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**ONTARIO BAR ASSOCIATION**  
**Charity and Not-for-Profit Law**

**Toronto – January 25, 2007**

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**General Insurance Issues for Charities and  
Not-for-Profit Organizations**

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**By Mervyn F. White, B.A., LL.B.**

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**1. INTRODUCTION**

- Charities and non-profits have risks associated with their activities much like any for profit business:
  - Leasing/property risks
  - Product liability
  - Operating retail enterprises
  - Operating motor vehicles
- Charities and non-profits also have some risks which are more unusual:
  - Counseling services
  - Aid operations in dangerous environments
  - Working with youth and vulnerable persons

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- Proper management of assets requires protecting against risks and limiting financial expense:
  - Pro-active approach to reducing risks in operations – use of proper policies etc.
  - Indemnities
  - Insurance
- Attracting and keeping directors, volunteers is always a challenge – offering meaningful indemnities and insurance provides comfort to them and attracts better quality candidates

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**2. WHAT IS INSURANCE**

- Insurance is a mechanism designed to spread the risk of random loss amongst a group of potential claimants
- Insurance law is first and foremost contract law
- All the regular rules of contract law apply to insurance contracts, such as the principle of contra proferentem in interpreting policies; the requirement of offer, acceptance and consideration to have a valid policy; buyer-beware, etc.

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- However, courts have exercised a significant deal of control historically over contracts of insurance – more so than in normal commercial transactions
- Public policy considerations play heavily in insurance law
- e.g. the fortuity principle (i.e. ordinary fortuitous losses are not covered by an insurance policy) is designed to ensure that wrongdoers can't profit from their wrong, or escape punishment

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- However, because insurance contracts provide for the spreading of random loss certain specific rules have developed through the courts and legislation:
  - Utmost good faith:
    - The normal rule of “buyer-beware” is suspended – the courts have held that parties to an insurance contract do not deal at arm’s length and the insured must disclose all relevant aspects of the anticipated risk to be insured while the insurer must not take advantage of an insured’s innocent non-disclosure to deny coverage

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- This duty to disclose applies regardless of whether specific questions or requests are made by the insurer for such information
- It is equally irrelevant whether the non-disclosure by the insured arises through inadvertence
- Information disclosure must be full and complete; misrepresentation or failure to disclose may vitiate the contract
- An insurer is not allowed at the claims stage to take advantage of the vulnerability of the insured

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- Fortuity:
- Insurance can not cover (unless the contract speaks specifically to such coverage) a loss that is certain to happen – *British and Foreign Marine Insurance Co. v. Gaint* [1921] 2 A.C. 41 (H.L)
  - This principle stops claims for intentional wrongs – criminal activity for example
  - Insurance may not provide coverage for actions by public authorities for breach of trust, improper investments, or violations of the *Anti-terrorism Act* (Canada), Bill C-45 amendments to the *Criminal Code* (Westray Mines) or other similar strict liability legislation

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- Indemnity:
- Other than life insurance, most insurance covers actual loss suffered by the insured and, as such, is indemnity insurance
  - Insurance does not contemplate a profit being made – if it did, then people may be encouraged to suffer losses purposely
  - To ensure that no profit is made, an insured can't claim insurance process and keep a judgment or settlement covering the same loss
  - When a claim is made, the claimant must prove that the occurrence happened, that loss has been sustained, and the quantum of the loss sustained

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**3. FACTORS IN DIFFERENT TYPES OF INSURANCE**

- Because insurance law is simply a type of contract law there are few limits on what parties may decide to contract to insure
- Counsel should be aware that legislation governs aspects of the relationship – *Insurance Act* (Ontario) for example
- Most property insurance policies are multi-peril policies involving claims by the insured against their own policies
- Liability insurance policies, such as commercial general liability policies, errors and omissions policies or employment practices insurance, involve covering claims by third parties against the insured

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- Property insurance policy claims usually relate to a first party claim – the party has suffered a loss which is covered
- Liability insurance policy claims are usually made by third parties injured by the insured – e.g. a person who is injured in a retail store claims against the owner’s policy – in such cases, the insured requires the insurer to defend, or cover legal costs of defence, under the insurer’s duty to defend, and indemnify or cover the loss itself, under the insurer’s duty to indemnify

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- Non-exhaustive list of types of insurance that might be of value to a charity or non-profit:
  - Directors’ and officers’ insurance
  - Errors and omissions insurance
  - Employment practices insurance
  - Property insurance
  - Life insurance
  - Best man or key man insurance
  - Disability insurance
  - Commercial general liability insurance

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**4. REVIEWING INSURANCE POLICIES**

- If asked by a charitable or non-profit client to review insurance coverage, counsel should consider the following options:
  - Review the insurance and provide an opinion
  - Have the broker provide written confirmation of coverage, including exclusions
  - Have the client retain the services of an insurance consultant to provide a specialized opinion

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- Counsel should be wary of offering up their own insurance to cover losses – if not comfortable giving advice on insurance issues then don't
- If counsel is intent upon reviewing insurance coverage, then the following is a non-exhaustive list of steps:
  - Firstly, determine the risks that the charity or non-profit assumes, or has assumed in the past through its operations (a "risk audit"):
    - What does it do

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- With whom – e.g. children, vulnerable persons; general public; other non-profits etc...
- When does it do it/has done it in the past
- Where does it do it – territory of risk
- Requires full and accurate disclosure of risks to perform a proper risk audit and review of insurance coverage
- This is often very challenging, clients don't want to pay for the risk audit as it can be very time consuming and expensive
- However, it is vital if you are going to give a fulsome and meaningful opinion on insurance coverage

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– If the client will not pay for a proper risk audit, then counsel should question giving an opinion at all

– Secondly, obtain copies of all policies, both past and present, and ensure that the whole policy including exclusions etc is provided for review – don't just accept the coverage page

- It is impossible to provide a meaningful opinion of coverage without learning the exclusions contained in the policies
- Obtain a direction from the charity allowing you to obtain all relevant policies from the insurer

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- In any opinion, make sure that you caveat your opinion in the documents actually provided

– Thirdly, determine what corporate indemnities are available (if dealing with directors' and officers' insurance)

– Fourthly, obtain written confirmation from the broker (if one has been involved) of coverage – this may provide an additional source of coverage if negligence occurs through the broker's failure to properly insure the client

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– Ask agent/insurance company to respond in writing to the following:

- What risks are covered?
- Who is covered under the policy?
- What is the amount of the coverage?
- What risks are not covered under the policy?
- What additional insurance should be obtained by the charity?

– Fifthly, have the client plug any gaps in coverage if possible through the purchase of insurance

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**5. OCCURRENCE POLICIES VS. CLAIMS-MADE POLICIES**

- Occurrence based policies are insurance policies which cover and are triggered by occurrences that are identified and defended in the insurance policy as a loss
  - Coverage may be provided even if the loss is not discovered until years later
  - Property insurance policies are usually occurrence based policies

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- Claims-made policies are insurance policies which only provide insurance coverage during a specific period – the claim must be made in that covered period for coverage to be provided
- It goes without saying that an occurrence based policy is better than a claims-made policy as it provides a larger period of coverage
  - Most liability policies, such as directors’ and officers’ liability insurance policies are claims-made policies

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**6. JURISDICTIONAL ISSUES**

- Many charities and non-profits carry out activities in multiple jurisdictions, both provincially in Canada as well as in other countries
- To determine which jurisdiction is applicable to coverage issues, when a cross-border dispute over coverage arises, one should look to the policy itself, as this issue may be addressed in the policy, as well as case law and legislation

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- For example, s. 123 of *Ontario Insurance Act* outlines the criteria to be applied to determine whether a contract of insurance will be deemed to have been made in Ontario and interpreted in accordance with the laws of Ontario
- Obviously, other jurisdictions have equivalent laws which leads to disputes - if this occurs, then the common law provides that the policy is to be read as a whole and the law with the closest and most substantial connection to the policy is to be applied

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**7. INTERPRETING POLICIES OF INSURANCE**

- In interpreting a policy of insurance, the courts will provide a broad and purposeful interpretation to the policy, while narrowly interpreting the exclusions in the policy
- In any claims situation, the onus rests on the insured to prove the claim and coverage; thereafter the onus shifts onto the insurer to prove that any exclusion is applicable; and if this is proven, then the onus shifts back to the insured
- Generally, insurance contract interpretation involved the court giving effect to the intention of the parties to the policy

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- Generally, in interpreting an insurance contract, courts have held that plain and ordinary meanings should be applied; however, the contract must be construed in keeping with the general principle that only fortuitous events can be covered
- Where there is ambiguity in wording, the court will give a meaning that favors the insured – this will be done in one of two ways, either through the application of the principle of *contra proferentem* or by determining the “reasonable” expectation of the parties

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**8. A SPECIFIC REVIEW OF DIRECTORS' AND OFFICERS' INSURANCE**

**Why have it?**

- Corporations, including charities and non-profits carry out their activities through the conduct of directors, officers, employees and volunteers
- Directors are responsible for the overall management, while officers are responsible for the day to day activities

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- There are a large number of common law actions that can be brought against directors and officers including claims of misrepresentation, breach of fiduciary duty, negligence, conspiracy, interference with contractual and economic relations
- There are also a large number of situations of imposed duties on officers and directors, and which may expose them to personal liability, such as for unpaid wages, un-remitted taxes

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- Charities and non-profits face the challenge of attracting qualified directors and officers; reducing possible personal liability against directors and officers makes this easier – can be done through corporate indemnification or insurance
- Statutory basis for directors' and officers' insurance as well as corporate indemnities
- Federal and Ontario corporate statutes now permit corporate indemnity and directors' and officers' insurance

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• **But in Ontario, charities must first consider the following in order to purchase directors' and officers' insurance:**

- What is the degree of risk?
- Are there alternatives to insurance?
- What is the cost of insurance in relation to the risk?
- What is the cost of insurance in relation to revenue?
- Does either indemnity or insurance further the management of charitable property?

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**The Nature of Directors' and Officers' Insurance**

- **Directors' and officers' insurance supplements, but does not replace, corporate indemnities**
- **Directors' and officers' liability insurance normally provides for a limited amount of coverage, for a limited number of losses, and subject to very specific exclusions**
- **Directors' and officers' liability insurance policies vary in wording and coverage from insurer to insurer**

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• **Having said this, there are certain things that can generally be taken for granted:**

- **Directors' and officers' liability insurance will not cover the wrongful act of a corporation**
- **Directors' and officers' liability insurance usually provides two types of coverage:**
  - **Indemnification for damages that directors and officers are obligated to pay as a result of their conduct and that are not first paid for by the corporation through indemnifications**
  - **Indemnification of the corporation, where the corporation has paid for the directors and officers wrongful act**

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- Coverage for a corporation’s wrongful act will only be provided if the policy contains “entity coverage”
- Directors’ and officers’ insurance policies are normally claims-made policies, and only apply to claims that are made during the policy period and reported during that same period or any reporting period provided for in the policy
- The corporation is usually the “named insured”, but in the definitions section of the policy, the corporation is identified as including the directors and officers as “insured persons”

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- Unless the policy states otherwise, it does not normally cover employees, agents or volunteers of the corporation, unless they are also directors or officers
- However, for charities and non-profit corporations, the definition of “insured person” is often wide enough to cover agents and volunteers
- Usually such policies provide that an insured person also includes that person’s spouse, estate, heirs or assigns

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- Such policies usually provide that the insured person must be legally obliged to pay a loss, before the insurer is required to indemnify the loss if there is not corporation indemnification available – if there is, then the corporation will in turn be indemnified for what it is required to pay
- Issues often arise about the types of losses that may constitute a legal obligation to pay that would in turn trigger coverage – negligence for example, or other tort losses are usually covered; breaches of contract are far more likely to not be covered

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- Potential liability is not good enough to trigger the duty to indemnify; actually liability, either by way of a judgment or a settlement (acceptable to the insurer) is required
- The loss that is covered, usually includes the damages sustained, any settlement of the claim, or legal costs
- Punitive or aggravated damages are normally not covered
- Punitive damages may not even be insurable due to public policy considerations (which is consistent with legislative provisions providing for indemnity of directors and officers, but which preclude indemnity for conduct that is not honest, undertaken in good faith or undertaken in the best interests of the corporation)

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- Punitive damages represent the court's and solicitor's outrage at conduct which is reprehensive and deserving of punishment – such conduct could not be indemnified at statute, and would not be insurable at common law as being against public policy
- Always review the terms of the policy to see what is and isn't covered as a loss; for example, loss usually is defined as not covering taxes, fines and penalties, injunctive or non-monetary relief such as declarations
- What is covered as conduct insured in a directors' and officers' liability insurance policy is usually identified in the definition of "wrongful act"

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- Usually the definition of "wrongful act" covers or refers specifically to "actual or alleged" wrongful acts; "alleged acts" have been held by courts to extend coverage over settlements, even where there hasn't been a finding of liability against a director or officer
- "Wrongful acts" are usually defined as covering any actual or alleged, errors, misstatements, misleading statements, acts, omissions, neglect, negligent acts or breaches of duty made in the director's or officer's insured capacity
- Coverage is contingent upon the wrongful act being undertaken by the director or officer in his or her official capacity and as such even covers intention acts

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- **Wrongful acts are also usually defined to cover any other matter claimed against a director or officer solely as a result of his or her status as a director or officer – this provides very broad coverage for the director or officer**
- **Directors’ and officers’ liability insurance policies are claims-made policies – meaning that three things may trigger coverage, namely: the date the claim is made; the date the wrongful act occurred; and the date the claim is reported to the insurer**

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- **The directors’ and officers’ liability insurance policy must be carefully reviewed to see what date triggers coverage; coverage may require one, two or all three of the triggers to occur or be met**
- **A true “claims made” policy is triggered by the making of the claim during the coverage period, regardless of when the wrongful act is alleged to have occurred**

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- **In some situations, a policy may contain a “Retroactive Date”, which identifies the earliest possible date for a wrongful act to be committed that will be covered:**
  - **Retroactive dates are identified on the Declaration Page of the policy, and if often identified as the date upon which the policy was issued**
  - **The policy will then go on to identify that coverage will only be provided for wrongful acts that occur after the retroactive date**
- **Obviously the Retroactive Date can lead to coverage gaps; to address this the insured can either provide appropriate indemnifications or consider purchasing “tail” coverage from one insurer and “nose” coverage from another**

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– “Tail” coverage provides coverage where a report of a possible circumstance that might give rise to a claim is made, and any subsequent claims relating to the reported circumstances is covered, as being deemed to have occurred at the time of the report

– Alternatively “extended reporting period” coverage can be purchased to cover a period after termination of a policy, which usually permits the insured to report claims under the terminated policy for a limited period of time

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– “Nose” coverage is purchased from another insurer which does not have a retroactive date, or which provides for limited prior acts coverage by extending the retroactive date back beyond the date of the policy issued by the first insurer

– What occurs is significant blanket coverage, but such coverage is quite expensive and may not be available

• What constitutes a “claim” triggering an obligation to report for example, is a demand for compensation or other form of redress or reparation by a third party which has been communicated to the insured

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• Most claims-made policies place a strict duty upon insureds to report the claim within a limited time

• Most directors’ and officers’ liability insurance policies also permit, but do not require, the reporting of circumstances that might give rise to a claim; where such reporting is provided for if a claim is subsequently advanced, the date of reporting will be used as the date to determine the date of reporting of the claim; this can affect coverage

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- **Directors and officers should be aware of this clause if it is available and exploit it, to ensure that there is coverage available, especially if the policy is due to come to an end, either through termination for non-renewal or cancellation**
- **In corporations it is usually common to see “polling” or requests circulated to ensure that directors and officers report all circumstances that might give rise to a claim prior to termination of insurance, or where the board is planning on resigning or being changed through elections**

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- **Directors’ and officers’ liability insurance often provides that there is no duty on the insurer to defend a claim; but is instead required to indemnify legal defense costs incurred**
- **This differs from commercial general liability policies which usually impose a duty to defend an insurer**
- **Some policies provide that defense costs will be advanced prior to resolution; some do not – check the wording of the policy**

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- **Directors’ and officers’ liability policy exclusions generally include:**
  - **Exclusions arising from competing or alternative insurance being available**
  - **Dishonest acts**
  - **Claims by insureds against directors and officers**
- **Dishonest or fraudulent acts are excluded based on public policy considerations, in that the director or officer should not benefit from his or her wrong doing**
- **The third category of exclusions involved situations of “insured vs. insured”; for example, where an insured company wants to sue an insured director or directors sue each other**

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