



FOSTER PARK
BROKERS INC.

Board Leadership Fundamentals 2017 Conference

Board and Organizational Insurance

March 4, 2017

Who is Foster Park Brokers?

- Largest independent insurance broker in Western Canada
- Established in 1979
- Four offices with 110 staff
- Does business with every major insurer
- Big supporter of local community initiatives



Who is Kathy Anders

- In the insurance industry since Elvis Presley was alive
- Life long Edmontonian
- Has a true passion for the not for profit sector
- Active volunteer
- Current & past board member for not for profit organizations



AGENDA

- Property & Liability Coverage
- Directors & Officers Liability
 - Good Governance
- D & O Claim examples
- Protect Against Fraud
- Cyber Liability

Who needs insurance?

- Every business
- No matter the size, the exposure to be sued is always present
- The claim could be frivolous but expense costs tend to be significant

Types of Insurance

- Auto
- Property
 - Building
 - Contents
- Liability
- Business Interruption
- Directors & Officers
- Errors & Omissions

Auto

- Standard SPF #1 auto wording
- Limited coverage for rented vehicles under this policy

Property

- Building – It's important that you insure to replacement value; co-insurance applies.
- Contents – insure to full replacement cost; co-insurance applies

Business Interruption

- Various types of business interruption coverage are available
- Coverage for lost profit is available depending on the type of operation
- Extra expense coverage is highly recommended

Liability

- Commercial general liability insurance (CGL) protects your business from lawsuits involving bodily injuries that occur within your workplace and injuries or damages caused by your employees elsewhere
- Personal injury liability (Libel or Slander)
- Medical payments (Voluntary)
- Tenant's legal liability (if you rent or lease your workspace)

Liability

- Coverage is worldwide but lawsuits must be brought within Canada
- Normally written on an “occurrence” basis
- Commercial Umbrella liability provides additional limit over top of the CGL and any auto policies scheduled on the policy
- Most common liability claims are slip & falls
- Defense costs are often more expensive than the actual claim payout

Errors and Omissions

- Limited professional liability coverage can be extended from the CGL depending on the exposure
- Professional Services often require separate errors & omissions coverage
- Normally written on a “claims made” basis
- Coverage trigger must be a financial loss. Bodily injury or property damage is covered under the CGL
- The policy form often depends on the type of professional service being offered

Abuse Coverage

- Organizations that work with the vulnerable sector are at high risk of allegations and claims of many types of abuse
- It's vital that you have the necessary coverage in place to protect the organization and employees against these claims
- Specialized insurance programs are available to address this type of exposure
- Prevention is always the best defense. A comprehensive risk management program is an important first step in defense

Directors & Officers Liability

- It assumes the indemnity obligation of the entity
- It covers the personal liabilities of the D&O's
- It protects the organizations assets
- It protects investors or stakeholders assets
- It pays defense costs even in a frivolous suit
- Provides access to expertise in a claim
- It's required to attract capable board members

D & O Definitions

- Corporation – separate legal entity; limited liability
- Directors – elected or appointed by the shareholders to oversee the business
- Officers – appointed by the board to manage the business of the entity

What is a Director?

- An individual who is a member of the board of an organization which manages the affairs of the organization
- Responsible for managing, supervising and overseeing the operation of the organization on behalf of its members. Role is no different than for-profit corporations
- Minimum of three (3) Directors for a Corporation

Legal Duty #1: Diligence

- Required to think things through diligently & carefully
- Standard of care: expected to exercise the same level of care that a reasonable person would with same abilities, skills and experience
- To act cautiously and try to anticipate the consequences of their actions and potential risks to the organization
- To be well-informed about activities and finances

Legal Duty #2: Loyalty

Required to put interests of the organization:

- Ahead of your own
- Ahead of another organization (This applies to Directors who are involved in more than one organization)

Legal Duty #3: Obedience

- Nearly all non-profits are autonomous organizations that have the power to write rules, make decisions and take actions that affect their members and participants
- Legally you have a contractual relationship based on governing documents: corporate objects (your legal purpose as described to the government), bylaws and policies
- Directors have a duty to comply with governing documents and to ensure staff and committees do as well. Part of your responsibility is to make sure these documents remain current and accurate

Additional Duties of D&O's

- **Failure to act as stated under a statute.**
For example, if a statute requires directors to file a report or maintain certain records, and these reports or records are not maintained, the director may be liable for an offence under that statute
- **Non-compliance of the organization with a statute**
For example, directors may be liable for financial losses, wrongful dismissal, employee discrimination or failure to remediate environmental damage. Be aware that directors can be held personally liable and that:
 - Ignorance is not a defence
 - Resignation is not necessarily a defence
 - Company indemnity may not be enough

Disclosure of Interests

- Every director must declare any indirect or direct interest in a proposed contract at a meeting of directors
- Disclosure must be immediate and in writing
- If disclosed and the Director has not voted on the issue, that Director is not accountable to the organization or its members for any profit realized nor is the contract voidable
- It is recommended that when in conflict, the Director recuses themselves from any discussion involving the issue

IN LAY PERSON'S TERMS ...

“A Board member agrees to undertake the legal and moral responsibility to perform their role as a Director at all times in the best interests of the organization and to do so free from any conflict of interest or prospect of personal gain”

Protecting Yourself as a Director

- Understand the mission of the organization
- Commit to doing the job well
- Know your legal duties
- Ensure the board can govern effectively and provide competent direction
- Confirm the organization indemnifies its directors and carries directors liability insurance
- Disclose any real or perceived conflict of interests and ensure it is recorded in the meeting minutes
- Come prepared for every meeting and actively participate

REALITY CHECK

The law will not treat you any different than a multi-national for profit corporation because you **'didn't know'** or you are a **'volunteer-based'** organization.

But Remember...

The law does not expect perfection, it only expects reasonableness

Governance Starts with the Board....

- Boards may be advisory, administrative-governing or policy-governing
- Boards may be small or large
- Boards may be representative or independent
- Boards may be elected or appointed
- Boards may consist of 'everyman' or 'experts'

'GOOD' GOVERNANCE

- **Vision** – identifying your destination
- **Planning** – setting goals and providing a pathway to get there
- **Resources** – securing the resources required to reach destination
- **Monitoring** – checking that progress is being made towards destination
- **Accountability** – using resources responsibly and reporting progress to your stakeholders (members, funders, partners)

KEY LESSONS

1. THE BOARD GOVERNS – DIRECTORS DO NOT
2. GOVERNANCE IS NOT MANAGEMENT
3. CREATING POLICY IS THE PRIMARY ROLE AND FUNCTION OF A BOARD

D & O Claims

Employment Related Claims

“I don’t need coverage for wrongful dismissal. My staff are all long term, loyal employees that would never sue us. We’ve never had problems like this in the past”

Common employment related claims

- Wrongful dismissal/termination of employment
- Employment related misrepresentation
- Sexual or workplace harassment
- Discrimination
- Employment related libel or slander
- Wrongful failure to employ or promote

Wrongful Dismissal Claim

A senior executive's employment was terminated after accusations of sexual misconduct and harassment from several employees. The executive sued the organization for wrongful termination and the D&O's for alleged contractual interference. The executive won the trial, the insurer won the appeal. Although no damages were paid to the executive, the defense costs were approx. \$250,000.

Breach of Duty, Abuse of Process

The board of a professional association revoked an individual's membership due to allegations of unethical conduct. The member sued the board alleging they had targeted her and not adhered to the organization's by-laws. The by-laws were found to be ambiguous which made it difficult to defend the action. A settlement was negotiated to save the reputation of the association. The insurer paid the settlement plus the \$100,000 in defense costs.

Wrongful Dismissal & Defamation

- A 15 year employee was terminated after a corporate reorganization. The employee sued for alleged wrongful dismissal. She also alleged she had been defamed by a written communication that found its way into the hands of individuals outside of the board. A settlement was eventually negotiated. Insurer paid the settlement plus the \$50,000 defense cost.

Breach of Trust

- In order to hold a fundraiser, a not for profit received a loan or “float” from another organization with the understanding it was to be repaid from the proceeds of the event. Unfortunately the funds were inadvertently deposited into the insured’s general funds and used to pay general expenses. The organization subsequently filed for bankruptcy and was unable to repay the “float”. The lawsuit filed against the organization and the directors included negligence for failing to properly supervise the employee and breach of trust. The insurer paid the \$75,000 negotiated settlement plus \$30,000 in defense costs.

Breach of By-Laws (Service Club)

The volunteer board of a small service club voted unanimously to expel a member after several incidents of disruptive behaviour after the member had consumed several alcoholic beverages. On one occasion, the member was verbally and physically abusive towards another member. Upon news of the expulsion, the member sued the club alleging they had breached their by-laws. The claim was eventually dismissed but the investigation and defense costs exceeded \$15,000.

What is Fraud?

- Wrongful or criminal deception intended to result in financial or personal gain; intended to deceive others
- Theft by lying or cheating
- Using acts of forgery and false documents
- Engaging in deceptive behaviour
- Manipulating information

Who Would Steal from a Non-Profit?

- CEO or other Managers (30 %)
- Board Members, CFO or Financial Staff (28%)
- Hired Fundraiser (28%)
- Other Employees/Volunteers

Why would they Steal from a Non-Profit?

- They're not really stealing because they intend to pay it back
- They're going to return it; no one would notice it's missing anyways
- They earned it because they are not appreciated
- They are not being paid what they deserve

What to Watch For

- GONE Theory
 - Greed
 - Opportunity
 - Need
 - Expectation

Red Flag Indicators

- Reluctance to take vacations
- Control issues and a general unwillingness to share duties
- Living beyond one's means
- Irritability or defensiveness
- Inability to keep up with regular work responsibilities

Risk Management Techniques

- Get to Know Your Employees
- Insist vacation time is used
- Form an effective and empowered audit committee
- Establish and enforce a system of effective internal controls
- Establish a strong culture
- Provide a clear process for reporting suspicious behavior
- Develop a response plan in case deterrence fails
- Confront the issue openly and directly

Cyber Fraud

- Social Engineering is the act of taking advantage of human behaviour to commit a crime
- Phishing is attempting to acquire information such as usernames, passwords, credit card numbers and other sensitive information by pretending to be a trusted entity in an electronic communication, such as email

Cyber Fraud

- Pagejacking and pharming occur when a computer user clicks on a link that brings him or her to an unexpected website. Pharming is the name for a hacker's attack intended to redirect a website's traffic to a fake site
- Vishing is similar to phishing and pharming, except victims of vishing attacks are solicited via telephone or another form of telecommunications

Risk Management Approach

- Develop Strategies to Prevent a Data Breach
 - Decrypted devices
 - Educate employees about phishing and pharming scams
 - Analyze your cyber risks from three different perspectives:
 - Technology
 - People
 - Processes

Protect Your Data—and Your Business

- Your cyber risk management program should include cyber liability insurance coverage that fits the needs of your business
- Be aware of the reporting requirements in the event of a breach
 - (PIPEDA – The Personal Information Protection and Electronic Documents Act came in force May 1, 2010)

Costs & Exposures

- 70% of breaches are not detected by the company but by TP's that experience the breach
- 90% of breaches are due to failure of a "People Process"
- 70% are unsecured connected devices

First Party Cost of a breach

- Public notification can cost between \$1-3/ record
- Interaction with the authorities
- Changes to the internal process
- Hiring a call centre and website(\$5,000-20,000)
- Credit, identity monitoring (\$10-30/individual)
- Public relations
- Restore/recreate the lost or damaged data
- The loss of revenue
- Cost of informant rewards
- Loss of reputation

Claims Examples

- Home Depot (2014)
 - Malicious software allowed theft of 56 million credit card numbers
 - Class action in US and Canada
 - Estimated cost into billions
 - \$100M insurance coverage (\$7.5M deductible)
- Target (2014)
 - Hackers stole 40 million credit card numbers
 - Derivative lawsuits, class actions by banks
 - \$148M investigation, monitoring, legal, call centre
 - \$200M cost of reissuing cards
 - \$100M upgrade payment terminals
 - 46% drop in profits
 - \$38M recovered from insurance
 - CEO resigns

Claims Examples

- Theft by employee (Evans v B of NS 2014)
 - Bank employee gave information of 643 customers to his girlfriend who sold it to a TP in an identity theft scam
 - 140 customers were victims
 - Bank compensated the customers for losses, offered credit monitoring and identity theft protection
 - This is the first case in Canada to be certified as a class action based on the tort of intrusion. The bank was held vicariously liable
- Loss of Personal Information (2013)
 - Unencrypted laptop lost with financial information of 52,000 clients
 - Multiple investigations including Canadian Securities Commission
 - Class action in Quebec not authorized but currently under appeal
 - Cost to date \$5.7M

Thank you!

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