

Directing the Director

Before accepting a position as a director on any board, a lawyer should realize the responsibilities and risks associated with a director's role.

Many lawyers who sit as directors assume that their professional errors and omission policy will cover them if they are sued in their capacity as a director. This is an incorrect assumption. Our errors and omission policy can be viewed on the LIANS website at www.lians.ca. Coverage is for professional errors and omissions which occur when rendering professional services to others. Professional services are defined on page 4 of the policy.

An insured acting in the capacity of director or officer of any enterprise other than LIANS or the Law Society is excluded from coverage pursuant to paragraph 3.9, Part III of the policy. Therefore a critical inquiry by a prospective director should be whether the organization carries Directors' and Officers' Liability Insurance and, if it does, what the scope of the coverage is.

The scope of Directors' and Officers' Liability Insurance coverage can be quite narrow. As well, for a claim to fall within D&O policy coverage, it typically must be made against the director during the policy and reported to the insurer prior to the expiration of the policy. If there is no D&O coverage ask whether you want to expose yourself to the potential loss of personal assets.

While Nova Scotia has enacted the *Volunteer Protection Act* S.N.S. 2002 c. 14, I caution members not to rely solely on this legislation for protection.

Section 2(h) of the *Act* states that volunteers may include a director, officer, trustee, or employee of the company. Use of the word "may" in this context suggests that society directors, officers, and employees **may not** always qualify as volunteers. As well, this legislation does not override Federal Legislation relating to any liability directors may have for remittances due under Federal Tax Legislation.

While "due diligence" is a defence to these types of obligations, the burden of proof is on the director to prove due diligence on a balance of probabilities. What constitutes diligence will depend on the factors and circumstances of the particular case including the particular skills of the director.

To help establish due diligence:

- Keep careful notes of meetings to show you that you have made adequate inquiries
- Understand your own, and the organizations's legal obligations
- Have an on-going knowledge of the state of the organization's finances, tax liabilities, and systems
- Ask at each meeting and insist that it is documented in minutes that all necessary remittances have been made and regulatory requirements are being met

In Chapter 13 of the *Directors Duties in Canada 2nd Edition*, 2002, Margot Priest and Hartley R. Nathan, Q.C., discuss what questions to ask before becoming a director and while serving as one to limit potential liability. I have summarized these recommendations in more detail on the **LIANS website — Loss Prevention Resources**. Access the website for more information on this topic.



Deborah E. Gillis, Q.C., is the Risk and Practice Management Advisor for LIANS. She may be reached at 423-1300 ext. 345 or at dgillis@lians.ca