MANAGING LIABILITY RISKS FOR CORPORATE DIRECTORS AND OFFICERS

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Fundamentally, corporate directors and officers have a legal duty to act as stewards of a corporation and supervise its management. This responsibility is especially critical for executives who make large project-related decisions.

As Canadian competitiveness evolves, construction companies must innovate to remain relevant. It is known, however, that with trial comes error. Particularly today, when Canadians have become more indebted than ever before, and when certain commodities are trading at historical lows, the scope and scale of a construction project can change in an instant, and the directors and officers of these companies must be prepared to make the most difficult of management decisions.

These decisions are what ultimately drive the business and determine its profitability. But at times, some decisions result in unforeseen consequences that can negatively impact the company's financial performance and security. In some cases, the very individuals who make these decisions, and their personal assets, are at risk.

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Emerging risks: Be aware...and prepare

It is critical for construction executives to be fully aware of the risks they face daily, the impact these risks can have on the business and its stakeholders, and to proactively engage management on its risk management programs and insurance policies.

Companies can sometimes find themselves in the eye of a perfect storm between the rising accountability that their executives face, and the increasing incidence of debilitating management issues, such as corporate insolvency, environmental contaminations and cyber security breaches.

There also exists an array of less-obvious management risks:

- A customer may allege breach of contract, failure to deliver services, or misrepresentation;
- A competitor may allege unfair trade practices, interfering with a contractual relationship, antitrust violations or intellectual property infringement; and/or
- A fellow director, minority shareholder or debt holder may claim breach of fiduciary duty, mismanagement or acting against the best interest of the company.

Events like these can quickly expose the limits of their existing Directors' and Officers' (D&O) Liability insurance coverage. Unfortunately, there are still many executives who fail to see the value in this kind of policy, and rely solely on the balance sheet to finance all forms of loss. On the other hand, some buyers believe that a modest policy limit with "all the frills" is enough, but that isn't always the case.

Historically, the traditional D&O policy was written to insure both the entity and the directors and officers who serve it. The problem is that this coverage is, in effect, shared by all insured parties. Statistically, claims brought against the entity are more common, more complex and more costly to defend than those brought against individual directors and officers. In fact, certain types of claims can erode an entire policy limit, leaving directors' and officers' personal wealth exposed to loss.

Enabling confidence with the *right* coverage

To address these limitations, many insurers have invested in a specialized product to complement traditional D&O coverage. The Side A Differences-in-Conditions (DIC) insurance policy is designed to bridge the gap between unavailable corporate indemnification, an unresponsive or exhausted underlying D&O policy, and the directors' and officers' personal assets.

In *Baker v. Ministry of the Environment*, a recent and highly publicized Canadian environmental case, the Court ruled that a group of directors must personally contribute to the costs associated with cleaning up contaminated land. While the company did, in fact, have an in-force D&O policy, it expressly excluded coverage for claims related to environmental incidents—and since the company itself had become insolvent, it could not actually afford the remediation costs ordered by the Court.

The insurance value of the Side A DIC policy is threefold: 1) Its limits can never be accessed by the entity, but are dedicated to the very directors and officers who serve it; 2) It provides an excess layer of D&O coverage; and 3) Its "DIC" feature can trigger a last line of defence for when executives need it most. The *real* value, however, lies in this policy's ability to attract and retain highly qualified corporate executives and board members. These professionals put their own wealth at risk with every decision they make, so investing in a product dedicated specifically to the decision makers should bolster the sense of trust and commitment that enable success.

Competitive coverage in a crowded market

While the Side A DIC policy is nothing new to the D&O market, there has been significant investment in this product type by a number of major Canadian specialty insurers. Ironclad™ by RSA, for example, offers market-leading coverage for businesses of any size. Featuring a minimum of two reinstatements of the limit of liability, coverage for environmental clean-up costs, flexible claims reporting provisions and only one exclusion, directors and officers may rest assured if their worst case scenario becomes a reality.

As corporate governance continues to evolve, create and complicate risks to companies of all sizes, policies must be able to adapt to the changing marketplace conditions. At the end of the day, every company should support its top talent by investing in the *right* product, and not just *more* of the same product that it has purchased for years.

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