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COVID-19: Seven things directors should consider in a crisis

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As the COVID-19 pandemic surges, corporations face unprecedented challenges. For boards of directors, whose missteps today could have severe legal repercussions down the road, the stakes have never been higher.

While the true impact of today's decisions likely won't play out for another 12 to 16 months, there are ways for Canadian directors to meet both their fiduciary duty (to act honestly, in good faith, with a view to the best interests of the corporation) and their duty of care (to exercise a level of care, diligence and skill that a reasonable person would exercise in comparable circumstances). To do so, will take a shift into crisis mode.

Your board's crisis conduct will likely differ from business as usual in a few significant ways. For instance, now is the time to increase communication between management and the board as much as is practical, which should facilitate more strategic business decisions. This is bound to result in a more hands-on approach on the part of the board, along with increased oversight of management responsibilities.

Key issues for directors

As you reframe this relationship in the months ahead, it is particularly important to focus on the following key issues, in tandem with your management team:

1. Crisis roles and responsibilities

The board has always assisted management by asking the right questions and pressure-testing management assumptions but, during a crisis, these responsibilities become more intense. To avoid blurring the lines between management and the board, directors should ensure that each stakeholder's role is clearly articulated and that evolving responsibilities are swiftly communicated.

2. Crisis monitoring

To stay on top of crisis-related risks, consider forming a central crisis-monitoring committee or multiple committees focused on different crisis-related issues, such as financial and cybersecurity risks. These committees should remain up-to-date on crisis-related issues (*e.g.*, by keeping track of releases from the World Health Organization and local health authorities), provide oversight, meet regularly with management and report to the board.

3. Meeting arrangements

In times of crisis, the board may need to replace its quarterly or biannual meeting schedule with a weekly or almost-weekly agenda. Consider scheduling meetings now for the next three or four months, while accommodating the current need to meet virtually rather than in person. Also be sure to properly document all information–particularly the decision-making process–to demonstrate the board has fulfilled its duty of care.

Additionally, while it can be beneficial to have legal counsel or other third-party experts present at such meetings, it is important to remember that these individuals serve an advisory role only. While the board can use this advice to inform decisions, it cannot abdicate its decision-making responsibilities.

4. Board/management communications protocols

To make sure the board has appropriate visibility into management's response to the crisis, communication between the board and management must be coordinated. In many cases, this will involve expanding channels of communication to include regular updates from various committees as well as other members of the senior management team, not just the CEO.

5. Internal/external communications strategies

Right now, clear communications with staff and management is paramount. The board should work with management to devise a strong strategic internal communications position so management can ultimately implement effective protocols and update employees without inciting panic.

From an external communications perspective, the board and management should determine, ahead of time, how much information the company wishes to share with the public–balancing the need for transparency with the risk of litigation. Keep in mind too that an inadequate external communications strategy can heighten reputational risk, which will inevitably impact the board.

6. Worker health and well-being

COVID-19 has forced many organizations to introduce more flexible and remote work options, in addition to heightened sanitation practices. Board members should remain up-to-date on the state of these practices and ensure management is addressing any additional risks as they arise–such as additional cybersecurity measures that may be required through remote work. As we move forward, directors should also ask questions to ensure management is taking steps to address employees' psychological well-being. If they do not, directors could be held personally liable.

7. Financial impact

Many organizations are going to suffer negative financial repercussions from this pandemic. For boards to fulfill their legal responsibilities, they must be able to prove that they discussed and continuously monitored:

- the financial situation of the company;
- potential changes to the organization's finances or investments;
- sources of available cash;
- the potential impacts on the supply chain and its operations; and
- strategies for continuing operations.

These activities should be addressed–and thoroughly documented–at all board meetings.

Weathering the storm

While boards will never be called to assume the role of management, the COVID-19 crisis has created a heightened need for increased communication and collaboration between the board and the management team. Right now, all key stakeholders must work together toward a single aligned goal: to make sure the company emerges from this experience as unscathed as possible. Things are changing fast and your mandate will likely keep shifting, but a committed focus should help directors meet their legal duties and ultimately avoid personal liability.

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