

# DIRECTORS AND OFFICERS RISK

## A Training Guide



December 2016



## ACKNOWLEDGEMENTS

This training guide was created in partnership with Marsh Canada. Their contribution played an important part in developing both the guide as well as the training.

## SUPPORTING RESOURCES

In addition to the materials identified in this document, there is a SHARE webinar on the topic of directors and officers risk. It is available at: <https://share.hscorp.ca/news-article/directors-and-officers-how-are-you-managing-risk/>

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# 1

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## Introduction

The decision to sit on a Board of Directors, to assist an Ontario Social Housing Corporation fulfil its mandate, is an honourable and rewarding endeavour. This Package is focused on helping Directors and Officers (D&O's) of Housing Providers better appreciate their unique oversight responsibilities and provide guidance on managing potential risks associated with the role.

D&O's collectively bring a range of experience, education and skills to a Housing Provider. However, when undertaking this role, each may not have a full understanding of their responsibilities and potential risks. At a minimum D&O's should educate themselves on governance essentials, fiduciary duties and conflicts of interest, to understand:

- a. Fiduciary duties/duty of care “duty of loyalty”
- b. The risks posed when fiduciary duties are overlooked
- c. Real, potential and perceived Conflicts of Interest
- d. Sources of funding
- e. Organizational structures
- f. The legal framework in which the organization operates
- g. The Board and Committees in the policy framework

With this knowledge the Board and each member can provide effective oversight, be diligent in reviewing the policies and procedures adopted by management, and assure they are receiving appropriate information to support this.

Because of the risk focus of this training kit, for broader or more in-depth training directors may wish to consider the following additional resources:

- **Institute of Corporate Directors** <https://www.icd.ca/Home.aspx>
- **Marsh Canada Limited** [www.marsh.ca](http://www.marsh.ca) (for liability and insurance related questions)

## Key Stakeholders and Risk

In Canada, case law makes it clear that directors **owe their prime duty to the housing corporation**, to ensure that it is viable and healthy for the long term. However D&O's for Housing Providers may interact with many different stakeholders, whose perspectives should be considered - but always from the context of the Housing Provider organization. From a risk perspective the following chart illustrates some of the stakeholders.



Figure 1. Housing Provider Director & officer Stakeholder Map

Housing Provider D&Os should be aware of the types of stakeholders and their respective interests, related risks and influence with the Housing Provider, relative to their oversight responsibility. There is, however, an important difference between risk oversight and risk management:

**“Risk Oversight” is a board of director’s function**, primarily ensuring that the corporation has a process for identifying, prioritizing and managing risk.

**“Risk Management” is a management/staff function** including oversight and monitoring to ensure policies are carried out and processes are executed in accordance with management’s selected performance goals and risk tolerances.

Appendix A provides some questions for the D&O to consider relative to operational risk and risk management oversight.

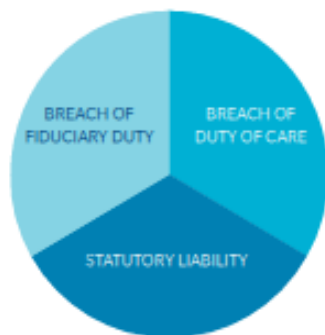
## Directors' Social Housing Providers - Potential Liability Issues

Directors and officers liability is an evolving field which requires ongoing monitoring. Media headlines of high-profile corporate scandals make corporations and particularly their directors and officers, take notice. Significant fines and penalties levied under Foreign Corrupt Practices legislation, the sweeping changes made by the Dodd-Frank Wall Street Reform and Consumer Protection Act and Sarbanes Oxley in the United States, Bill 198 in Ontario, and similar legislation in other provinces, as well as increased regulatory oversight have brought heightened focus to directors and officers (D&O) liabilities. There are estimated to be more than 100 provincial and federal statutes imposing other personal liabilities upon directors and officers. These issues are shaping the way (D&O) liability is being handled by corporations and management. Increasingly, executives are making D&O insurance one of their top priorities.

Corporations must manage the risk of directors and officers liability through an integrated process, which includes:

- Understanding the risks associated with being a director or officer
- Establishing an internal awareness and communication structure
- Implementing a management process to address these issues and risks
- Considering the need for protection of the directors and officers (i.e. through indemnification and insurance)

As shown in Figure 2, there three broad categories by which personal liability can be imposed on directors and officers.



**Figure 2. Three Bases of Personal Liability for Directors and Officers**

### Fiduciary Duty

Directors and officers are expected to act in the best interests of the corporation and its shareholders, and not in their own interests:

*“Every director and officer of a corporation in exercising his powers and discharging his duties shall, (a) act honestly and in good faith with a view to the best interests of the Corporation” (i.e. Business Corporations Act (Ontario) (“OBCA”), section 134(1), Canada Business Corporations Act (“CBCA”), section 122(1)).*

D&Os are to act in the best interests of the corporation and its shareholders (not in their own interests). Examples include:

- Realizing secret profits or unfair gain through personal transactions with or on behalf of the corporation
- Conflicts of interest
- Competing with the corporation to its detriment
- Realizing personal gain from the use of material, non-public corporate information (insider trading)
- Taking personal advantage of a corporate opportunity

## **Duty of Care**

Directors and officers are also under a duty of care to act with reasonable behaviour towards all matters and also reasonably inquire on and monitor corporate affairs:

*“Every director and officer of a corporation in exercising his powers and discharging his duties shall, (b) exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.” (i.e. OBCA, section 134(1), CBCA, section 122 (1)).*

This duty requires not only reasonable behaviour with respect to matters submitted for approval but also reasonable inquiry and monitoring of corporate affairs. Directors and officers may rely on outside expertise but they must monitor the outside professional to ensure that the task is being completed properly. Recent trends also indicate that courts favour interpreting the standard of “prudent person” as “prudent professional” if the director or officer has special training or expertise, thereby increasing potential liability.

Breach of Duty of Care examples include:

- Unreasonable behaviour on matters submitted for approval
- Inability to inquire about and monitor corporate affairs
- Inability to monitor outside professionals to ensure tasks / work are being completed

## Statutory Liabilities

D&Os actions are governed by various federal and provincial statutes. Examples include:

- Corporate and Securities Legislation – Bankruptcy and Insolvency Act, Competition Act, Ontario Securities Act, Investment Canada Act
- Obligations to Employees – Employment Standards Act (Ontario), Occupational Health and Safety Act (Ontario), Canada Labour Code
- Obligations to Government for Taxes and Source Deductions – Income Tax Act, Retail Sales Tax Act (Ontario)
- Environmental Legislation – Environmental Protection Act (Ontario), Ontario Water Resource Act.

Recent trends in legislation show the desire to hold directors and officers increasingly liable for their actions and the conduct

## Personal Indemnification Agreements

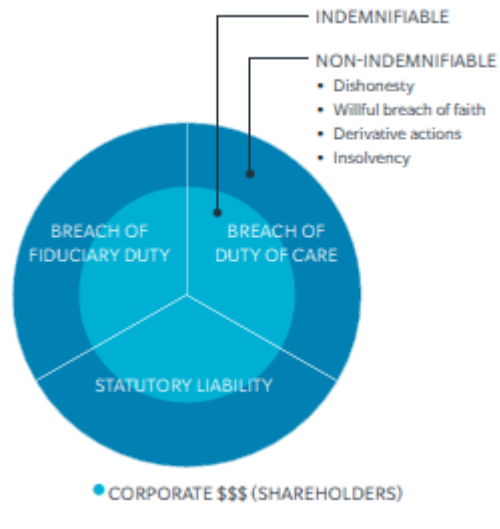
Various federal and provincial Business Corporations Acts generally provide that a corporation may indemnify a director or officer against all costs, charges, and expenses, including an amount paid to settle an action or satisfy a judgement, reasonably incurred by him in respect of any action or proceeding to which he was a party:

- a) in all actions, if he / she acted honestly and in good faith with a view to the best interests of the corporation; and
- b) in the case of a criminal action or proceeding that is enforced by a monetary penalty, if he / she had reasonable grounds for believing his / her conduct was lawful.

Indemnification rights may be improved through personal indemnification agreements and directors and officers are increasingly obtaining such agreements. A personal indemnity agreement is a bilateral agreement between the company and the individual director and officer that cannot be unilaterally changed by the company. A well-crafted personal indemnity agreement has the added advantage of being able to address a number of important issues from a director and officer liability and personal protection perspective, such as timing of advancement of defence costs, selection of defence counsel, maintenance of D&O insurance, etc.

As shown in Figure 3, this right to be indemnified is substantially restricted in a number of areas.





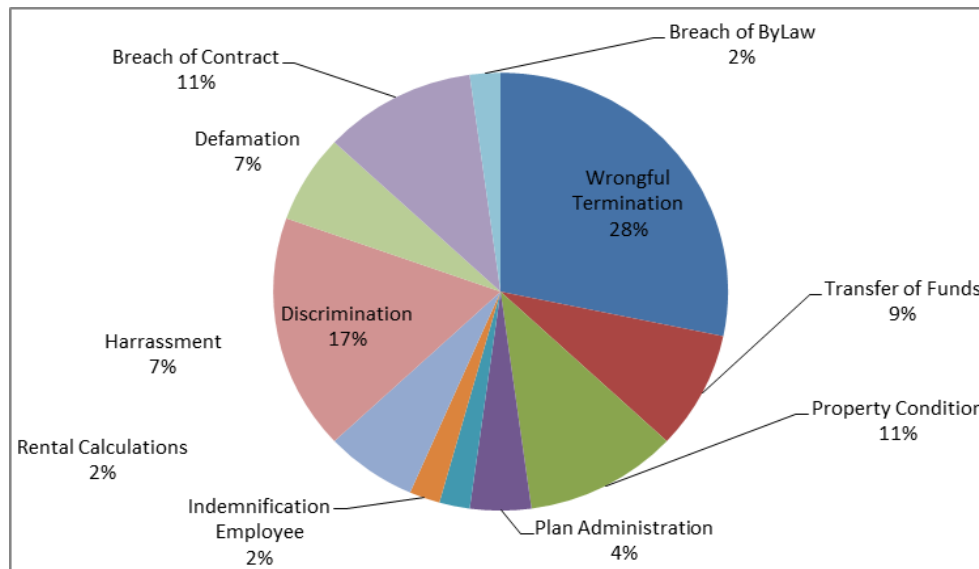
**Figure 3. Indemnifiable vs Non-Indemnifiable Acts**

Corporate indemnification does not singularly provide complete protection as it may not be available under a number of circumstances, including the following:

- The corporation becomes insolvent or does not have sufficient available cash flow to pay the losses and expenses incurred by the directors and officers.
- Indemnification is often discretionary. There has to be a determination whether indemnification is appropriate in the circumstances. Where bad conduct is alleged, the board of directors may refuse to indemnify a director or officer. The composition and attitude of the board may change, so that it is no longer sympathetic to a director or officer. In such circumstances, the board of directors may refuse to indemnify such director or officer.
- Public policy considerations and statutory limitations may cause some claims to be insurable but not indemnifiable.

## Loss Experience

Since D&Os can be held personally responsible for liability associated with their duties, it is important to understand how a breach of those duties is most likely to occur. The following is a multi-year chart of Ontario Social Housing D&O insurance claims by type of proximate cause.



**Figure 4. Recent Ontario Housing Provider Directors and Officers Claims Experience, by Type.**

Wrongful termination of an employee has been the leading cause of D&O claims in the Ontario housing provider sector in recent years. Whether due to unique circumstances or management system failure, expectations on the Board is to ensure that management has put in place human resources policies and there is process to assure compliance. Board failure to do this, or recognize a pattern of organizational behaviour which may increase the risk, can both result in claims being filed and the potential for successful defence diminished. This is a good example of why risk oversight to assess whether or not management is taking appropriate steps to maintain or enhance the organization's culture and reputation should be a priority for D&Os.

In addition to the above, the following are some other examples of types of claims / allegations experienced by D&O's:

- Inadequate disclosure
- Merger/acquisition activity
- Mismanagement of donations
- Financial performance or mismanagement
- Executive compensation
- Breach of fiduciary duty
- Salary, wage or compensation dispute
- Dishonesty / fraud
- Loss or bankruptcy
- Environmental safety

# 2

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## Policies and Procedures

Typically, the Board cannot and should not be involved in direct operational management. However, assuring the organization has appropriate operational policies and procedures in place is a key risk management strategy for D&O's.

Through their oversight role, D&O's should satisfy themselves that risk and other management policies and procedures designed and implemented by Housing Provider's senior leadership are consistent with the organization's mandate, strategy and risk appetite and are functioning as directed. While not intended to be complete and exhaustive, the following are examples of some policies and procedures that if introduced and adopted by Housing Provider Boards will help mitigate exposure to risk.

### **SAMPLE BOARD POLICY 1: OCCUPATIONAL HEALTH AND SAFETY**

*The Housing Provider, the Board and CEO are committed to the health, safety and wellness of employees, and the prevention of occupational injuries in support of a safe and healthy workplace.*

*The Housing Provider acknowledges its responsibility to effectively manage and communicate its programs regarding health, safety and wellness and to maintain compliance with the Occupational Health and Safety Act and related regulations.*

*Every employee, contractor and volunteer is responsible for working in a safe and healthy manner and promoting a secure and hazard free environment.*

### **SAMPLE BOARD POLICY 2: REPORTING ON COMPLIANCE**

*The CEO shall ensure that processes and operating policies are in place to assure compliance with applicable legislation, regulations and by-laws (federal/provincial/municipal), statutory filings and any associated risks; and will report to the Board on the status of statutory filings, compliance with legislation and any associated risks.*

*The CEO will report to the Board on a quarterly basis on the Housing Provider's compliance. This should include confirmation the Housing Provider has, as required by law, paid all:*

- a. *Salary, wages and vacation pay owing to employees*
- b. *Remittances for employee income tax deductions, Canada Pension Plan (CPP) and Employment Insurance (EI) premiums and contributions*
- c. *Workplace Safety and Insurance Board (WSIB) premiums*
- d. *Employer Health Tax (EHT)*
- e. *Harmonized Sales Tax (HST)*

### **SAMPLE BOARD POLICY 3: WHISTLEBLOWING**

*This Policy is to encourage and enable the reporting of alleged or potential wrong doing and violations of policies related to ethical behaviour or business conduct, by anyone in the organization, without fear of reprisal.*

*Alleged or potential wrongdoing related to ethical behaviour or business conduct may include:*

- *Questionable financial, accounting controls, audit practices or potential violations of law*
- *Environmental issues, including failure to comply with legislation or policies concerning dangerous goods or hazardous substances*
- *Violations of behaviour and conduct policies, conflicts of interest or other human resources policies and legislation*
- *Breach of contract and negligence or failure to comply with legislation including criminal offences*

### **SAMPLE BOARD POLICY 4: QUALITY IMPROVEMENT AND SAFETY**

*The Housing Provider recognizes that a high quality housing system is one that is accessible, appropriate, effective, efficient, equitable tenant population focussed, and safe.*

*The Housing Provider is committed to ensuring that it is responsive and accountable to its tenants, and focused on creating a positive housing experience and that ultimately this Housing Provider will hold its executive team accountable for its achievement.*

## **SAMPLE BOARD POLICY 5: RISK MANAGEMENT**

*The Board must be knowledgeable about risks inherent in housing operations and ensure that appropriate risk analysis is performed as part of its decision-making.*

*In particular, the Board:*

- *Oversees the CEO's risk management program*
- *Ensures that appropriate programs and processes are in place to protect against risk*
- *Expects the CEO to identify unusual risks to the Housing Provider and ensures that there are plans in place to manage and mitigate such risks*
- *Expects the CEO to identify and assess the associated organizational risks when reviewing and approving resource allocation decisions*
- *Anticipates financial needs and potential risks, and develops contingency plans*
- *Works with the CEO to reduce organizational risks and promote ongoing quality improvement*

*The Board is responsible for ensuring that appropriate risk management practices are in place, and for reviewing and approving the Housing Provider's variance and risk tolerance levels.*

## **SAMPLE BOARD POLICY 6: RESPECT FOR DIVERSITY**

*The Housing Provider as represented by the Directors, officers, employees, volunteers, values and respects the diversity of its tenants, the community and each other.*

*The Housing Provider is committed to being an organization which recognizes the dignity and worth of every person.*

*In addition to complying with applicable laws, the Housing Provider will:*

- *Establish the principles, processes and responsibilities essential for creating and maintaining a positive work environment consistent with applicable laws*
- *Promote a climate of understanding and mutual respect for the dignity and worth of every person*
- *Be courteous and tactful in all interactions*
- *Respect the customs and beliefs of individuals consistent with the mission of the Housing Provider*
- *Strive towards equity and fairness and work with honesty, integrity, respect and good faith*
- *Be sensitive to potential barriers to accessibility*

## **SAMPLE BOARD POLICY 7: PRIVACY, SECURITY AND CONFIDENTIALITY OF INFORMATION**

*Every director, officer, staff and volunteer and agents of the Housing Provider shall respect the confidentiality of matters:*

- *Brought before the Board*
- *Brought before any committee*
- *Dealt with in the course of an employee's employment, agent or volunteer's activities*

*The Board recognizes the importance of respecting and ensuring the confidentiality of all tenant and employee-related information.*

## **SAMPLE BOARD POLICY 8: ACCESS TO INFORMATION**

*Consistent with the Board's commitment to good governance practices, timely access to information, appropriate protection of personal privacy, and appropriate protection of other information that is exempted or excluded from disclosure under the Freedom of **Information and Protection of Privacy Act**, the Board will make available to the public:*

- *The statement of Board and Director roles, responsibilities and accountabilities*
- *A list of elected and ex-officio Directors and their attendance records*
- *Policies governing the Board and Board standing committees*
- *A report on the Corporation's performance as part of its Annual Report*
- *Upon request, information that is subject to disclosure under the **Freedom of Information and Protection of Privacy Act**.*

## **SAMPLE BOARD POLICY 9: FINANCIAL OBJECTIVES**

*The Board will ensure the safeguarding of the Housing Provider's assets and the prudent use of its resources.*

*The Board will ensure that the Housing Provider is operated and managed in an efficient and effective manner according to accepted business and financial practices and approved policies, and that it operates within its known and approved annual funding.*

*The CEO is accountable to the Board for ensuring that this objective is achieved, that the fiscal position of the Housing Provider is not placed at risk, and that adequate internal controls and processes are in place and monitored for compliance. The CEO shall not:*

- *Direct or approve the expenditure of designated annual revenue for other than its intended purpose*
- *Direct or approve the expenditure of more funds than have been budgeted, or expend more funds than have been received or reasonably forecast to be received*
- *Direct or approve the cash position falling, at any time, below the amount needed to settle payroll and all other obligations in a timely manner, in accordance with generally accepted good business practices or the agreed terms inherent with the obligation*
- *Knowingly allow any payments or filings to be overdue or inaccurately filed.*

## **SAMPLE BOARD POLICY 10: ASSET PROTECTION**

*The CEO is accountable to the Board to ensure that assets are reasonably protected, adequately maintained and not placed at unnecessary risk.*

*The CEO will ensure that appropriate administrative policies and procedures are in place and that these policies and procedures are monitored for compliance.*

*The CEO will ensure that:*

- *Reasonable insurance with an appropriate deductible, is maintained*
- *There is appropriate property, boiler and machinery, and liability insurance coverage for all assets and operations of the Housing Provider, which may be subject to replacement or repair as a result of theft or casualty loss*
- *Adequate liability insurance coverage is maintained for the Housing Provider, directors and officers in order that they will be indemnified and saved harmless while engaged in activities on behalf of the Housing Providers.*

## SAMPLE BOARD POLICY 11: PROCUREMENT AND CONTRACT MANAGEMENT PROTOCOLS

*The purpose of this policy is to specify principles that, when applied, will ensure the integrity and transparency of procurement activity, and to specify mandatory requirements to ensure adherence to the principles. This policy applies to all procurements by the Housing Provider relating to goods and services to ensure the following principles are upheld:*

- *Competition from suppliers is encouraged*
- *The process of procurement is accountable*
- *The evaluation of the procurement is equitable and fair to all proponents*

*Goods and services shall be acquired competitively, through open and transparent procurement procedures, to meet specific needs with the objective of obtaining the best value for the funds to be expended. The Housing Provider is committed to ensuring all transactions involving acquiring goods and services follow this procedure.*

*The outcome of all procurements will be to achieve and maximize the added value to the Housing Provider. The following principles should form the basis for decisions made by the Housing Provider staff in the planning, acquisition and management of goods and services procurements.*

- **Competition and Fair and Equal Treatment of Suppliers** - *Suppliers must be treated in a fair, equitable and responsible manner. Equal treatment is to be provided to all suppliers through comparable transparent procurement procedures.*
- **Competitive Acquisition Procedures** - *The procedures to be followed for the acquisition and approval of goods and services shall be on the basis of “Competitive Methods and Approval” methods established.*
- **Conflicts of Interest** - *The Housing Provider must ensure it effectively manages internal and external conflicts of interest. The evaluation team for each procurement project must ensure there are no undeclared internal direct or indirect conflicts of interest. Proponents are also required to declare in writing any conflicts in their proposal submission.*
- **Procurement Record Keeping** - *Proper documentation must be maintained for all stages of the procurement project and be in accordance with the Records Retention Policy.*
- **Confidentiality** - *The Housing Provider must ensure proponent information submitted in confidence as part of a procurement project is adequately protected.*
- **Contract Management Protocols Policy** - *All contractual arrangements must be approved by the CEO and/or Board as applicable before any work can begin.*



- ***Request for Proposals (RFP) - Procurement*** will write the RFP for the project lead and CEO's review and approval before issuance of the document.
- ***Contract Management - Procurement*** must be advised of any changes required to an executed contract (e.g. extension of contract term, additional services, additional fees, etc.) so that a Letter of Agreement reflecting any changes can be prepared and executed.

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## Insurance

The following material is not intended to be a comprehensive review of directors and officer's liability insurance, but is a general overview of some of the key issues and considerations facing directors and officers today.

### Not for Profit Directors and Officers Liability Insurance Policy

D&O liability insurance policies were designed to protect directors and officers for the legal liability they may sustain when acting in their executive capacity. A policy may also reimburse or pay on behalf of the organization to the extent to which it indemnifies its directors and officers.

The following is the typical structure of a Not for Profit D&O policy:

#### I. INSURING AGREEMENTS

The policy is typically split into three separate coverages in the insuring agreement:

**Clause 1: Individual Coverage** — Provides direct coverage for individual directors and officers against whom a claim has been made based on a wrongful act, and where indemnification is not provided by the organization. No deductible is applied.

**Clause 2: Corporate Indemnity Coverage** — Reimburses or pays on behalf of the organization amounts paid to indemnify directors and officers arising from a claim alleging their liability for a wrongful act. This is based on the requirement to indemnify contained within the company's bylaws or articles or by contractual agreement. A deductible is applied.

**Clause 3: Entity Coverage** — Provides direct coverage for the organization's liability either through the policy wording or by endorsement.

With respect to private, not-for-profit, and many Crown companies, coverage is typically extended to include direct claims against the entity for a variety of claims.

## II. LIMIT OF LIABILITY

The policy's limit of liability typically applies to all loss, including defence costs, such that costs paid to defend a claim erode the policy limits of liability.\*

## III. CLAIMS-MADE COVERAGE AND SEVERABILITY

A D&O liability insurance policy is usually a "claims-made" policy form, meaning that coverage is triggered at the time the claim is made, regardless of when the wrongful act giving rise to the claim was committed. Claims-made coverage requires that all claims or incidents which may arise and result in a claim during the policy period be reported immediately to the insurer. Failure to comply with the claims-reporting provisions of the policy could result in the insurer denying coverage for the claim. "Severability" in D&O liability policies refers to the issue of whether facts or information pertaining to one insured under the policy can adversely affect coverage for another insured under the same policy. Generally, severability is meant to protect innocent directors and officers from losing coverage based on wrongdoing by other culpable directors and officers.

Severability may exist in regard to the D&O liability insurance application (such that any false representations made in the application are imputed only to the person(s) having knowledge of their falsity) and with respect to the exclusions (such that only those persons to whom the exclusion directly applies will be denied coverage).

## IV. KEY DEFINITIONS

The policy generally includes all "loss" associated with a claim, including defence costs, but usually excludes fines and penalties.

**"Claim"** is generally defined to include a demand for monetary or non-monetary damages, civil or criminal proceedings, and administrative or regulatory proceedings. Many policies will also allow policyholders to report circumstances which may evolve into a claim.

Typically, a **"Wrongful Act"** for which the D&O policy provides coverage includes any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by any director or officer in his or her insured capacity. It should also include other matters claimed solely by reason of his or her serving in such insured capacity, often encompassing statutory obligations such as liabilities for unpaid taxes, employee wages and vacation pay which may be imposed on directors and officers even if they did not commit a "Wrongful Act".

The definition of **"Loss"** typically includes damages, settlements, judgements, and defence costs.\* The definition of loss does not include amounts for which the insured is not financially liable or matters deemed to be uninsurable by law. (\* Note - the issue of whether defence costs

are in addition to the policy limits of liability is currently being litigated in Quebec under the Civil Code.)

## V. ALLOCATION

In most circumstances, claims will have both covered and uncovered allegations and will name both covered and uncovered individuals or entities. To establish how a claim will be treated, many insurers will pre-set an allocation of the amount they will pay regardless of where the actual liabilities lie. This pre-set allocation is generally only with respect to defence costs rather than settlement or indemnity.

## VI. EXCLUSIONS

Matters which are typically excluded under a D&O policy can be classified into three broad categories. The Board should ensure appropriate coverage exists elsewhere.

### 1. Insured elsewhere:

- Bodily injury/property damage (commercial general liability);
- Pension liability (fiduciary liability);
- Pollution, except for non-indemnifiable carve-out (environmental impairment/commercial general liability);
- Prior claims notice reported under an expired policy; and
- Pending or prior litigation as of a certain date.

### 2. Uninsurable by law:

- Deliberately fraudulent acts; and
- Illegal personal profit, benefit, or advantage (e.g. illegal remuneration).

### 3. Outside of the intent of the D&O policy:

- Organization vs. insured, or insured vs. insured with some exceptions;
- Acts outside the insured's capacity as a director or officer.

## VII. EXTENSIONS

A number of extensions of coverage may be available in the marketplace and are provided by insurers on a selective basis:

### NOT FOR-PROFIT OUTSIDE DIRECTORSHIP LIABILITY

- Coverage can be extended to directors and officers sitting on outside boards of not-for-profit organizations such as charities, associations, and sports clubs.
- Coverage is usually restricted to positions where the individual is sitting with the knowledge and consent of the organization and is typically provided on a blanket basis (not requiring a specific schedule).

#### SPOUSAL LIABILITY

- Coverage can be extended to the spouse or domestic partner of the director and officer if named as a co-defendant in an action but typically only to the extent that the claim against the spouse or domestic partner arises out of a wrongful act of the director or officer; there is no coverage if the allegations against the spouse or domestic partner involve their own wrongful acts.

#### EMPLOYMENT PRACTICES LIABILITY

Coverage may be provided to an expanded group of insureds (including employees) for claims arising out of employment related issues such as wrongful dismissal, discrimination, humiliation, and sexual harassment.

#### POLLUTION D&O LIABILITY COVERAGE

- Pollution-related coverage is typically very narrow under a Not-for-Profit D&O policy, and is generally limited to the cost of defending a pollution related action.

#### RECISSION

- Insurers have the right to rescind any insurance policy in the event of a material misrepresentation, contained either in the application or the attachments thereto. This can be problematic in the circumstances of D&O coverage where the individual directors and officers may not have been privy to the procurement of insurance and the representations therein. To protect innocent directors and officers, insurers may provide non-rescindable coverage for non-indemnifiable claims or for the entire contract.

#### PRIORITY OF PAYMENTS

In the event a loss may exceed the available limit of liability, this provision will prioritize coverage first to the individual directors and officers for non-indemnifiable claims and then, subject to the insured's direction, to coverage for the organization.

# APPENDIX A

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## Operational Risk Checklist

The following topics address issues that Housing Corporations could face on a day to day basis and how the Board can monitor the risk management related elements of each issue.

### ***Community and Media***

Depending on the type of issue, Housing Corporations face the possibility of media involvement; usually in the form of negative coverage and press. The directors and officers should be confident that management has the ability to effectively communicate externally and internally.

### ***Crisis Management***

#### Overview

In the event of large scale or major events, the organization should have a documented process to ensure communication (internally and externally) is managed effectively.

#### Questions for Consideration

Does the organization have a documented Crisis Management Plan?

Is it updated on a regular basis?

Is the management aware of the process?

Is the management team confident it can carry out the plan effectively?

What is the Board's role in the process?

### ***Contingency Planning***

#### Overview

A comprehensive contingency plan will help the organization plan for and manage adverse incidents to limit the negative impact of disasters to tenants and the business.

#### Questions for Consideration

Did the organization complete the Contingency Planning Guide?

Is it updated on a regular basis?

Is the management aware of the plan?

Is the management team confident it can carry out the plan effectively?

## ***Tenants***

Many of the issues faced by tenants are directly tied to the operational business risks Housing Corporations manage on a regular basis. While directors and officers do not get involved in the day-to-day operations of the organization, they should be aware of key issues that could potentially climb to the Board's attention.

Operationally, the management team is responsible for the well-being of tenants. The Board is entitled to numerous operational reports and they should be reported to the Board on a regular basis.

The following risk issues should be reported on by management to the Board.

### ***Evacuation Procedures***

#### **Overview**

In the event of a possible evacuation, tenants need to be aware of the "Muster Site" or safe evacuation centre to receive further instructions. Should evacuations be required for a lengthy period of time, tenants should have alternate locations where they may potentially go.

#### **Questions for Consideration**

Does the organization have an evacuation plan?

In case of a prolonged site outage, is the organization prepared to temporarily relocate tenants?

How will the organization pay for the temporary relocation? Will our insurance cover it?

Does management feel that tenants are properly educated on evacuation procedures? (e.g. personal evacuation kits, muster sites etc.)

### ***Safety Policies and Education***

#### **Overview**

The majority of insurance claims come from water damage and fire loss, an area of risk that could potentially be mitigated through effective tenant safety policies and training. The ***Occupiers Liability Act*** describes how the Corporation is responsible for the safety of its tenants and as such, should be making a reasonable effort to ensure their awareness of all policies and procedures.

#### **Questions for Consideration**

What are our key safety initiatives?

What are some of the safety education practices?

How often do we communicate safety topics to tenants?

## *Tenant Harassment & Discrimination*

### Overview

Housing Corporations have the obligation to provide equal treatment with respect to occupancy of a unit without discrimination or harassment.

Housing Corporations should also be aware of harassment between tenants.

### Questions for Consideration

Does the organization have a Harassment and Discrimination policy?

Are our employees, contracts etc. aware of our policy?

Are directors and officers aware of their responsibilities with regards to tenant harassment?

## *Tenant Payment (by Internet / Credit Card)*

### Overview

Some Housing Corporations provide tenants with the ability to pay their fees via Internet, Telephone Banking or Credit Card. Regulatory policies require safe guards to be in place when Personal Credit Information (PCI) or general personal information is collected and stored.

### Questions for Consideration

What tenant information do we collect?

What Regulations is the organization subject to?

Does the organization have a privacy policy?



## *Condition of Properties*

### Overview

Conditions of the properties refer to the everyday operational based activities that keep the properties safe and up to code. There are numerous codes and procedures that must be met including:

- Building codes
- Fire protection maintenance
- Extinguisher checks
- Accessibility requirements
- Sprinkler checks
- Fuel storage tanks
- Environmental Assessments
- Water damage control plans
- Preventative maintenance
- Electrical preventative maintenance
- Roof anchor systems
- Monthly premise safety inspections
- Snow logs
- Winter grounds inspections

The Board should at a minimum be aware of these items. Management can report on the status of each item on a quarterly basis or as needed.

### Questions for Consideration

Are municipal zoning and legal non-conforming uses being complied with?

Does the Housing Corporation have fuel oil storage tanks either above ground or below ground, is it aware of the requirements for upgrading or removal?

How often are the alarms tested and maintained?

Does each unit have a fire extinguisher? How often are they checked and maintained?

Have accommodations been made for people with disabilities in accordance with the Accessibility for Ontarians with Disabilities Act?

## *Corporation*

From and strategic perspective, Housing Corporations face similar strategic and financial risks to other organizations. Directors and officers should feel confident that management have the tools (policies and procedures) necessary.

## *Reviewing of Organization By-Laws*

### Overview

Reviewing the Housing Corporation's by-laws is an essential part of the Board's mandate. The review should focus on legal compliance (e.g. are they in line with municipal, provincial and federal laws?) and internal compliance (e.g. are the by-laws followed and not ignored by the Board and management and are we meeting our responsibilities?)

### Questions for Consideration

When was the last time the by-laws were reviewed?

How often are the by-laws reviewed?

Is there any part of the by-laws that the Board and management are not in compliance with?

How are new Board members educated on their responsibilities?

## *Employment Practices*

### Overview

Boards can be held liable for employment practices including hiring and termination issues. The Board should be confident that management has the appropriate employee policies and procedures in place to deal with hiring / termination, health and safety and employee benefits.

### Questions for Consideration

Does the Housing Corporation have hiring and termination policies and practices for employees and volunteers?

Is it in compliance with human rights legislation, provisions of the Employment Standards Act, statutory requirements such as pay equity, and privacy legislation?

In relation to wrongful dismissal, is the organization aware that punitive damages may be awarded in a case where the employer's conduct was harsh, vindictive, reprehensible and malicious?

Has the organization implemented a policy concerning accommodation for employees who are members of a disadvantaged group identified in the Human Rights Code (Ontario)?

Has the organization implemented policies on effective compensation and conflict of interest?

Are employees and volunteers screened including criminal record checks?

Is the Board possible exposed to criminal liability under recent amendments with regards to the Criminal Code from actions of its employees or volunteers?

Has the organization undertaken an occupational health and safety audit conducted by an experienced work place safety consultant?

Has the organization implemented a policy concerning workplace violence, harassment prevention and sexual harassment?

Is there a need for a discipline procedure for employees / volunteers?

## Expenses

### Overview

Housing Corporations should be transparent on all expenses paid including those for employees. Part of the Board's responsibility is to ensure the organization is transparent and accountable to its tenants, the public and the community.

### Questions for Consideration

Does the Housing Corporation have an expense policy?

Is management aware of the policy?

Does the Board receive the appropriate reports on expenses?

What is the organization's procedure on making the reports available to the public?

## Taxes and Financial Audits

### Overview

As an organization, Housing Corporations are responsible to pay income taxes, property taxes and other dues. The Board is responsible to monitor and approve the organization's financials. The Board should be aware of all major financial decisions and issues by management.

### Questions for Consideration

Is the organization in compliance with income tax obligations?

Has the organization reviewed its municipal property tax assessment for accuracy and to determine both classification and valuation?

Does the Board have an audit committee in place?

Are all salaries, benefits and statutory deductions being paid by the organization on a timely basis with reports to the Board?

Is the organization operating with a deficit and if so, for how long?

## Procurement (Maintenance / Capital Projects)

### Overview

Third party contractors will be engaged with Housing Corporations for maintenance procedures, capital projects and other services. The organization should have a procurement policy in place with the objective of obtaining the best value for the funds spent.

### Questions for Consideration

Does the Housing Corporation have a contractor tender process?

Is the management team aware of the process?

Are contractors mandated to carry Liability coverage? WSIB?

How does the organization deal with conflict of interest?

Is the Board provided with reports on the types of contracts the organization enters into?

Does the Board get involved in the decision making process for large capital projects?

## Insurance

### Overview

Insurance for the Housing Corporation and the Board will provide coverage for the organization in the event of a property or liability loss as well as coverage to the Directors and Officers in the form of D&O insurance coverage. The Board should receive reports from management on the types and frequency of claims and incidents.

### Questions for Consideration

Does the Housing Corporation keep historical records of its insurance program?

Is there Directors and Officers liability coverage in place and it is reviewed on a regular basis to ensure its adequacy?

Are the directors aware of their duties with respect to ensuring:

The purposes of the organization are properly carried out and the organization's activities comply with their purpose?

The organization's financial stability and overall performance?

Proper hiring and supervision of management and staff?

Has the Board delegated too much responsibility to executive staff by restricting itself to establishing policy decisions only without careful and ongoing monitoring and review?

Are the directors aware of their fiduciary responsibilities at law in operating the organization?

Are new and existing directors receiving proper orientation and training?

Do the majority of our tenants purchase tenant insurance?



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