

This program has been accredited by the Law Society of Upper Canada towards the professional development requirement for certification.  
Corporate & Commercial Law: 7 hours.  
Environmental Law: 1 hours.  
Criminal Law: 0.5 hours.



# 5<sup>th</sup>

# DIRECTORS' & OFFICERS' LIABILITY

New liability risks in the current regulatory environment

March 2 & 3, 2010, Toronto  
Two-Day Event!

*Workshop Included: Document Retention/ Destruction/ Production*

## participating organizations

Bennett Jones LLP	Metrolinx
Chubb Insurance Company of Canada	Miller Thomson LLP
Davies Ward Phillips & Vineberg LLP	Ogilvy Renault LLP
Deloitte & Touche LLP	Ontario Securities Commission
Farris, Vaughan, Wills & Murphy LLP	Torys LLP
Federal Express Canada Ltd.	WeirFoulds LLP
Lerners LLP	

## course highlights

- Hear from some of the sharpest legal minds in Canada and the U.S. as they discuss liability issues facing directors and officers
- See how the proper production, maintenance and disposal of documentation can have a huge impact on the liability of in-house counsel in the event of claims or suits involving the corporation
- Learn about directors' and officers' exposure under corporate law and find out what directors and officers must do to protect themselves against lawsuits
- Find out where regulators are focusing their attention, the areas of increased exposure and best practices for risk mitigation
- Examine the D&O issues arising from M&As and the areas to be addressed to protect directors and officers

## who should attend

Corporate Directors & Officers, CFOs, Compliance Officers, Risk Managers, Senior In-House Counsel, Lawyers in D&O Liability, Corporate Governance & Litigation and D&O Insurance Executives & Brokers



**Course Leader**  
Mitchell H. Gropper,  
Farris,  
Vaughan, Wills  
& Murphy LLP



**Course Leader**  
Jeffrey S. Leon,  
Bennett Jones  
LLP



Bryan Finlay,  
WeirFoulds  
LLP



Kelly  
Friedman,  
Ogilvy  
Renault LLP



James A.  
Hodgson,  
Ogilvy  
Renault LLP



Lisa C.  
Munro,  
Lerners LLP



Eleni  
Maroudas,  
Chubb  
Insurance  
Company of  
Canada



J. Bruce  
McMeekin,  
Miller  
Thomson LLP



Usman M.  
Sheikh,  
Ontario  
Securities  
Commission



Crawford  
Smith,  
Torys LLP



David  
Stewart,  
Deloitte &  
Touche LLP



Kent E.  
Thomson,  
Davies Ward  
Phillips &  
Vineberg LLP



Brian D.  
Wylynko,  
Federal  
Express  
Canada Ltd.

as well as:

Heather Platt,  
Metrolinx

## FACULTY

### COURSE LEADERS

#### MITCHELL H. GROPPER

Mitchell H. Gropper, Q.C., is a Partner at Farris, Vaughan, Wills & Murphy LLP in Vancouver. He joined Farris in 1998 after spending the majority of the previous 28 years with McCarthy Tétrault where he served as Managing Partner. He has an active practice, often giving advice to boards of directors and independent committees of boards of directors; corporations and directors in “going private” transactions; and M&As of public and private corporations.

#### JEFFREY S. LEON

Jeffrey S. Leon, LSM, a Partner in Bennett Jones LLP’s Toronto office, is a certified Specialist in Civil Litigation by the Law Society of Upper Canada and has a general litigation practice with a focus on business litigation. He is recognized as a leading practitioner in corporate and commercial litigation, directors’ and officers’ liability and professional liability.

### CO-LECTURERS

#### BRYAN FINLAY

Bryan Finlay, Q.C., senior partner at Weir-Foulds LLP, is a senior trial and appellate counsel. He appears before all levels of the courts and tribunals. His general litigation practice includes commercial, public law, constitutional and administrative law litigation.

#### KELLY FRIEDMAN

Kelly Friedman is a partner in the Toronto office of Ogilvy Renault LLP. She is a versatile advocate and negotiator with a focus on complex commercial disputes and regulatory matters.

#### JAMES A. HODGSON

James A. Hodgson is a Senior Partner in the Toronto office of Ogilvy Renault LLP. He practices commercial, corporate and civil litigation. His practice focuses on shareholders’ rights, securities litigation, class actions, construction law, product liability and professional liability.

#### LISA C. MUNRO

Lisa C. Munro is a partner at Lerner LLP and a member of the firm’s Executive Committee. She was called to the bar in 1994 and has developed a practice in commercial litigation with an emphasis on complex business, banking, and class action litigation.

#### ELENI MAROUDAS

Eleni Maroudas is Corporate Counsel for Chubb Insurance Company of Canada. Her areas of responsibility include manuscripting and policy drafting, providing advice and assistance for regulatory compliance matters, non-disclosure and confidentiality agreements and ethics oversight and training.

#### J. BRUCE MCMEEKIN

J. Bruce McMeekin is a Partner in the Markham office of Miller Thomson LLP. He has advised private sector clients and provincial and municipal governments on a range of environmental, regulatory and business crime matters.

#### HEATHER PLATT

Heather Platt is Senior Legal Counsel & Associate Corporate Secretary at Metrolinx.

#### USMAN M. SHEIKH

Usman M. Sheikh is Litigation Counsel with the Enforcement Branch of the Ontario Securities Commission.

#### CRAWFORD SMITH

Crawford Smith is the co-coordinator of Torys’ Litigation and Dispute Resolution Practice. Crawford’s practice focuses on most corporate and commercial matters, securities and broker/dealer litigation and environmental litigation.

#### DAVID STEWART

David Stewart is a Partner in the Forensic & Dispute Services practice of Deloitte & Touche LLP in Toronto, and he is National Leader of Deloitte’s Analytic Forensic Technology practice in Canada. He specializes in forensic investigations and computer forensic services.

#### KENT THOMSON

Kent Thomson is the Head of the Davies Ward Phillips & Vineberg LLP’s Litigation Department in Toronto and has been recognized repeatedly as one of Canada’s leading litigation counsel.

#### BRIAN WYLYNKO

Brian Wylynko is the Managing Director, Regional Counsel & Corporate Secretary at Federal Express Canada Ltd. He is responsible for all legal, government relations and regulatory matters affecting Federal Express Canada.

## COURSE PROGRAM

### CORPORATE LAW EXPOSURE & THE BUSINESS JUDGMENT RULE

Not all decisions of directors and officers result in a benefit to the organization, as lawsuits filed against directors and officers for allegedly causing harm to a corporation profess. The Business Judgment Rule provides a legal defense against personal liability for a loss to the organization due to business decisions, but that protection can vanish if key requirements are not met. Examine directors’ and officers’ exposure under corporate law and find what directors and officers must do to protect themselves against these lawsuits.

- Directors’ obligations and liability in the oppression remedy context
- Conditions required for granting oppression claims relief
- In the corporation’s interest: derivative lawsuits
- Recent cases invoking the Business Judgment Rule defense
- Due care in making informed decisions

### SECURITIES LITIGATION & ENFORCEMENT

What new securities liability risks and exposures have emerged for directors and officers in the current regulatory environment? U.S. and Canadian securities regulators have stepped up compliance enforcement activities and enacted changes that have opened the doors to lawsuits by shareholders as well as by private equity investors. Learn more about where regulators are focusing their attention, the areas of increased exposure and best practices for risk mitigation.

- Liability for non-compliance with securities legislation
- Potential exposure and liability for prospectus misstatements or omissions
- Civil liability for misrepresentation in continuous disclosure documents
- Understanding the new Securities Transfer Act
- Increased exposure involving private placements
- Lawsuits under section 11 of the U.S. Securities Act

## SECURITIES CLASS ACTION EXPOSURE

Part XXIII.1 of the Securities Act (Ontario) creates a statutory cause of action for secondary market liability. What are the increased standards of disclosure and the points of exposure for alleged misrepresentations or misleading information in documents, verbal public statements and other written communications? This presentation will examine the impact, the potential liability and the realities of this legislation.

- Continuous disclosure: primary and secondary market lawsuits
- The courts' role as a gatekeeper in applying the screening provision
- Litigation strategy in the new securities class actions regime
- Disclosure policy and the due diligence defence
- Lessons from the Imax case and other recent developments

## D&O LIABILITY IN MERGERS & ACQUISITIONS

Merger and acquisitions create new liability concerns for director, as M&A activity increases pressure on companies to deliver value and to defend against derivative lawsuits. This discussion will examine the D&O issues arising from M&As and the areas to be addressed to protect directors and officers.

- Due diligence and risk management in M&As
- Competition Act liability in M&As
- Increased potential exposure to derivative lawsuits
- Heightened review in U.S.
- Increased exposure for takeover bid defensive tactics under OSC Rule 62-202

## D&O LIABILITY IN CANADIAN SUBSIDIARIES

The major duties and responsibilities of directors and officers in Canadian subsidiaries can be broken down into four categories: fiduciary duty, duty of care, the duty to supervise the management of the business of the corporation and other statutory obligations. Directors and officers can be held personally liable for breaches of these duties, which can include damages, fines and imprisonment. Indemnification and insurance are both available for directors and officers to manage risk and liability.

- Understanding D&O duties and responsibilities
- Personal liability for breaches of duties
- Indemnification
- Insurance

## PROTECTING AGAINST SELF-INCRIMINATION IN CROSS-BORDER PROCEEDINGS

With increased economic integration among Canada, the U.S. and the EU, a growing number of Canadian corporations and senior business executives can expect to be governed not simply by domestic legislation and regulatory authorities, but also by laws and authorities of the foreign jurisdictions. In the competition law arena, for example, executives who face investigations for anti-competitive conduct will need to protect their rights against self-incrimination in each jurisdiction. However, as this session will highlight, their ability to do so is problematic because of the increasing trend toward multi-jurisdictional investigations.

- Differing competition regimes in Canada, the U.S. and Europe
- Protections against self-incrimination in each regime
- How information-sharing provisions can prejudice protection against self-incrimination
- What the future holds

## D&O LIABILITY IN EXECUTIVE COMPENSATION CASES

Are executive compensation scandals Canada bound? Following a rash of cases filed against companies in the U.S., new SEC rule-making is increasing scrutiny of executive compensation practices and calling for greater disclosure of all compensation features. This presentation will examine the exposure, the new executive compensation disclosure and compliance standards and the risk mitigation actions that can be taken.

- Disclosure and transparency in executive compensation
- Understanding the implications of backdating and "springboarding"
- Learning from the Hollinger International and Hewlett Packard cases
- Executive compensation governance: potential D&O liability
- The controversy over performance target disclosure

## DIRECTORS' & OFFICERS' CRIMINAL LIABILITY

Media reports abound with tales of criminal cases lodged against company directors and officers for fraud. Directors and officers face increased exposure to criminal and regulatory liability as charges are increasingly brought against individuals. This presentation will examine the latest developments in Canadian and U.S. D&O criminal liability with lessons in avoidance and protection against personal liability.

- D&O liability and Bill C-45
- Corporate guilt and the "directing mind"
- Fraud allegations and enforcement on the increase
- The U.S. McNulty Memorandum: an end to attorney-client privilege?

## ENVIRONMENTAL LIABILITY OF DIRECTORS & OFFICERS

Provincial and federal environmental protection acts hold directors and officers liable for pollution violations. What can company directors do to operate within acceptable standards under the law? This presentation will discuss D&O environmental liability and best practices for due diligence and risk management.

- "Strict liability" in environmental violations
- Environmental Protection Act Section 280
- Due diligence and internal prevention systems
- Retroactive and joint and several liability

## BUSINESS RESTRUCTURING, INSOLVENCY & BANKRUPTCY

The directors and officers of businesses in financial distress face exposure to lawsuits brought by shareholders, bankruptcy trustees, federal or statutory receivers, and debtors-in-possession. What things can be done to protect directors and officers against these suits? Learn about the issues that come into play affecting D&O liability during business restructuring, insolvency and bankruptcy and the best strategies for securing protection.

- Restructuring under CCAA, BIA or Chapter 11 in the U.S.
- Transactions triggering a change in control
- Scrutiny of actions taken near the point of insolvency
- Enforceability of priority of payment provisions in bankruptcy

## NEGOTIATING D&O INSURANCE AND INDEMNIFICATION

Insurance indemnifies some of the risks of D&O liability, but what are the "gaps" that need to be addressed and negotiated? Side coverage offers some added protection, but coverage limitations and exclusions can expose directors and officers to liability. This presentation will highlight why one should get D&O coverage. In light of the recent Ontario Court of Appeal decision in Bennett Environmental, directors and officers also need to examine their role and responsibilities in connection with indemnification.

- Why one should get D&O coverage and what you typically get
- Examining Side A DIC coverage to manage D&O risk and asset protection
- Negotiating rescission & severability terms
- Evaluating the benefits of Side C/Entity coverage

## WORKSHOP

### DOCUMENT RETENTION/ DESTRUCTION/ PRODUCTION

With the increased complexity of today's corporate activity and increased scrutiny from regulators, shareholders and authorities, the role and responsibilities of directors and officers in the area of document retention, production and destruction have grown exponentially. In addition to being a matter of good corporate policy, the proper production, maintenance and disposal of documentation can have a huge impact on the liability of directors and officers in the event of claims or suits involving the corporation.

- Search & seizure preparedness
- Document retention requirements when an investigation is ongoing
- Negotiating the terms of an order or request
- Conducting an internal investigation for purposes of immunity
- Litigation readiness

# MULTIMEDIA PRESENTATIONS

Register for Directors' & Officers' Liability and we will give you free of charge a CD-ROM comprising the following virtual presentations from recent Federated Press courses and conferences. Presented in their entirety with complete audio and accompanying PowerPoint slides totaling 785 minutes of expert learning, these presentations are an added bonus to this year's course. Bear in mind that these presenters are not necessarily those that you will see and hear at this year's course.

## Negotiating D&O Insurance Carve-Outs

Catherine Richmond, *Willis Canada*;  
Havelock B. Madill, *Brownlee LLP*  
Time: 53 Slides: 26

## Going Private Transactions

Peter C. Goode,  
*McCarthy Tétrault LLP*  
Time: 35

## Directors' & Officers' Criminal Liability

Richard J. Berrow,  
*Fasken Martineau DuMoulin LLP*  
Time: 50

## D&O Liability in Executive Compensation Cases

Leslie R. Duncan,  
*Gowling Lafleur Henderson LLP*  
Time: 48

## Environmental Liability of Directors & Officers

Kate Chisholm,  
*EPCOR Utilities Inc.*  
Time: 36

## Protecting Against Self-Incrimination in Cross-Border Proceedings

Don Jack,  
*Lerners LLP*  
Time: 35

## The Shifting Sands in the "Vicinity of Insolvency"

William J. Kenny, Q.C.,

*Miller Thomson LLP*

Time: 48

## Developing a Performance Monitoring System for the Board

Lynn Korbak,  
*Morneau Sobeco*  
Time: 58 Slides: 9

## Developing a Performance Evaluation System for the Board of Directors

Scott Ewart,  
*Molson Canada*  
Time: 48 Slides: 15

## Assessing Risk Management and Using Assessment to Improve the Way the Board Does Business

Audrey T. Ho,  
*TELUS*  
Time: 78 Slides: 18

## Crisis Management and Communications for Corporate Counsel

Brian M. Leck,  
*Toronto Transit Commission*  
Time: 85 Slides: 37

## Managing the General Counsel's Governance Role: Working With the Board

Scott Ewart,  
*Molson Canada*  
Time: 42 Slides: 16

## Managing Risk and Legal Compliance

John F. Cairns,  
*CHUBB Insurance Company of Canada*  
Time: 69 Slides: 75

## Council as the Board's Information Gatekeepers

Lawrence Thacker,  
*Lenczner Slaght Royce Smith Griffin LLP*  
Time: 49

## Ensuring Legal and Ethical Behavior by the Corporation and the Board

Derek S. Baldwin,  
*IBIS Risk Management Services Inc.*  
Time: 51 Slides: 22

Audio/Video segments clickable slide by slide  
Papers and overheads also included  
Print any of the material for your own use



**Registration:** To reserve your place, call Federated Press toll-free at 1-800-363-0722. In Toronto, call (416) 665-6868 or fax to (416) 665-7733. Then mail your payment along with the registration form. Places are limited. Your reservation will be confirmed before the course.

**Location:** Metropolitan Hotel, 108 Chestnut Street, Toronto, Ontario, M5G 1R3

**Cost:** The attendance fee for the course is \$1825 per person and covers attendance for one person and the lecturers' presentation material. The fee further includes lunch on both days, morning coffee on both days and refreshments during all breaks. You may purchase a Proceedings CD-ROM containing edited actual proceedings and materials from the course.

**Time:** This course is a two-day event. Registration begins at 8:00 a.m. The morning sessions start promptly at 9:00. The second day ends at 4:00 p.m.

**Cancellation:** Please note that non-attendance at the course does not entitle the registrant to a refund. In the event that a registrant becomes unable to attend following the deadline for cancellation, a substitute attendee may be delegated. Please notify Federated Press of any changes as soon as possible. Federated Press assumes no liability for changes in program content or speakers. A full refund of the attendance fee will be provided upon cancellation in writing received prior to February 18, 2010. No refunds will be issued after this date. Please note that a 15% service charge will be held in case of a cancellation.

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