

2 - Gower

Indemnification of Directors

I. INTRODUCTION

This paper will attempt to identify all of the questions that arise in drafting legislation to provide for indemnification of directors, directly by the corporation or indirectly by insurance.

Directors can be made personally liable for breaches of common law and statutory duties. The duties imposed by the common law are the fiduciary obligations of loyalty and good faith and the business duties of skill and care.

It is not the purpose of this paper to canvass the law on directors duties. Generally, however, the fiduciary duties are tested by normal business practice; "the court asking itself whether the directors have done what they honestly believe to be right, and normally accepting that they have if satisfied that they have behaved as honest men of business might be expected to act"¹.

Mr. Justice Romer in Re City Equitable Fire Insurance Company Limited, [1925] Chancery 407 has stated the duty of skill and care required of a director. The headnote to that case provides, in part, as follows:

Duties of Directors.—The manner in which the work of a company is to be distributed between the board of directors and the staff is a business matter to be decided on business lines. The larger the business carried on by the company the more numerous and the more important the matters that must of necessity be left to the managers, the accountants, and the rest of the staff.

In ascertaining the duties of a director of a company, it is necessary to consider the nature of the company's business and the manner in which the work of the company is, reasonably in the circumstances and consistently with the articles of association, distributed between the directors and the other officials of the company.

¹. Gower, *Modern Company Law* (2nd ed., 1957 p. 474)

In discharging those duties, a director (a) must act honestly, and (b) must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take, in the circumstances, on his own behalf. But, (c) he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment. (d) he is not bound to give continuous attention to the affairs of his company; his duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committees to which he is appointed, and though not bound to attend all such meetings he ought to attend them when reasonably able to do so; and (e) in respect of all duties which, having regard to the exigencies of business and the articles of association, may properly be left to some other official, he is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

The common law duties have been clarified and enlarged by statutory provisions to be found in the Companies Acts and elsewhere.

In Alberta, for example, directors are liable under the Companies Act for, among other things, the wages of employees, for failure to file insider trading reports, and making loans to shareholders².

In the absence of statutory provisions there is much confusion in the law as to the directors' rights to be indemnified for their liabilities. By laws and incorporating documents frequently create a power in a corporation to indemnify and this is followed by an agreement between the directors and their corporations. If there is no agreement, indemnity is often conditioned on a successful defence and some benefit accruing to the corporation.

In Albert the sole statutory provision is section 292 of the Companies Act, R.S.A. 1970 c. 60. That section provides

².R.S.A. 1970, c. 60, ss. 77, 84, 14

as follows:

292. If in any proceeding against a director of a company for negligence or breach of trust it appears to the court that the director is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, the court may relieve him, either wholly or partly, from his liability on such terms as the court thinks proper. [R.S.A. 1970, c. 60, s. 292]

To date there have been no Alberta cases construing this section but help may be obtained from the English case law dealing with section 448 of the Imperial Companies Act 1948. The Alberta section is modeled on this English provision.

Under the section three circumstances must be shown to exist to enable the court to grant relief, (1) the person to be excused is shown to have acted honestly, (2) he must be shown to have acted reasonably and, (3) having regard to all of the circumstances he ought fairly to be excused³.

Reference may also be made to Selangor United Rubber Estates Ltd. v. Cradock et al [1968] 1 W.L.R. 1555 where directors were not relieved of liability for blindly following the request of the majority shareholder.

In re Brazilian Rubber Plantations and Estates Limited [1911] 1 Ch. 425 directors were relieved for issuing a false prospectus which had been prepared on the basis of a report by the vendor which report was subject to no inquiry.

In Re J. Franklin and Son Ltd. [1937] 4 ALL. E.R. 43 no relief was granted to directors who were improperly appointed (see also Re Gilt Edge Safety Glass Ltd. [1940] 2 ALL. E.R. 237.

³. See Re Duomatic Ltd. [1969] 2 W.L.R. 114

In National Trustees Company of Australasia Limited v. General Finance Company of Australasia Limited [1905] A.C. 373 trustees were not relieved from liability for relying on their solicitor's advice which was wrong (see contra in Re Claridge's Patent Asphalte Company Limited [1921] 1 Ch. 543.

A. CORPORATE AND THIRD PARTY PROCEEDINGS

Legislation dealing with the indemnity of directors must distinguish between the two broad categories of litigation to which directors stand exposed. In one category, litigation is brought by or on behalf of the corporation for a breach by the director of his fiduciary duty to the company or for a breach of his standard of skill and care. The second category may, for convenience, be termed third party litigation. These proceedings are commenced against the directors in their capacity as directors by, among others, governments, creditors, competitors and shareholders.

In the latter situation it would seem appropriate that the role of directors and agents be equated. An agent is entitled to be indemnified by his principal against all liabilities incurred in the reasonable performance of the agency, provided there is no contract to the contrary. In the former case the implication is that the director was not acting in the best interests of the company and his conduct ought therefore to be subject to a different test.

B. Exclusivity of Statutory Provisions

The second major distinction which legislation dealing with indemnification of directors must make is between exclusive and non-exclusive statutory provisions.

In the past, enabling legislation such as the Alberta Companies Act, made no reference to a corporate power to indemnify

directors. However, the standard forms of articles of association (see Appendix 1) in use within the province generally contain provisions to the effect ". . . that directors shall receive indemnification from all costs, losses and expenses which any such director shall incur or become liable to by reason of any contract entered into or act or thing done by him as director, and further that he shall be indemnified by the company against reasonable expenses, including attorney's fees incurred by him in connection with defending an action against him commenced by reason of the fact that he is a director, except in relation to matters as to which he is liable for negligence or misconduct in the performance of his duties."⁴

From the cases referred to earlier in the introduction it appears that this type of clause is valid. The standard clause fails however, to answer the more difficult issues which will be canvassed in this paper.

Recent legislative reform in Canada⁵ specifically provides, with qualifications, for the indemnification of directors. These provisions are modeled on the Delaware Code and do not provide an exclusive statutory regime (see Appendix 2).

New York, North Carolina and California have recently opted for exclusive statutory provisions for indemnification of directors. Paragraph 721 of the New York Business Corporation Law provides as follows:

No provision made to indemnify directors or officers for the defense of any civil or criminal action or proceeding, whether contained in the certificate of incorporation, the by-laws, a resolution of shareholders or directors, an agreement or otherwise, nor any award of indemnification by a court, shall be valid unless consistent with this article.

⁴ Potter, Director's Liability Insurance (1971) 9 Alta. Law Review 331

⁵ Statutes of British Columbia 1973 c. 18 s. 151
 Revised Statutes of Ontario 1970 c. 53 s. 147
 Statutes of Canada 1974-75 c. 33 s. 119

While the exclusive regime approach was rejected by the authors of the new Canada Act it does have two distinct advantages. First, it defines the outer limits of public policy and second it eliminates the uncertainty of a by-law approach, which by-law may or may not be valid when put to the scrutiny of the court. Flexibility is preserved to the corporations if the statute is broadly worded, for the corporation may always reduce the limits of the indemnity.

II. LEGISLATIVE TERMS

A. Parameters of Indemnity

Directors may seek indemnity from their corporations in a multitude of situations: where they have been vindicated on the merits, where they have achieved partial success, where a matter has been settled or compromised, where a technicality has resulted in their success and where they have been convicted or adjudged liable to the corporation or third party.

Likewise, the corporation may wish to indemnify their directors in any of these situations.

Vindication on the merits has been recognized as grounds for granting indemnity. This is so whether the action is brought by or on behalf of the corporation or by a third party and regardless of whether the proceedings are civil, criminal or administrative.

(i) Mandatory Indemnity

Recent legislation, notably in California, New York and Canada has provided for mandatory indemnity in such circumstances. However the statutory provisions are far from uniform.

Section 119 subsection 3 of the Canadian Business

Act provides for mandatory indemnity of a director who has been substantially successful in his defense.

Paragraph 724(a) of the New York Business Corporation Law provides for a director who has been wholly successful, the merits or otherwise.

Section 830 of California's Corporation Code provides for mandatory indemnification if two conditions are met: (1) the person sued is successful in whole or in part, or the proceeding against him is settled with the approval of the court and (2) the court finds that his conduct fairly and equitably permits such indemnity.

Questions

1. Do we wish to provide for mandatory indemnity?
2. Should indemnification be mandatory only for success on the merits?
3. If we are to allow mandatory indemnity for success based on technicalities, must we distinguish between proceedings brought by third parties and those by or on behalf of the corporation?
4. Should there be mandatory indemnity for settlements and compromises made in proceedings brought by or on behalf of the corporation.

The phrase "substantially successful" in the Canadian Business Corporation Act implies a hearing has been held.

At the opposite end of the spectrum is the situation where the director has been convicted of an offense or judgment has gone against him. Here the distinction between third party

8

derivative proceedings is critical. Prima facie, if a director is unsuccessful in defending a derivative action he should not be indemnified. One must be mindful however, of the situation where directors acting in good faith, in the best interests of the company, and on the advice of counsel attempt to prevent a takeover they believe to be piratical.

The Canada Business Corporations Act and the British Columbia Companies Act adopt the test used by the New York Business Corporation Law in determining whether indemnity should be allowed when the proceedings have gone against the director. The director must have acted honestly and in good faith with a view to the best interests of the corporation. In criminal matters he must have had reasonable grounds for believing his conduct was lawful.

The New York Business Corporation Law has an absolute prohibition against indemnity when a director is adjudged to have breached a statutory duty to the corporation. The test of honesty and good faith would seem in such circumstances, to be inapplicable. Ontario adopts a similar attitude, although that statute appears to have a broader scope. It provides that no director shall be indemnified who is adjudged to be in breach of any "duty or responsibility imposed upon him under this Act or under any other Act . . .".

Questions

1. Should the test for permissive indemnity be the same for derivative and third party proceedings.
2. Should there be an absolute prohibition against indemnity in derivative proceedings where the director is adjudged to be in breach of duty to the corporation.

(ii) Extent of the Indemnity

In those statutes which distinguish between third party proceedings and proceedings brought by or on behalf of the corporation there is also a distinction in the extent of the indemnity.

The Canada Business Corporations Act provides; in third party proceedings, "against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment reasonably incurred" and in derivative actions, "against all costs, charges and expenses reasonably incurred". The U.S. jurisdictions use the same formula, however they also specify attorney's fees which are often substantial. This specific inclusion of attorney's fees is no doubt a result of the many "strike suits" which are pursued in that country.

Questions

1. Should the distinction between third party and derivative suits be continued to prevent "double looting".
2. Should there be provision for advanced payments so that the director may put forward a proper defense.
3. Should a losing shareholder in a derivative suit be obliged to indemnify the director?
Note: California has such a provision.
4. What if no action or proceeding is commenced but monies have been expended to short circuit the threatened action.
5. Should there be provision for partial indemnity

where the director has been successful in part and unsuccessful in part.

(iii) Who may be Indemnified

There is considerable variation in the statutory provisions on the question of who may be indemnified. British Columbia refers only to directors, Ontario and Canada refers to directors and officers, Canada also refers to directors and officers of companies who act as such on the request of another corporation which is a shareholder or creditor of the first.

Questions

1. Should employees and controlling shareholders also be included within the group who may be indemnified.

Note: That Connecticut defines officer to include any person (corporate or natural) who has legal power directly or indirectly to elect a majority of the Board.

Delaware's statute specifically includes employees and agents of the corporation.

2. Is not the director and officer who assumes responsibilities at the request of another corporation protected by the law of agency.

All of these statutes appear to provide for former directors, heirs and legal representatives.

B. Approval of Indemnity

It would appear that a director or the corporation and perhaps a shareholder, should be able to apply in a summary

way to a court, for approval of indemnity, and this whether the indemnity is mandatory or permissive. A director may wish to apply to compel the corporation to indemnify him. A corporation may wish to apply to forestall any threatened shareholder suit based on a questionable indemnification. A shareholder may wish to apply simply to assure himself that the affairs of the corporations are being properly conducted.

The Canada Business Corporation Act in section 119 subsection 5 provides for such application by a director and the corporation.

The British Columbia Act requires court approval in all cases where a corporation seeks to indemnify a director. The Canada Act requires court approval only in the case of derivative actions. Neither Ontario nor New York make such a requirement.

Questions

1. Should court approval be required before any indemnity payment?
2. Will such a requirement, which prevents agreement in advance, inhibit individuals from assuming the office of directors?
3. What about directors who are not also officers of the corporation and paid only token amounts?

Where court approval is not required the statutes vary in their approach to the approval of indemnification. The Ontario Business Corporation Act leaves the procedure to be embodied in the by-laws. There is no statutory direction. The New York Business Corporation Law in paragraph 724 subsection b provides a statutory procedure as follows:

§ 724. Payment of indemnification other than by court award

(a) A person who has been wholly successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding of the character described in section 722 (Authorization for indemnification of directors and officers in actions by or in the right of a corporation to procure a judgment in its favor) or 723 (Authorization for indemnification of directors and officers in actions or proceedings other than by or in the right of a corporation to procure a judgment in its favor) shall be entitled to indemnification as authorized in such sections.

(b) Except as provided in paragraph (a), any indemnification under section 722 or 723, unless ordered by a court under section 725 (Indemnification of directors and officers by a court), shall be made by the corporation, only if authorized in the specific case:

(1) By resolution of the board acting by a quorum consisting of directors who are not parties to such action or proceeding upon a finding that the director or officer has met the standard of conduct set forth in section 722 or 723, as the case may be, or, in the absence of such a quorum,

(2) By resolution of the board upon the opinion in writing of independent legal counsel that indemnification is proper in the circumstances because the applicable standard of conduct set forth in such sections has been met by such director or officer, or

(3) By resolution of the shareholders upon a finding that the director or officer has met the applicable standard of conduct set forth in such sections.

Questions

1. If the directors are also the dominate shareholders, what benefit flows from shareholder approval.
2. Is simple notice to shareholders of such payment sufficient if they are provided access to the courts.
3. What if there has been no adjudication of the issue prior to the payment being made?
4. What about hard cases where it is difficult

determine whether the statutory standard has been met.

C. Miscellaneous

Should the proposed Alberta rules on indemnification apply to foreign corporations?

Should we as a matter of policy seek to spread the risk of management among the shareholders?

What role does deterrents play in the Board room.

Will corporations become less effective if directors are not freely indemnified?

What role should the company play when its directors are embroiled in suits: by third parties, in derivative actions?

Is it proper for counsel to represent both the corporation and the directors in a derivative suit?

May a corporation set up a counter-claim against a complaining shareholder, or participate actively in the defense of a derivative suit.

III. Liability Insurance

The model insurance policy for indemnification of directors and officers is that provided by Lloyds of London. The policy is divided into two parts: part one, reimburses the corporation for payments actually made by it in the indemnification of directors, part two, insures individual directors against losses for which they have not otherwise been indemnified by their corporation.

Most recently enacted corporate statutes provide expressly for the purchase of insurance. The statutes vary enormously, however, as to the types of risks for which insurance may be purchased.

The British Columbia Act; section 151 subsection 4 appears to be open ended, the company being authorized to purchase insurance against any liability incurred by a director. The Ontario B.C.A. goes full tilt in the opposite direction. Section 147 subsection 3 provides that the corporation may purchase insurance except against a liability arising out of contravention of section 144/^{which} sets out the director's fiduciary duties and his duties of skill and care. The new Canada B.C.A. takes the middle road; s. 119 subsection 4 provides that the corporations may purchase and maintain insurance to protect their directors from liability arising under s. 117(1)(b). That section sets out the directors duties of skill and care.

Questions

1. If, as a matter of public policy, Alberta desires to spread the risk of management should the provision for insurance by the same as British Columbia?

NOTE: The policy itself will contain exclusionary clauses, e.g.: Claims based on transactions where directors have made personal gains, claims arising from criminal activity, and claims otherwise invalid on the grounds of public policy.

2. Will insurance undermine the deterrent effect of a threat of civil or criminal action?

3. Will insurance provide a fund to which an injured party may look?

4. Is director liability insurance the same as E & O insurance for lawyers and doctors?

5. Will directors be forced to settle cases rather than go to the expense of "vindication proceedings"? What happens to court approval?

6. Are the premiums paid for D & O insurance a taxable benefit to the directors?

7. Will directors respond to the challenge of business more aggressively with the security of D & O insurance coverage?

APPENDIX I

INDEMNITY TO DIRECTORS AND OTHERS

115. Every director or officer of the Company and his heirs, executors and administrators, respectively, shall from time to time and at all times be indemnified and saved harmless out of the funds of the Company from and against:

- (a) all costs, charges and expenses whatsoever which such director or officer sustains or incurs in or about any action, suit or proceedings which is brought, commenced or prosecuted against him for or in respect of any act, deed, matter or thing whatsoever made, done or permitted by him in or about the execution of the duties of his office; and
- (b) all other costs, charges and expenses which he sustains or incurs in or about or in relation to any act, deed, matter or thing whatsoever made, done or permitted by him in or about the execution of the duties of his office;

except such costs, charges and expenses as are occasioned by his own wilful neglect, default or dishonesty.

116. No director or officer of the Company shall be liable for the acts, deeds, neglects or defaults of any other director or officer, or for joining in any receipt or other act for conformity, or for any loss or expenses happening in the Company through insufficiency or deficiency of any security in or upon which any of the monies of the Company shall be invested, or for any loss or damage arising from the bankruptcy, insolvency or tortious act of any person with whom any money, securities or effects shall be deposited, or for any other loss occasioned by error of judgment or oversight on his part, or for any other loss, damage or misfortune whatsoever which shall happen in the execution of the duties of his office or in relation thereto, unless the same shall happen through his own wilful neglect, default or dishonesty.

British Columbia Companies Act

Indemnification.

151. (1) A company may, with the approval of the Court, indemnify a director or former director of the company or a director or former director of a corporation of which it is or was a shareholder, and his heirs and personal representatives, against all costs, charges, and expenses, including an amount paid to settle an action or satisfy a judgment, actually and reasonably incurred by him, including an amount paid to settle an action or satisfy a judgment in a civil, criminal, or administrative action or proceeding to which he is made a party by reason of being or having been a director, including an action brought by the company or corporation, if

(a) he acted honestly and in good faith with a view to the best interests of the corporation of which he is or was a director; and

(b) in the case of a criminal or administrative action or proceeding, he had reasonable grounds for believing that his conduct was lawful.

(2) The Court may, upon the application of a company, director, or a former director, make an order approving an indemnity under this section, and the Court may make any further order it considers appropriate.

(3) Upon an application under subsection (2) the Court may order notice to be given to any interested person.

(4) A company may purchase and maintain insurance for the benefit of a person referred to in this section against any liability incurred by him as a director. 1973, c. 18, s. 151.

Ontario Business Corporation Act

147. (1) **Indemnification of directors.**—Subject to subsection (2), the by-laws of a corporation may provide that every director and officer of the corporation and his heirs, executors, administrators and other legal personal representatives may from time to time be indemnified and saved harmless by the corporation from and against,

- (a) any liability and all costs, charges and expenses that he sustains or incurs in respect of any action, suit or proceeding that is proposed or commenced against him for or in respect of anything done or permitted by him in respect of the execution of the duties of his office; and
- (b) all other costs, charges and expenses that he sustains or incurs in respect of the affairs of the corporation.

(2) **Idem.**—No director or officer of a corporation shall be indemnified by the corporation in respect of any liability, costs, charges or expenses that he sustains or incurs in or about any action, suit or other proceeding as a result of which he is adjudged to be in breach of any duty or responsibility imposed upon him under this Act or under any other statute unless, in an action brought against him in his capacity as director or officer, he has achieved complete or substantial success as a defendant.

(3) **Insurance.**—A corporation may purchase and maintain insurance for the benefit of a director or officer thereof, except insurance against a liability, cost, charge or expense of the direc-

tor or officer incurred as a result of a contravention of section 144. 1970, c. 25, s. 147.

Canada Business Corporation Act

Indemnification

119. (1) Except in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, a corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or a person who acts or acted at the corporation's request as a director or officer of a body corporate of which the corporation is or was a shareholder or creditor, and his heirs and legal representatives, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of such corporation or body corporate, if

(a) he acted honestly and in good faith with a view to the best interests of the corporation; and

(b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, he had reasonable grounds for believing that his conduct was lawful.

Indemnification in derivative actions

(2) A corporation may with the approval of a court indemnify a person referred to in subsection (1) in respect of an action by or on behalf of the corporation or body corporate to procure a judgment in its favour, to which he is made a party by reason of being or having been a director or an officer of the corporation or body corporate, against all costs, charges and expenses reasonably incurred by him in connection with such action if he fulfils the conditions set out in paragraphs (1) (a) and (b).

Right to indemnify

(3) Notwithstanding anything in this section, a corporation shall indemnify any person referred to in subsection (1) who has been substantially successful in the defence of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of the corporation or body corporate against all costs, charges and expenses reasonably incurred by him in respect of such action or proceeding.

Directors' and officers' insurance

(4) A corporation may purchase and maintain insurance for the benefit of any person referred to in this section against any liability incurred by him under paragraph 117(1) (b) in his capacity as a director or officer of the corporation.

Application to court

(5) A corporation or a person referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit.

Notice to Director

(6) An applicant under subsection (5) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.

Other notice

(7) Upon an application under subsection (5), the court may order notice to be given to any interested person and such person is entitled to appear and be heard in person or by counsel.

§ 722. Authorization for indemnification of directors and officers in actions by or in the right of a corporation to procure a judgment in its favor

(a) A corporation may indemnify any person, made a party to an action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he, his testator or intestate, is or was a director or officer of the corporation, against the reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, or in connection with an appeal therein, except in relation to matters as to which such director or officer is adjudged to have breached his duty to the corporation under section 717 (Duty of directors and officers).

(b) The indemnification authorized under paragraph (a) shall in no case include:

(1) Amounts paid in settling or otherwise disposing of a threatened action, or a pending action with or without court approval, or

(2) Expenses incurred in defending a threatened action, or a pending action which is settled or otherwise disposed of without court approval. L.1961, c. 855; as amended L.1962, c. 819, § 2, both eff. Sept. 1, 1963.

§ 723. Authorization for indemnification of directors and officers in actions or proceedings other than by or in the right of a corporation to procure a judgment in its favor

(a) A corporation may indemnify any person, made, or threatened to be made, a party to an action or proceeding other than one by or in the right of the corporation to procure a judgment in its favor, whether civil or criminal, including an action by or in the right of any other corporation of any type or kind, domestic or foreign, which any director or officer of the corporation served in any capacity at the request of the corporation, by reason of the fact that he, his testator or intestate, was a director or officer of the corporation, or served such other corporation in any capacity, against judgments, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action or proceeding, or any appeal therein, if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in the best interests of the corporation and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful.

(b) The termination of any such civil or criminal action or proceeding by judgment, settlement, conviction or upon a plea of nolo contendere, or its equivalent, shall not in itself create a presumption that any such director or officer did not act, in good faith, for a purpose which he reasonably believed to be in the best interests of the corporation or that he had reasonable cause to believe that his conduct was unlawful. L.1961, c. 855; amended L.1962, c. 819, § 3; L.1963, c. 689, § 7, all eff. Sept. 1, 1963.

2.

§ 724. Payment of indemnification other than by court award

(a) A person who has been wholly successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding of the character described in section 722 (Authorization for indemnification of directors and officers in actions by or in the right of a corporation to procure a judgment in its favor) or 723 (Authorization for indemnification of directors and officers in actions or proceedings other than by or in the right of a corporation to procure a judgment in its favor) shall be entitled to indemnification as authorized in such sections.

(b) Except as provided in paragraph (a), any indemnification under section 722 or 723, unless ordered by a court under section 725 (Indemnification of directors and officers by a court), shall be made by the corporation, only if authorized in the specific case:

(1) By the board acting by a quorum consisting of directors who are not parties to such action or proceeding upon a finding that the director or officer has met the standard of conduct set forth in section 722 or 723, as the case may be, or,

(2) If a quorum under subparagraph (1) is not obtainable with due diligence;

(A) By the board upon the opinion in writing of independent legal counsel that indemnification is proper in the circumstances because the applicable standard of conduct set forth in such sections has been met by such director or officer, or

(B) By the shareholders upon a finding that the director or officer has met the applicable standard of conduct set forth in such sections.

(c) Expenses incurred in defending a civil or criminal action or proceeding may be paid by the corporation in advance of the final disposition of such action or proceeding if authorized under paragraph (b). Added L.1962, c. 819, § 4; amended L.1963, c. 689, § 8, both eff. Sept. 1, 1963.

§ 725. Indemnification of directors and officers by a court

(a) Notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board or of the shareholders in the specific case under section 724 (Payment of indemnification other than by court award), indemnification shall be awarded by a court to the extent authorized under sections 722 (Authorization for indemnification of directors and officers in actions by or in the right of a corporation to procure a judgment in its favor), 723 (Authorization for indemnification of directors and officers in actions or proceedings other than by or in the right of a corporation to procure a judgment in its favor), and paragraph (a) of section 724. Application therefor may be made, in every case, either:

(1) In the civil action or proceeding in which the expenses were incurred or other amounts were paid, or

(2) To the supreme court in a separate proceeding, in which case the application shall set forth the disposition of any previous application made to any court for the same or similar relief and also reasonable cause for the failure to make application for such relief in the action or proceeding in which the expenses were incurred or other amounts were paid.

(b) The application shall be made in such manner and form as may be required by the applicable rules of court or, in the absence thereof, by direction of a court to which it is made. Such application shall be upon notice to the corporation. The court may also direct that notice be given at the expense of the corporation to the shareholders and such other persons as it may designate in such manner as it may require.

(c) Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law. Formerly § 724, L.1961, c. 855; renumbered 725 and amended L.1962, c. 819, § 5; L.1963, c. 689, § 9, all eff. Sept. 1, 1963.

§ 726. Other provisions affecting indemnification of directors and officers

(a) All expenses incurred in defending a civil or criminal action or proceeding which are advanced by the corporation under paragraph (c) of section 724 (Payment of indemnification other than by court award) or allowed by a court under paragraph (c) of section 725 (Indemnification of directors and officers by a court) shall be repaid in case the person receiving such advancement or allowance is ultimately found, under the procedure set forth in this article, not to be entitled to indemnification or, where indemnification is granted, to the extent the expenses so advanced by the corporation or allowed by the court exceed the indemnification to which he is entitled.

(b) No indemnification, advancement or allowance shall be made under this article in any circumstance where it appears:

(1) That the indemnification would be inconsistent with the law of the jurisdiction of incorporation of a foreign corporation which prohibits or otherwise limits such indemnification;

(2) That the indemnification would be inconsistent with a provision of the certificate of incorporation, a by-law, a resolution of the board or of the shareholders, an agreement or other proper corporate action, in effect at the time of the accrual of the alleged

cause of action asserted in the threatened or pending action or proceeding in which the expenses were incurred or other amounts were paid, which prohibits or otherwise limits indemnification; or

(3) If there has been a settlement approved by the court, that the indemnification would be inconsistent with any condition with respect to indemnification expressly imposed by the court in approving the settlement.

(c) If, under this article, any expenses or other amounts are paid by way of indemnification, otherwise than by court order or action by the shareholders, the corporation shall, not later than the next annual meeting of shareholders unless such meeting is held within three months from the date of such payment, and, in any event, within fifteen months from the date of such payment, mail to its shareholders of record at the time entitled to vote for the election of directors a statement specifying the persons paid, the amounts paid, and the nature and status at the time of such payment of the litigation or threatened litigation.

(d) The provisions of this article relating to indemnification of directors and officers shall apply to domestic corporations and foreign corporations doing business in this state, except as provided in section 1320 (Exemption from certain provisions). Formerly § 725, L.1961, c. 855; renumbered 726 and amended L.1962, c. 819, § 6; L.1963, c. 689, § 10, all eff. Sept. 1, 1963.

Library references: Corporations § 308(1) et seq.; C.J.S. Corporations § 803.
Hornstein on Corporations: Indemnification of directors and officers for expenses incurred in successful defense of suits, see Hornstein's Corporation Law and Practice, §§ 133, 267, 733.

§ 727. Insurance for indemnification of directors and officers

(a) Subject to paragraph (b), a corporation shall have power to purchase and maintain insurance:

(1) To indemnify the corporation for any obligation which it incurs as a result of the indemnification of directors and officers under the provisions of this article, and

(2) To indemnify directors and officers in instances in which they may be indemnified by the corporation under the provisions of this article, and

(3) To indemnify directors and officers in instances in which they may not otherwise be indemnified by the corporation under the provisions of this article provided the contract of insurance covering such directors and officers provides, in a manner acceptable to the superintendent of insurance, for a retention amount and for co-insurance.

(b) No insurance under paragraph (a) may provide for any payment, other than cost of defense, to or on behalf of any director or officer.

(1) if a judgment or other final adjudication adverse to the insured director or officer establishes that his acts of active and deliberate dis-

honesty were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled, or

(2) in relation to any risk the insurance of which is prohibited under the insurance law of this state.

(c) Insurance under any or all subparagraphs of paragraph (a) may be included in a single contract or supplement thereto. Retrospective rated contracts are prohibited.

(d) The corporation shall, within the time and to the persons provided in paragraph (c) of section 726 (Other provisions affecting indemnification of directors or officers), mail a statement in respect of any insurance it has purchased or renewed under this section, specifying the insurance carrier, date of the contract, cost of the insurance, corporate positions insured, and a statement explaining all sums, not previously reported in a statement to shareholders, paid under any indemnification insurance contract.

(e) This section is the public policy of this state to spread the risk of corporate management, notwithstanding any other general or special law of this state or of any other jurisdiction including the federal government.

Added L.1969, c. 1007, § 1, eff. Sept. 1, 1969.

MODEL BUSINESS CORPORATION ACT

§ 5. Indemnification of Officers, Directors, Employees and Agents

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

MODEL BUSINESS CORP. ACT.

- 2 -

(c) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) or (b), or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subsections (a) or (b) (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsections (a) or (b). Such determination shall be made (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (3) by the shareholders.

(e) Expenses (including attorneys' fees) incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized in the manner provided in subsection (d) upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

(f) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any by-law, agreement, vote of shareholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.



**AMERICAN HOME
ASSURANCE COMPANY**

A CAPITAL STOCK COMPANY FOUNDED 1853

P.O. Box 166 — Toronto Dominion Centre, Toronto 111, Ontario.

**CANADIAN
DIRECTORS AND OFFICERS LEGAL LIABILITY APPLICATION**

1. (a) Corporation Name:
(b) Place of Incorporation:
2. Address
3. Amount of Insurance \$ _____ Self Insured Retention \$ _____
4. (a) Nature of Business
(b) Annual Sales
(c) Net Worth
(d) Total Assets
5. Corporation has continually been in business since _____.
6. Attach copies of latest Annual Report and Dun & Bradstreet report.
7. Copy (Certified by Corporate Secretary) of the indemnification provision in the By Laws.
8. Stock (a) Total number of common stock shareowners _____
(b) Total number of common shares outstanding _____
(c) Total number of common shares owned by its Directors (direct and beneficial) _____
(d) Total number of common shares owned by its Officers (direct and beneficial) not Directors _____
9. Corporation (a) Annual election date of Directors _____
(b) Compulsory retirement age for Directors _____; Officers _____
10. Complete list of all subsidiary corporations.

11. Complete list of all Directors of parent company by name and affiliation with other Corporations.

12. Complete list of all Officers of parent company by name and affiliation with other Corporations.

13. Has there been or is there now pending any claim against any person proposed for insurance in their capacity of either Director or Officer of the above Corporation?

14. Does any Director or Officer have knowledge or information of any act, error, or omission which might give rise to a claim under the proposed policy?

15. The Corporation, its Directors and Officers have not been involved in or have any knowledge of any pending suit, e.g. Antitrust, except as follows:

16. It is warranted that if such knowledge or information exists any claim or action arising therefrom is excluded from this proposed coverage.
17. It is agreed that the Directors and Officers will give the insurer the right to associate with them in the defense and settlement of any claim that appears reasonably likely to involve the insurer and the Directors and Officers will cooperate with the insurers in the defense of such claim.
18. It is agreed that a Director or Officer may elect not to appeal a judgment in excess of the retained limits, however the insurer may wish to make such appeal at its own cost and expense.
19. It is agreed that all Directors and Officers shall furnish the insurer with copies of investigations, pleadings, and all other papers relating to an occurrence which could give rise to a possible claim under the proposed policy.
20. It is agreed that the Corporation will file with American Home Assurance Company, as soon as the same become available, a copy of each registration statement and annual or interim report which the Corporation may from time to time file with the Securities and Exchange Commission.
21. Previous Directors and Officers Legality Liability Insurance (Answer Each Item)
Name of Company _____
(a) Limit _____ Self Insured Retention _____
(b) Premium _____ (indicate annual or three year).
22. Has any carrier refused or cancelled coverage? _____
Loss Experience _____

THE UNDERSIGNED AUTHORIZED OFFICER OF THE CORPORATION DECLARES THAT TO THE BEST OF HIS KNOWLEDGE THE STATEMENTS SET FORTH HEREIN ARE TRUE.

SIGNING OF THIS APPLICATION DOES NOT BIND THE UNDERSIGNED TO COMPLETE THE INSURANCE, BUT IT IS AGREED THAT THIS FORM SHALL BE THE BASIS OF THE CONTRACT SHOULD A POLICY BE ISSUED, AND IT WILL BE ATTACHED TO THE POLICY.

Signed _____

Title _____

Attest

Corporation _____

Date _____

Broker _____

(Corporate Seal)

Address _____

**IF AN ORDER IS RECEIVED THE APPLICATION IS ATTACHED TO THE PC
SO IT IS NECESSARY THAT ALL QUESTIONS BE ANSWERED IN DETAIL.**

**DIRECTORS AND OFFICERS LIABILITY
and
CORPORATION REIMBURSEMENT**

POLICY NUMBER

RENEWAL NUMBER



A CAPITAL STOCK COMPANY — FOUNDED 1853
188 UNIVERSITY AVENUE, TORONTO, ONTARIO

DECLARATIONS

- ITEM 1. NAMED INSURED:
MAILING ADDRESS:
- ITEM 2. POLICY PERIOD: From _____ To _____
(12:00 Noon Standard Time at the address stated herein)
- ITEM 3. LIMIT OF LIABILITY: \$ _____ each policy year and this shall be the combined limit of liability for both policy forms 2938/2939, which attach hereto and form a part hereof.
- ITEM 4. RETENTION: (Each Loss) \$ _____
- ITEM 5. PREMIUM: 3 Year Premium Prepaid \$ _____
3 Year Installments
payable each anniversary
1st \$ _____
2nd \$ _____
3rd \$ _____
- ITEM 6. THIS POLICY DOES NOT PROVIDE COVERAGE FOR THE FOLLOWING OFFICER POSITIONS: (Absence of entry means no exceptions)

**SPECIMEN
POLICY**

Authorized Representative

Countersignature
Date

Countersigned
At

In consideration of the premiums and statements made to the Insurer by application, a copy of which is attached and made a part hereof, this Declaration Page with Policy Form 2938/2939 together with the completed and signed application, constitute the contract, and the American Home Assurance Company, herein called the "INSURER", agrees as follows:

DIRECTORS & OFFICERS

1. INSURING CLAUSE

This policy shall, subject to its terms, conditions and limitations as hereinafter provided, pay on behalf of each and every person who was or now is or may hereafter be a Director or Officer of the Company named in Item 1 of the Declarations (who are hereinafter individually or collectively sometimes called the "Insureds") against loss (as hereinafter defined) arising from any claim or claims which may be made against the Insured, jointly or severally, during the policy period by reason of any Wrongful Act (as hereinafter defined) in their respective capacities of Directors or Officers.

2. DEFINITIONS

(a) The term "Director or Officer" shall mean:

(i) Any duly elected Director or duly elected or appointed Officer of the Company named in Item 1 of the Declarations, except as noted under Item 6 of the policy Declarations. Coverage will automatically apply to all newly created Directors and Officers after the inception date of this policy subject to:

(a) Written notice of all such changes to the Insurer, within thirty (30) days after each anniversary date, or the termination date, whichever is sooner, and

(b) payment of any additional premium required.

(ii) any Director or Officer of a Subsidiary Company who is also a person described in Clause 2 (a) (i).

(b) The term "Policy Year" shall mean a period of one year commencing each year on the day and hour first named in Item 2 of the Declarations or if the time between the effective date or anniversary and termination of the policy is less than one year, then such lesser period.

(c) The term "Loss" shall mean any amount which the Insureds are legally obligated to pay for a claim or claims made against them for Wrongful Acts, and shall include damages, judgments, settlements, costs, charges and expenses (excluding salaries of officers or employees of the company) incurred in the defense of actions, suits or proceedings and appeals therefrom; provided always that such subject of loss shall not include fines or penalties imposed by law or other matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.

(d) The term "Wrongful Act" shall mean any breach of duty, neglect, error, misstatement, misleading statement, omission or other act done or wrongfully attempted by the Insureds or any of the foregoing so alleged by any claimant or any matter claimed against them solely by reason of their being such Directors or Officers of the Company named in Item 1 of the Declarations.

3. EXTENSIONS

Subject otherwise to the terms hereof, this policy shall cover loss arising from any claims made against the estates, heirs, legal representatives or assigns of deceased Insureds who were Directors or Officers of the Company named in Item 1 of the Declarations at the time the acts upon which such claims were based were committed, and the legal representatives or assigns of Directors or Officers in the event of their incompetency, insolvency or bankruptcy.

4. EXCLUSIONS

The Insurer shall not be liable to make any payment in connection with any claim made against the Insureds:

(a) for libel or slander;

(b) based upon or attributable to their gaining in fact of any personal profit or advantage to which they were not legally entitled;

- (c) for the return by the Insureds of any remuneration paid to the Insureds without the previous approval of the stockholders of the Company named in Item 1 of the Declarations which payment without such previous approval shall be held by the Courts to have been illegal;
- (d) for an accounting of profits in fact made from the purchase or sale by the Insureds of securities of the Company within the meaning of Section 16 (b) of the Securities Exchange Act of 1934 and amendments thereto or similar provisions of any state statutory law or common law in the United States of America;
- (e) for liability to account to the Company for any direct benefit or advantage received or receivable by the Insureds as a result of any transaction relating to the capital securities of the Company within the meaning of Section 113 of the Securities Act, 1966, of the Province of Ontario and amendments thereto or similar provisions of any statutory or common law of Canada or of any province thereof;
- (f) based on or attributable to any failure or omission on the part of the Insureds to effect and maintain insurance;
- (g) which, at the time of happening of such loss, is insured by any other existing valid policy or policies under which payment of the loss is actually made, except in respect of any excess beyond the amount or amounts of payments under such other policy or policies;
- (h) for which the Insureds are entitled to indemnity under any policy or policies in force previous hereto;
- (i) for which the Insureds shall be indemnified by the Company named in Item 1 of the Declarations for damages, judgments, settlements, costs, charges or expenses incurred in connection with the defense of any action, suit or proceeding and appeal therefrom to which the Directors or Officers may be a party or with which they may be threatened, pursuant to the law, common or statutory, or the Charter or By-Laws of the Company named in Item 1 of the Declarations, duly effective under law, which determines and defines such rights of indemnity;
- (j) brought about or contributed to by the dishonesty of the Insureds; however, notwithstanding the foregoing the Insureds shall be protected under the terms of this policy as to any claims upon which suit may be brought against them, by reason of any alleged dishonesty on the part of the Insureds, unless a judgment or other final adjudication thereof adverse to the Insureds shall establish that acts of active and deliberate dishonesty committed by the Insureds with actual dishonest purpose and intent were material to the cause of action so adjudicated.

NOTE: The Wrongful Act of any Director or Officer shall not be imputed to any other Director or Officer for the purpose of determining the applicability of the Exclusions enumerated in this Clause 4.

5. LIMIT AND RETENTION

- (a) The Insurer shall be liable to pay 95% of loss excess of the amount stated in (c) below up to the amounts hereinafter stated, it being warranted that the remaining 5% of each and every loss shall be carried by the Insureds at their own risk and uninsured.
- (b) Subject to the foregoing, the Insurer's liability for any claim or claims made against it shall (except for any additional amount payable by virtue of Clause 6) be the amount stated in Item 3 of the Declarations which shall be the maximum liability of the Insurer in (a) each policy year and in (b) the discovery period if the right is exercised by the Insureds in accordance with Clause 8 (a), and not the maximum aggregate so payable with respect to the policy period and the discovery period.
- (c) This policy is only to pay the excess over the retention amount stated in Item 4 of the Declarations in respect of each and every loss hereunder, including costs, charges and expenses as described in Clause 6. The retention amount stated in Item 4 of the Declarations is to be borne by the Insureds and is not to be insured. Losses arising out of the same act or interrelated acts of one or more of the Insureds shall be considered a single loss and only one retention amount shall be deducted from the aggregate amount of such losses. In such cases, the retention shall be pro rated among the Insureds in proportion to their respective losses.
- (d) The foregoing provisions shall apply to this policy and the Company Reimbursement policy attached hereto, as though they constitute a single policy and the Insurer's maximum liability under both policies together shall not exceed the limits and retention set out in Paragraphs 5 (a), 5 (b) and 5 (c) above.

6. COSTS, CHARGES AND EXPENSES AND DEFENSE

- (a) No costs, charges and expenses shall be incurred without the Insurer's consent which shall not be unreasonably withheld; however, in the event of such consent being given, they will pay, subject to the provisions of Clause 5 (c), 95% of all such costs, charges and expenses; subject nevertheless to the following conditions:
- (i) If a payment not in excess of the limit of liability has to be made to dispose of a claim, costs, charges and expenses shall be payable in addition to the limit of liability otherwise applicable under this policy.
 - (ii) If the claim is successfully resisted by the Insureds, costs, charges and expenses shall be payable up to but not exceeding the limit of liability under this policy.
 - (iii) If a payment has to be made to dispose of a claim in excess of the limit of liability under this policy, the Insurer's liability to pay costs, charges and expenses in connection therewith shall be limited to such proportion of the said costs, charges and expenses as the limit of liability herein bears to the amount paid to dispose of the claim, but the Insurer's liability as aforesaid to pay costs, charges and expenses shall be in addition to the limit of liability otherwise applicable under this policy.
- (b) The Insureds shall not be required to contest any legal proceedings unless counsel (to be mutually agreed upon by the Insureds and the Insurer) shall advise that such claim should be contested by the Insureds and the Insurers consent thereto, such consent not to be unreasonably withheld. It is further agreed that the Insurer shall have the right, if it should so desire, to take over the defense or settlement of any claim in the name of the Insureds subject to the provisions of this Clause. In the event of the Insureds being so required to contest legal proceedings, the Insurer subject to the provisions of Clause 5 (c) and notwithstanding the provisions of paragraph (a) of this Clause 6, will pay 95% of all costs, charges and expenses in connection therewith, in addition to the limit of liability otherwise applicable under this policy.
- (c) The words "costs, charges and expenses" shall include the cost of any appeal, attachment or similar bond.

7. LOSS PROVISIONS

- (a) The time when a loss shall be incurred within the meaning of this policy shall be the date on which the Company named in Item 1 of the Declarations or the Insureds shall give written notice to the Insurer as hereinafter provided.
- (b) The Company named in Item 1 of the Declarations or the Insureds shall as a condition precedent to the Insureds right to be indemnified under this policy give to the Insurer notice as soon as practicable in writing of any claims made upon the Insureds.
- (c) If during the policy period or during the discovery period if the right is exercised by the Insured in accordance with Clause 8 (a):
- (i) The Company named in Item 1 of the Declarations or the Insureds shall receive written or oral notice from any third party that it is the intention of such third party to hold the Insureds responsible for the results of any specified Wrongful Act by the Insureds while acting in the capacities aforementioned; or
 - (ii) The Company named in Item 1 of the Declarations or the Insureds shall become aware of any occurrence which may subsequently give rise to a claim being made against the Insureds in respect of any such Wrongful Act; and shall in either case during such period give written notice to the Insurer of the receipt of such written or oral notice under (i) above or such occurrence under (ii) above, then any claim which may subsequently be made against the Insureds arising out of such Wrongful Act shall for the purpose of this policy be treated as a claim made during the currency hereof.
- (d) Notice hereunder shall be given to the Insurer, Toronto-Dominion Bank Tower, Toronto 1, Canada.
- (e) The Insureds shall give the Insurer such information and cooperation as it may reasonably require and as shall be in the Insureds power.
- (f) Losses shall be paid in legal currency of Canada.

B. GENERAL CONDITIONS

(a) Discovery Clause

If the Insurer shall cancel or refuse to renew this policy, the Insureds shall have the right, upon payment of the additional premium of 25% of the three year premium hereunder, to an extension of the cover granted by this policy in respect of a claim or claims which may be made against the Insureds, during the period of twelve calendar months after the date of such cancellation or non-renewal, but only in respect of any Wrongful Act committed before the date of such cancellation or non-renewal.

(b) Cancellation Clause

Notwithstanding anything contained in this policy to the contrary this policy may be cancelled by the Company named in Item 1 of the Declarations or the Insureds at any time by written notice or by surrender of this policy. This policy may also be cancelled by or on behalf of the Insurer by delivering to the Company named in Item 1 of the Declarations or by mailing to the Company named in Item 1 of the Declarations, by registered, certified or other first class mail, at its mailing address as shown in Item 1 of the Declarations, written notice stating when, not less than thirty (30) days thereafter, the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this policy shall terminate at the date and hour specified in such notice.

If this policy shall be cancelled by the Company named in Item 1 of the Declarations or the Insureds, the Insurer shall retain the customary short rate proportion of the premium hereon.

If this Policy shall be cancelled by the Insurer, the Insurer shall retain the pro-rata proportion of the premium hereon.

Payment or tender of any unearned premium by the Insurer shall not be a condition precedent to the effectiveness of cancellation but such payment shall be made as soon as practicable.

If the period of limitation relating to the giving of notice is prohibited or made void by any law controlling the construction thereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

9. SUBROGATION

In the event of any payment under this policy, the Insurer shall be subrogated to the extent of such payment to all the Insureds' rights of recovery therefor, and the Insureds shall execute all papers required and shall do everything that may be necessary to secure such rights including the execution of such documents necessary to enable the Insurer effectively to bring suit in the name of the Insureds.

10. NOTICE

By acceptance of this policy, the Company named in Item 1 of the Declarations agrees to act on behalf of all Insureds with respect to the giving and receiving of notice of claim or cancellation, the payment of premiums and the receiving of any return premiums that may become due under this policy.

IN WITNESS WHEREOF, The Insurer has caused this policy to be signed by its President and a Secretary and countersigned on the Declarations page by a duly authorized agent of the Insurer.



SECRETARY



PRESIDENT

COMPANY REIMBURSEMENT

1. INSURING CLAUSE

This policy shall, subject to its terms, conditions and limitations as hereinafter provided, pay on behalf of the Company named in Item 1 of the Declarations loss (as hereinafter defined) arising from any claim or claims which may be made during the policy period against each and every person, jointly or severally, who was or now is or may hereafter be a Director or Officer (as herein defined) of the Company, by reason of any Wrongful Act (as hereinafter defined) in their respective capacities of Directors or Officers of the Company, but only when the Directors or Officers shall have been entitled to indemnification by the Company for damages, judgments, settlements, costs, charges or expenses incurred in connection with the defense of any action, suit or proceeding or any appeal therefrom to which the Directors or Officers may be a party or with which they may be threatened, pursuant to law, common or statutory, or the Charter or By-Laws of the Company duly effective under such law which determines and defines such rights of indemnity.

2. DEFINITIONS

(a) The term "Director or Officer" shall mean:

(i) Any duly elected Director or duly elected or appointed Officer of the Company named in Item 1 of the Declarations except as noted under Item 6 of the policy Declarations. Coverage will automatically apply to all newly created Directors and Officers after the inception date of this policy subject to:

a) Written notice of all such changes to the Insurer, within thirty (30) days after each anniversary date, or the termination date, whichever is sooner, and.

b) payment of any additional premium required.

(ii) any Director or Officer of a Subsidiary Company who is also a person described in Clause 2 (a) (i).

(b) The term "Policy Year" shall mean a period of one year commencing each year on the day and hour first named in Item 2 of the Declarations or if the time between the effective date or anniversary and termination of the policy is less than one year, then such lesser period.

(c) The term "Loss" shall mean any amount the Company shall be required or permitted by law to pay to a Director or Officer as indemnity for a claim or claims against him arising out of those matters set forth in the Insuring Clause above whether actual or asserted and subject to the applicable limits and conditions of this policy, shall include damages, judgments, settlements, costs, charges and expenses (excluding salaries of Officers or employees of the Company) incurred in the defense of actions, suits or proceedings and appeals therefrom for which payment by the Company may be required or permitted according to applicable law, common or statutory, or under provisions of the Company's Charter or By-Laws effective pursuant to such law provided always that such subject of loss shall not include fines or penalties imposed by law or other matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.

(d) The term "Wrongful Act" shall mean any breach of duty, neglect, error, misstatement, misleading statement, omission or other act done or wrongfully attempted by the Directors or Officers or any of the foregoing so alleged by any claimant or any matter claimed against them solely by reason of their being such Directors or Officers.

3. EXTENSIONS

Subject otherwise to the terms hereof, this policy shall cover the Company for loss arising from any claims made against the estates, heirs, legal representatives or assigns of deceased Directors or Officers who were Directors or Officers at the time the acts upon which such claims were based were committed, and the legal representatives or assigns of Directors or Officers in the event of their incompetency, involency or bankruptcy.

4. EXCLUSIONS

The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers:

- (a) which at the time of happening of such loss, is insured by any other existing valid policy or policies under which payment of the loss is actually made, except in respect of any excess beyond the amount or amounts of payments under such other policy or policies;
- (b) for which the Directors or Officers are entitled to indemnity under any policy or policies in force previous hereto.

5. LIMIT AND RETENTION

- (a) The Insurer shall be liable to pay 95% of loss excess of the amount stated in (c) below up to the amount hereafter stated, it being warranted that the remaining 5% of each and every loss shall be carried by the Company at its own risk and uninsured.
- (b) Subject to the foregoing, the Insurer's liability for any claim or claims made against it shall (except for any additional amounts payable by virtue of Clause 6) be the amount stated in Item 3 of the Declarations, which shall be the maximum liability of the Insurer in (a) each policy year and in (b) the discovery period if the right is exercised by the Company in accordance with Clause 8 (a), and not the maximum aggregate so payable with respect to the policy period and discovery period.
- (c) This policy is only to pay the excess over the retention amount shown in Item 4 of the Declaration in respect of each and every loss hereunder, including costs, charges and expenses as described in Clause 6 and such retention amount is to be borne by the Company and is not to be insured. Losses arising out of the same act or interrelated acts of one or more of the Directors or Officers shall be considered a single loss and only one retention amount shall be deducted from the aggregate amount of such losses.
- (d) The foregoing provisions shall apply to this policy and the Directors and Officers Liability Policy attached hereto as though they constitute a single policy and the Insurer's maximum liability under both policies together shall not exceed the limits and retention set out in Paragraphs 5 (a), 5 (b) and 5 (c) above.

6. COSTS, CHARGES AND EXPENSES AND DEFENSE

- (a) No costs, charges and expenses shall be incurred without the Insurer's consent which shall not be unreasonably withheld; however, in the event of such consent being given, they will pay, subject to the provisions of Clause 5(c), 95% of all such costs, charges and expenses; subject nevertheless to the following conditions:
 - (i) If a payment not in excess of the limit of liability has to be made to dispose of a claim, costs, charges and expenses shall be payable in addition to the limit of liability applicable under this policy.
 - (ii) If the claim is successfully resisted by the Insureds, costs, charges and expenses shall be payable up to but not exceeding the limit of liability under this policy.
 - (iii) If a payment has to be made to dispose of a claim in excess of the limit of liability under this policy, the Insurer's liability to pay costs, charges and expenses in connection therewith shall be limited to such proportion of the said costs, charges and expenses as the limit of liability herein bears to the amount paid to dispose of the claim, but the Insurer's liability as aforesaid to pay costs, charges and expenses shall be in addition to the limit of liability otherwise applicable under this policy.
- (b) The Insureds shall not be required to contest any legal proceedings unless counsel (to be mutually agreed upon by the Insureds and the Insurer) shall advise that such claim should be contested by the Insureds and the Insurers consent thereto, such consent not to be unreasonably withheld. It is further agreed that the Insurer shall have the right, if it should so desire, to take over the defense or settlement of any claim in the name of the Insureds subject to the provisions of this Clause. In the event of the Insureds being so required to contest legal proceedings, the Insurer subject to the provisions of Clause 5 (c) and notwithstanding the provisions of paragraph (a) of this Clause 6, will pay 95% of all costs, charges and expenses in connection therewith, in addition to the limit of liability otherwise applicable under this policy.
- (c) The words "costs, charges and expenses" shall include the cost of any appeal, attachment or similar bond.

7. LOSS PROVISIONS

- (a) The time when a loss shall be incurred within the meaning of this policy shall be the date on which the Company shall give written notice to the Insurer as hereinafter provided.
- (b) The Company shall as a condition precedent to its right to be indemnified under this policy give to the Insurer notice as soon as practicable in writing of any claims made upon the Directors or Officers.
- (c) If during the policy period or during the discovery period if the right is exercised by the Company in accordance with Clause 8 (a):
 - (i) the Company shall receive written or oral notice from any third party that it is the intention of such third party to hold the Directors or Officers responsible for the results of any specified Wrongful Act by the Directors or Officers while acting in the capacities aforementioned; or
 - (ii) the Company shall become aware of any occurrence which may subsequently give rise to a claim being made against the Directors or Officers in respect of any such Wrongful Act; and shall in either case, during such period give written notice to the Insurer of the receipt of such written or oral notice under (i) above or of such occurrence under (ii) above, then any claim which may subsequently be made against the Directors or Officers arising out of such Wrongful Act shall for the purpose of this policy be treated as a claim made during the currency hereof.
- (d) Notice hereunder shall be given to the Insurer, Toronto Office.
- (e) The Company shall give the Insurer such information and cooperation as it may reasonably require and as shall be in the Company's power.
- (f) Losses shall be paid in legal currency of Canada.

8. GENERAL CONDITIONS

(a) Discovery Clause

If the Insurer shall cancel or refuse to renew this policy the Company shall have the right, upon payment of the additional premium of 25% of the three year premium hereunder, to an extension of the cover granted by this policy in respect of any claim or claims which may be made against the Directors or Officers during the period of twelve calendar months after the date of such cancellation or non-renewal but only in respect of any Wrongful Act committed before the date of such cancellation or non-renewal.

(b) Cancellation Clause

Notwithstanding anything contained in this policy to the contrary this policy may be cancelled by the Company at any time by written notice or by surrender of this policy. This policy may also be cancelled by or on behalf of the Insurer by delivering to the Company or by mailing to the Company, by registered, certified, or other first class mail, at the Company's address as shown in Item 1 of the Declarations, written notice stating when, not less than thirty (30) days thereafter, the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this policy shall terminate at the date and hour specified in such notice.

If this policy shall be cancelled by the Company, the Insurer shall retain the customary short rate proportion of the premium hereon.

If this policy shall be cancelled by or on behalf of the Insurer, the Insurer shall retain the pro rata proportion of the premium hereon.

Payment or tender of any unearned premium by the Insurer shall not be a condition precedent to the effectiveness of cancellation but such payment shall be made as soon as practicable.

If the period of limitation relating to the giving of notice is prohibited or made void by any law controlling the construction thereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.


SUBROGATION

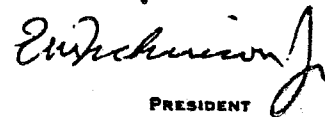
In the event of any payment under this policy, the Insurer shall be subrogated to the extent of such payment to all the Company's rights of recovery therefor, and the Company shall execute all papers required and shall do everything that may be necessary to secure such rights including the execution of such documents necessary to enable the Insurer effectively to bring suit in the name of the Company.

NOTICE

By acceptance of this policy, the Company named in Item 1 of the Declarations agrees to act on behalf of all Insureds with respect to the giving and receiving of notice of claim or cancellation, the payment of premiums and the receiving of any return premiums that may become due under this policy.

WITNESS WHEREOF, the Insurer has caused this policy to be signed by its President and a Secretary and countersigned on the Declarations page by a duly authorized agent of the Insurer.


SECRETARY


PRESIDENT