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## **DIRECTORS AND OFFICERS INSURANCE: KNOW YOUR COVERAGE AND YOUR OPTIONS**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

When people agree to serve as volunteers on charitable or not-for-profit boards of directors, potential liability issues are probably not forefront in their minds. Of course, this is understandable. If people were consumed with worry over potential legal liability issues, there would be many more vacant positions on charitable and not-for-profit boards across Canada. However, once a person volunteers to serve on a board and gets involved in the challenging issues and decisions that directors often face, potential liability for the decisions they make will become important. Directors and officers liability insurance (“D&O insurance”) is an important shield to protect directors, officers, and even other volunteers and employees, from potential personal legal liabilities.

### **B. COVERAGE CONSIDERATIONS**

Unlike some other common forms of insurance policies, such as automobile insurance, which are regulated by statute, D&O insurance is not standard, and coverage will vary substantially between insurers. Therefore, your insurance broker or consultant will play an important role in securing the D&O insurance policy which is right for you and your organization. Some important matters to discuss with your broker include:

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1. Insurance Limits

The basic level of D&O insurance starts at \$1million. Depending on the size and complexity of your organization, these insurance limits may need to be substantially increased to avoid being faced with a claim which may be only partially insured because of inadequate limits. Ideally, coverage for any legal or claim investigation fees should be separate from the liability limits. Otherwise, a substantial amount of your coverage could be consumed by legal fees if you are faced with a complicated claim that ends up in court.

2. Broad Definition of “Insured”

To enhance the protection for your organization, not only the directors and officers, but other persons involved in carrying out the organization’s activities should also be covered. These persons may include your volunteers, members, employees, as well as the organization itself.

3. Broad Claim Coverage

Some D&O policies only cover claims for “monetary damages” made in civil lawsuits. For many organizations, this limited claim coverage is inadequate. Superior D&O insurance will offer coverage for:

- demands or claims for monetary damages and non-monetary relief, whether or not a lawsuit is actually commenced;
- criminal, administrative or regulatory proceedings; and
- arbitration proceedings.

4. Employment Practices Liability Coverage

Many D&O insurance policies do not provide coverage for matters relating to legal claims made by an organization’s employees or former employees. Depending on the size of the organization, these types of claims are common and should be covered. A superior D&O insurance policy will provide coverage for claims relating to:

- wrongful dismissal, sexual or workplace harassment and discrimination (including human rights tribunal proceedings);
- employment related libel, slander or invasion of privacy; and
- the failure to provide or enforce adequate workplace or employment policies.

## 5. Territorial Scope of Coverage

Many D&O policies only cover claims made in Canada or the United States. For organizations with activities in other countries, that limited territorial scope of coverage will not be adequate. Therefore, you may need coverage on a worldwide basis, or at the very least in the countries that your organization is active.

## 6. Policy Exclusions

As with all insurance policies, D&O insurance policies will contain numerous exclusions from coverage. Be sure to read and understand what is excluded from your coverage. For example, most policies now exclude any claims relating to abuse or molestation, including allegations that the directors failed to prevent its occurrence. Sometimes it is possible to negotiate with the insurer to remove exclusions so as to improve your coverage. Again, this is a matter to review carefully with your broker.

## C. CONCLUSION

D&O insurance should form part of your and your organization's overall insurance protection. Almost all non-profit and charitable organizations require two or more kinds of separate insurance policies to cover the range of insurable risks faced by the organization, its directors, officers and others. In addition to D&O insurance, you will also typically require General Liability coverage, which is intended to insure different liability risks than D&O insurance, such as bodily injury and property damage claims.

Effective insurance protection for you and your organization is available, and it is worth the time and effort to familiarize yourself with coverage options. The time spent in securing proper insurance coverage will provide peace of mind and pay off in the event that you or your organization are ever faced with a claim or lawsuit.