What precautions should a proposed director take prior to accepting to act as a corporate director? / What are the duties of a member of a board of directors?

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This *Need to Know Express* is part of a series of newsletters which each answers one or several questions in a practical and concrete way. These bulletins have been or will be published over the next few weeks. In addition, a consolidated version of all the *Need to Know Express* newsletters published on this topic will be available upon request.

These various newsletters, as well as others published on the subject of governance, are or will be available on our website (Lavery.ca/publications – André Laurin).

3. WHAT PRECAUTIONS SHOULD A PROPOSED DIRECTOR TAKE PRIOR TO ACCEPTING TO ACT AS A CORPORATE DIRECTOR?

A person who is invited or wishes to become a director should clearly make some prior verifications, including:

his interest for the organization and its objectives;
the requirements of the position as to time and efforts and his availability in that respect;
the actual possibility to make a significant contribution, therefore resulting in added value for the legal person;
the quality of incumbent directors, who will be his colleagues if he accepts to act as a director;
the receptivity of management respecting sound governance and the help provided by management to directors to enable them to discharge their duties and play their full role;
the quality of the existing corporate governance;
the financial health of the legal person;
the existence of actual or threatened significant proceedings against the legal person;
the compliance by the organization with laws and contracts;
the existence of adequate directors' and officers' liability insurance coverage;
the availability of an indemnification undertaking by the legal person in favour of the director;
the existence of recent director resignations and the reason thereof;
the proportionality of compensation relative to the liability risks (mainly in the case of reporting issuers).

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Preliminary discussions with the chief executive officer, the chairman of the board and some current and former directors may be helpful in obtaining adequate confirmations in respect of many of these items. However, these discussions should be completed by reviewing documents such as the financial statements, court records, minutes...).

A person who is an officer, director or employee of a corporation must also ensure that the new office as director is acceptable to the first corporation. The new office may in fact contravene a policy of the corporation, the contract between the individual and the corporation or the interest of the corporation.

The risks to reputation related to accepting to act as director with some legal persons are not to be neglected either. We have recently seen that the reputation of high quality persons who had accepted on a *pro bono* basis to act as directors of not-for-profit organizations suffered as a result. The media, politicians and even auditors general sometimes draw quick, ill-founded conclusions as to the proper discharge of their duties by directors.

4. WHAT ARE THE DUTIES OF A MEMBER OF A BOARD OF DIRECTORS?

Incorporating statutes, particularly the *Canada Business Corporations Act*[1] and the *Business Corporations Act*[2] (Quebec), as well as the *Civil Code of Québec*[3] all stipulate two general duties which directors are subject to, that is, the duty of care and the duty of loyalty. The Canada Business Corporations Act stipulates these duties as follows:

"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."

In addition to these general duties, a director is also subject to many statutory obligations or presumptions of liability or guilt under various statutes, particularly for unpaid salaries and remittance of deductions at source and GST/QST. It is important for directors to be aware of all the statutory obligations and presumptions and know how to recognize them, ensure that the legal person takes appropriate measures in this respect and that the board supervises such measures.

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1 Canada Business Corporations Act, R.S.C. 1985, c. C-44.

2 *Business Corporations Act*, C.Q.L.R., c. S-31.1 art. 119.

3 *Civil Code of Québec*, L.R.Q., c. C-1991, articles 321 and following.

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