

# Protecting Directors Checklists

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## PROTECTING DIRECTORS CHECKLISTS

### INDEMNITY AGREEMENTS:

1. Is the obligation of the corporation to indemnify the director mandatory (as opposed to discretionary)?
2. Does it cover all types of actions: civil, criminal, regulatory, derivative actions, suits brought directly by the corporation, oppression, etc.?
3. It should offer indemnification “to the fullest extent permitted by law.” It should not attempt to define the circumstances in which indemnification is not permitted.
4. It should advance defence costs as they are incurred. The director can pay them back if a court determines indemnification was not permitted in the case.
5. The advancement of defence costs should include the costs of an investigation before a claim is actually filed against the director.
6. Corporation should have burden of proof to show indemnification is not permitted, must pay director’s expenses in enforcing the indemnity agreement, and require the corporation to obtain a legal opinion before refusing indemnification.
7. Any disputes between director and corporation on whether director is entitled to indemnification should be resolved by arbitration to speed the process.
8. Include settlements and claims made against the director as a result of the director sitting on affiliated boards, such as a subsidiary.
9. Include obligation of the corporation to maintain D&O insurance and permit director the right to maintain that insurance in the event the corporation becomes insolvent.
10. Corporation should covenant to seek court approval in the event it is required for the corporation to provide the director with indemnification.
11. As Alberta might eventually move in the direction of Ontario and the Federal regime (permitting indemnification in a broader range of circumstances) provide that the scope of indemnification under the contract can increase to provide broader indemnification compatible with the Act.
12. Provide for a limitation of actions against the directors.

13. Give the director a say on the choice of counsel and permit the director their own counsel (paid for by the Corporation) in the event of actual or potential differences in interest and defences between the director and the Corporation.

#### **DIRECTORS AND OFFICERS INSURANCE:**

1. Note that Ontario and Canada now permit insurance for breaches of fiduciary duty. Alberta does not permit this.
2. Note as well, that common D&O exclusions will include many behaviours that are “fiduciary-like”: dishonesty, fraud, and self-dealing.
3. Note that there is still considerable variability between D&O insurance contracts, so you will need to review.
4. Side-A coverage is primarily need by growth companies. If money is tight, side-A is generally cheaper if bought by itself.
5. The policy should include regulatory actions as well as civil actions.
6. Ensure that any misrepresentation in the insurance application (which can be extensive) does not impact innocent directors.
7. Pay attention to whether there is a clause that excludes claims made between insured parties, if one of the parties is the corporation. This would exclude derivative and corporate claims against the director.
8. Defense expenses should be paid as they are incurred.
9. Non-legal defense expenses should also be paid (eg. forensic auditor, expert witness, financial experts, etc.)

#### **BY-LAWS:**

1. Note that while some U.S. jurisdictions have supported the enforceability of these by-laws, they have not been considered by Canadian courts. The one exception is the advance notice by-laws upheld in *Northern Minerals Investment Corp. v. Mundoro Capital Inc.*, 2012 BCSC 1090.
2. Exclusive forum by-law (upheld in US: *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*):

“Unless the Corporation consents in writing to the selection of an alternative forum, the applicable court of competent jurisdiction for the Province of Alberta, Canada (the