



Lax  
O'Sullivan  
Lisus  
Gottlieb

Published by Financier Worldwide Ltd  
©2022 Financier Worldwide Ltd. All rights reserved.  
Permission to use this reprint has  
been granted by the publisher.

■ **INDEPTH FEATURE** Reprint August 2022

# D&O RISK & LIABILITY

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in D&O risk & liability.

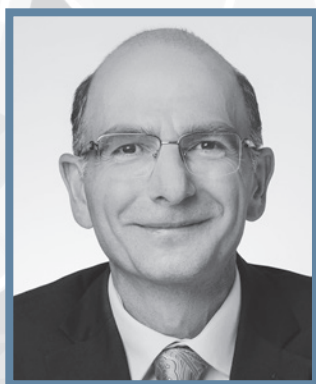


**FINANCIER**  
WORLDWIDE corporatefinanceintelligence



## *Lax O'Sullivan Lisus Gottlieb LLP*

### *Respondents*



**HOVSEP AFARIAN**

**Partner**

**Lax O'Sullivan Lisus Gottlieb LLP**

**+1 (416) 956 5093**

**hafarian@lolg.ca**

Hovsep Afarian is a recognised legal expert in the insurance industry. His expertise in insurance disputes is wide ranging, having acted in disputes involving D&O policies, cyber claims, fidelity bonds, E&O policies, CGL policies, property policies, life insurance policies, marine policies and environmental liability policies. Mr Afarian has appeared before all levels of court across Canada as policyholder counsel. He has been at the forefront of the developing cyber insurance industry. He has been involved in some of the largest and most significant insurance claims in Canadian history.



**MATTHEW LAW**

**Partner**

**Lax O'Sullivan Lisus Gottlieb LLP**

**+1 (416) 849 9050**

**mlaw@lolg.ca**

Matthew Law's practice focuses on policyholder insurance coverage disputes, corporate commercial litigation, and general civil litigation. He has successfully litigated or resolved numerous insurance coverage disputes across a variety of industries and frequently acts as lead counsel on injunctions, arbitrations and trials. Mr Law frequently argues cases before courts and administrative tribunals, including multi-day hearings, summary judgment motions and injunctions. He has also represented clients in lengthy private arbitrations involving complex legal issues and expert evidence.

*Lax O'Sullivan Lisus Gottlieb LLP*

---

**Q. Could you outline some of the key factors currently driving the personal risks facing directors and officers (D&Os) in today's market?**

**A.** One driver of risk for directors & officers (D&Os) is the pronounced increase in shareholder activism, both in Canada and globally, with investors approaching boards more frequently, and relying more on social media to coordinate class action lawsuits. There has also been a corresponding increase in regulatory activism, with regulators more aggressively enforcing D&O accountability measures for failures to mitigate risk. Another factor driving personal risks for D&Os is the steady increase in the availability of litigation funding, providing potential plaintiffs and class groups with the financial resources to finance complex and protracted lawsuits against D&Os. Finally, the emerging cross-border phenomenon of cyber risk has increased exposure for D&Os. Canada has ramped up legislative action on this front, building in mechanisms to existing cyber-related legislation providing for D&O liability in the event of breaches of cyber systems.

---

**Q. In your opinion, have there been any recent, high-profile D&O claims cases in which the outcome proved to be particularly significant? How might such cases impact how D&Os view the risks they face?**

**A.** Although not specifically in the insurance context, the securities claim pursued by Greenpeace against a publicly traded company, and its D&Os, for allegedly misleading investors in a preliminary prospectus about climate change-related risks, is significant and foreshadows the types of D&O claims on the horizon. The Alberta Securities Commission, in a first for Canadian securities litigation, agreed to review the complaint, subjecting D&Os to legal scrutiny related to negligence in climate change-related risk assessments. A recent Canadian decision which held that verbal resignations for directors are not valid also may have broader implications, particularly in circumstances where directors may be trying to remove themselves from a rapidly deteriorating situation.



*Lax O'Sullivan Lisus Gottlieb LLP*

---

**Q. In what ways have the personal risks faced by D&Os changed over the past few years? What major new risks have arisen?**

**A.** The personal legal risks faced by D&Os have historically centred on allegations of poor managerial decision making. Recently, however, there have been substantial shifts that have introduced new personal risks for D&Os. For example, climate change-related risks have become a new hotbed for lawsuits that engage D&O liability, specifically in how they disclose, manage and respond to climate risks. Stakeholders across the spectrum are also becoming increasingly sensitive to their environmental responsibilities. Additionally, social media has changed how information about companies is accessed and shared. Digital platforms have made it easy for investors to coordinate and collectively attack business decisions made by D&Os, including using class actions and ordinary litigation to pressure management and the board.

---

**Q. In terms of D&O insurance, what steps should companies take to ensure they offer their D&Os an appropriate level of coverage?**


**A.** Robust insurance coverage for D&Os is important to attract top talent. Companies, with the assistance of brokers, can engage in 'risk mapping' to ensure that emerging risks are covered and that policy limits are sufficient. Run-off coverage is also important to protect against future claims based on historical misconduct. Exclusions should be vetted closely and difference in conditions (DIC) coverage, which has narrow exclusions, should be secured. The D&O market is very competitive, often allowing favourable policy language to be obtained, though the market has hardened over the last two years.

---

**Q. How have D&O insurance policies evolved in recent years? Have there been any general changes in terms, exclusions, pricing and so on?**

**A.** The D&O insurance market has shifted considerably because of a substantial increase in the volume of litigation being commenced against companies and their boards. Claims against D&Os are also on the rise in volume and complexity, prompting underwriters to re-evaluate their rates and policy structures. While the insurance market saw premiums and

*Lax O'Sullivan Lisus Gottlieb LLP*



*Robust insurance coverage for D&Os is important to attract top talent. Companies, with the assistance of brokers, can engage in 'risk mapping' to ensure that emerging risks are covered and that policy limits are sufficient.*

deductible amounts sharply increase over the past two years, the market is expected to soften and self-correct in the transition to a post-coronavirus (COVID-19) era. In addition, within the past year, there has been a steady increase in capacity and competition in the D&O insurance market which will also help to stabilise policy pricing. That said, restricted exposure to certain classes of business continues as insurers remain cautious.

---

**Q. What advice would you give to both companies and D&Os when they are assessing the merits of a particular D&O policy? Which elements are of paramount importance?**

**A.** When assessing the merits of a policy, D&Os should work with their insurance broker to inform themselves on the current and forecasted market changes that will substantially affect their rates, deductibles and terms. D&Os should also work closely with their corporate leadership teams to ensure that present and future risks facing the business are considered by their specific policy structure and terms. These factors should also be considered on an ongoing basis as companies evolve and



*Lax O'Sullivan Lisus Gottlieb LLP*

expand. It is of paramount importance that D&Os and their companies not 'set it and forget it' when it comes to insurance coverage. They must work with their broker to regularly evaluate the coverage they have, especially its exclusions, the coverage they need, and the coverage that is available in the market.

---

**Q. How might the personal risks facing D&Os evolve in the months and years to come? To what extent are they becoming more complex, international and unpredictable in scope?**

**A.** One emerging risk stems from the rise of cryptocurrency and blockchain technologies to process transactions with a company. This area remains lightly regulated as many legislators are still trying to grasp how it functions and its potential impacts. But once those regulations take hold, D&Os will find themselves exposed to yet another potential fault line of liability. Another emerging risk is greater legislative and public scrutiny applied to ethical sourcing in the supply chain. These supply chain concerns cross national boundaries, given offshoring and outsourcing are common business

practices, complicating the risk mitigation process. Finally, the greater awareness of and sensitivity to appropriate conduct in the workplace, including in relation to harassment, sexual assault and racism, create a new area of personal risk for D&Os, who may face claims for failing to ensure a safe and inclusive workplace. This risk requires clearly defined policies. □

*Lax O'Sullivan Lisus Gottlieb LLP*

[www.lolg.ca](http://www.lolg.ca)

---

**LAX O'SULLIVAN LISUS GOTTLIEB (LOLG)** is Canada's premier counsel firm. The firm's lawyers handle the most complex commercial disputes and public law cases. They carry a robust trial, arbitration and appellate practice across the country and in the Supreme Court of Canada. LOLG is regularly engaged as trial and appellate co-counsel by peer law firms, and as court officers in large and sensitive litigation mandates. The firm also acts as counsel in insolvency cases, class actions, securities litigation and administrative law matters, as well as infrastructure, franchise, employment and health law disputes.

**HOVSEP AFARIAN** Partner  
+1 (416) 956 5093  
hafarian@lolg.ca

**MATTHEW LAW** Partner  
+1 (416) 849 9050  
mlaw@lolg.ca

---

