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What are the Duties and Responsibilities of Corporate Directors during the COVID-19 Crisis?

April 27, 2020

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By all accounts, the coronavirus pandemic and the measures implemented by the government have created a particularly difficult and delicate situation for almost all organizations.

Despite this extraordinary situation, the general duties of directors (duty to comply with the law, duty of care and duty of loyalty or fiduciary duty) as required by the relevant laws of incorporation and by the *Civil Code of Québec* remain the same. However, in the current context, the directors of a legal person must greatly improve and intensify their thinking process and their actions, in order to ensure that they respect these duties and, in particular, to ensure that they act in the best interests of the legal person in question. According to the incorporation laws and the *Civil Code of Québec*, the board of directors is responsible for the management of the legal person or, as the case may be, for the supervision of the management performed by the persons to whom they have delegated their powers, namely the legal person's management team.

Duty of care

For directors of legal persons, respecting their duty of care involves, now more than ever:

- an understanding of the challenges and risks associated with the impact of COVID-19 on the legal person's business, clients, employees, suppliers, etc.;
- identifying the best management measures available, relying upon what they reasonably consider as being the best practices under the circumstances;
- attentively monitoring the implementation of the decisions made and making the appropriate adjustments as things evolve.

On this subject, please note that the business corporations acts specify that directors are considered to have complied with their duty of care if their decisions rely in good faith on the reports of a person

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whose profession lends credibility to his statements.

Duty of loyalty

As well as a duty of care, the law also imposes a duty of loyalty, also referred to as a fiduciary duty, on directors of legal persons, which, among other things, requires them to act in the best interests of the legal person. The Supreme Court of Canada provided interpretations of the duty of loyalty in its 2008 *BCE decision*[1] (many of these interpretations have been explicitly integrated into recent modifications to the *Canada Business Corporations Act*[2]):

> characterizing the interests of the legal person as being those of a responsible corporate citizen (or "good corporate citizen");
> highlighting that directors pursuant to this duty of loyalty may consider the interests of the stakeholders, such as shareholders, employees, retired persons, creditors, consumers, governments and the environment, who may be affected by their decisions;
> specifying, however, that if the interests of the various stakeholders cannot be reconciled with the best interests of the legal person, the long-term best interests of such legal person viewed as an ongoing concern must prevail.

In practice, in order to respect this duty, directors cannot disobey the law. They must also, in particular:

> ensure that the legal person takes necessary measures to respect the directives of public authorities;
> ensure that the legal person takes appropriate measures to protect the health of its employees, clients and suppliers;
> not tolerate practices that are generally detrimental to the legal person or that aim to fraudulently profit from the current crisis;
> prioritize measures that have the best chance of enabling a substantial part of the legal person's business to survive and restart the majority of its operations once the situation returns to normal[3].

We believe that in the current circumstances, it would be consistent with best practices for directors to consider the interests of stakeholders. This involves identifying those interests and evaluating them reasonably and fairly, as well as evaluating whether they can be reconciled with the legal person's best interests.

It is clear that the current situation does not easily allow for reconciling, at least in the short term, the interests of all of stakeholders with the interests the legal person, which must prevail. Maintaining the conditions and relationships that existed before the crisis will be, in most cases, difficult to reconcile with the long-term best interests of the legal person, as defined and interpreted by the law and the courts. Directors therefore must arbitrate between these interests in a reasonable way, prioritizing the interests of the legal person, even if it is difficult to do so.

This crisis, the government directives and their effects require leadership and creativity on the part of directors. As has been written by several observers, the current crisis will necessitate new approaches when the pandemic is over. In this endeavour, directors must be proactive and must help management find solutions to limit the negative effects of the crisis and plan on potential new ways for the carrying out of the legal person's operations in the coming years.

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1. *BCE Inc.* v. *1976 Debentureholders,* [2008] 3 S.C.R. 560, 2008 SCC 69.
2. See subsection 122 (1.1) of the *Canada Business Corporations Act*, RSC 1985, c C-44.
3. A very apropos article on the way directors can fulfill their duties of diligence and loyalty was posted on the Harvard Law School Forum on Corporate Governance on March 29, 2020: GREGORY, Holly J., GRAPSAS, Rebecca and HOLLAND, Claire, *Ten Considerations for Boards of Directors*, Cambridge, Harvard Law School Forum on Corporate Governance, online: https://corpgov.law.harvard.edu/2020/03/29/ten-considerations-for-boards-of-directors/.

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