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Pandemic Pandemonium: Anticipating and Mitigating Risk

On May 11, 2020, Canadian Lawyer held a webinar titled “COVID-19: Litigation Fallout: What Organizations Need to Do to Mitigate Their Risk” as part of their online event series focused on steering organizations through crisis. The risk of liabilities and potential for litigation are top-of-mind as businesses navigate from the pandemic towards its aftermath. Michelle Kelly, a partner at Cox & Palmer, led the speakers as they discussed practical tips and what to expect upon returning to the ‘new normal’. Below are some key takeaways for organizations, and their in-house and external counsel.

There is Virtually No Going Back

While the pandemic has caused massive disruptions to the justice system, Lenczner Slaght partner, Matthew Lerner, stressed that “the courts are very much open for business”. Although the extent to which matters are being heard varies greatly across provinces and court levels, courts nation-wide are increasingly encouraging (or ordering) parties to proceed with motions, examinations and even trials remotely. This forced technological overhaul of the court system will have lasting effects on the access to and delivery of justice moving forward. As Justice Myers put it: “It’s 2020...We should not be going back.” Counsel will be expected to keep matters moving and to collaborate extensively to assist the court in this transition, for example by cooperating to provide the record in one easy-to-access location.

Keep an Eye on Litigation Trends

Although Dina Raphael, Associate General Counsel at BMO Financial Group, expects the number of COVID-related claims to jump once the dust settles and courts re-open, she noted that the first wave of claims has already begun.

Common problems faced by organizations such as business interruption, failure to take proper steps to protect individuals from exposure to the virus, or return to work policies are raising a host of insurance litigation and class action issues. In the longer-term, we will likely witness a second wave of claims including contractual disputes, securities litigation regarding disclosure of the impact of COVID-19, and employment issues related to lay-offs or unsafe workplaces.

Mark Cooper, Chief Legal and Compliance Counsel for Marsh

Canada Limited, commented that much uncertainty remains regarding how the courts will account for the government's active role in managing the pandemic and informing business decisions.

Make Use of Internal and External Counsel

More than ever, organizations should turn their focus inwards and complete detailed internal risk analyses. Particular attention should be given to current contracts and to any force majeure or material adverse change clauses which may be triggered by the circumstances. Mark Cooper highlighted that this is the time to look carefully at insurance policies, as many insurers are announcing commercial relief measures.

Eric Azran, a partner at Stikeman Elliott LLP, stressed the value of engaging external counsel for crisis management sooner rather than later, particularly as organizations resume business and employees return to work, which in turn will increase legal and reputational exposure. At the same time, Dina Raphael noted the advantage of relying on internal counsel to conduct pre-emptive negotiations with contracting parties.

Hindsight is 2021

Matthew Lerner's top tip for organizations is to remember that, with the situation changing by the minute, any action taken in the heat of the pandemic will inevitably be judged through the lens of hindsight once the dust settles. Anything that happens now engages long-lasting consequences – both legal and reputational. Although the Courts are committed to opening up, organizations should be wary of turning to litigation prematurely. The same careful approach should be taken regarding internal return to work and business resumption policies. Eric Azran reminded us that, although institutions are currently in survival mode, reasonableness is the yardstick against which actions will be judged in retrospect.

Internal and external counsel are key players in navigating these uncertain circumstances and minimizing future exposure. Cheryl Woodin, a partner at Bennett Jones LLP, advised that any action taken by an organization during this time should be thoroughly documented and informed by the fact that, in assessing reasonableness, courts will most certainly look to the information that was reasonably available at the time the decision was made.