; otherwise, the Chair would adversely affect the credibility and authority of the company's executive officers;

- **giving any instructions** whatsoever to the CEO that do not express a board decision on a matter within its competence;
- except in the exceptional circumstances described above, not keeping the necessary distance between management and the board; failure to keep the appropriate distance would likely **reduce** or eliminate **management accountability**;
- **becoming** in practice and on a regular basis, the equivalent of the CEO's **immediate superior**;
- **accepting** significant **personal favours** that could affect the independent exercise of his judgment regarding management generally and the CEO specifically; and
- where the Chair disagrees with the majority of the directors, **inducing the CEO** to refrain from implementing the board's decision and to **follow the minority position** supported by the Chair.

It has frequently been noted that the regular **daily physical presence** of the Chair in the company's offices **increases the risk** of the Chair becoming involved in matters that do not concern him or the Chair failing to keep the necessary distance required to ensure the requisite "*checks and balances*".

## Assistance to the Chair

The company must provide the Chair with the proper **tools and sufficient material and human resources** to do his work. Otherwise, it would be difficult for the Chair to effectively fulfil his mandate.

Thus, the Chair should have access to the resources of the corporate **secretariat**. The **Corporate Secretary's mandate** should require him or her to **comply with the Chair's instructions** regarding board meetings. Moreover, the Corporate Secretary should comply with the **confidentiality** requirements that may occasionally be imposed by the Chair, by board committee chairs, by the board or by the committees themselves. Those confidentiality requirements may force the Corporate Secretary to refrain from disclosing certain information to management. Lastly, management should solicit and take into account the comments of the Chair and those of the board in **assessing** the performance of the Corporate Secretary.

## Expertise, qualities and skills of a Chair

The following statements are an attempt to portray an **ideal profile** of the expertise, qualities and skill set of a good Chair.

First, it is obvious that the Chair should not be a frustrated manager or power-hungry individual.

In addition to the evident qualities of **intelligence and leadership** and the talents required to **develop** or build **consensus**, a Chair should have the following attributes:

- **ability to exercise independent judgment** vis-à-vis management and his personal interests;
- ability to **understand the issues**, challenges, realities and problems involved in company **management**;
- be a good **judge of people**;
- be a good and understanding **listener** and be respectful of others;
- **ability to synthesize** and have a good sense of priorities and good judgment;
- ability to **build on people's talents and viewpoints**;
- ability to **communicate** at the highest levels;
- have a spotless reputation for **integrity**;
- be sufficiently **humble** to allow the spotlight to shine on the CEO rather than on the Chair;
- have **adequate knowledge of the economic sector** in which the company operates or be able to **absorb** that knowledge **quickly**;
- have the **ability** and courage to make **difficult decisions**, and
- have a career including **experience** in which such **abilities**, qualities, talents and skills have been successfully **demonstrated**.

It has been argued by some in the U.S. that it is impossible to find people with such a profile, thereby justifying the continuing combination of roles.

**Dissenting** votes and opinions should not be regular occurrences within the board because that indicates that the board does not function harmoniously or collegially and it is unable to achieve consensus. A true consensus builder can usually significantly reduce the incidence of dissent.

## Committee chairs

Some of the above comments concerning the Chair also apply in large measure to the chairs of board committees, pension committees and other kinds of committees, with the necessary adjustments.

## Conclusion

**Every company and every period in its development has specific characteristics and requirements. The context, the identity of the company's shareholders or members, as the case may be, the composition of the board, and the personalities of the Chair and of the CEO are some of the many factors that will affect the role of the Chair and the specific qualities that the Chair of a particular company should have.**

**However, the fundamental features and requirements should remain constant, regardless of the circumstances. This newsletter has attempted to explain and describe some of them.**

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### Other publications by the author on corporate governance and ethics

1. *In-house Counsel's Obligations under Certain Provisions of the Code of Ethics of Advocates*, July 2007
2. *When Should a Director Resign?* March 2007
3. *Directors of Quebec Non-profit Organizations ("NPOs")*, September 2006
4. *A recent Québec Court of Appeal Decision Involving Extra-contractual Liability of Directors*, May 2006
5. *The "Nominee" Director and Conflicting Loyalties*, May 2006
6. *Corporate Directors: Suggested Precautions*, November 2005
7. *Directors' Liability, Indemnification and Insurance Coverage*, November 2005
8. *The New Corporate Governance Rule and Guidelines*, July 2005
9. *Recent Developments respecting Corporate Governance and Directors' Liability*, March 2005

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