

# FIDUCIARY LIABILITY INSURANCE

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## OVERVIEW

Since 2000, Canada has been fertile ground for fiduciary litigation. Recent court decisions throughout Canada have broadly interpreted the obligations and duties (common law and statutory) imposed on fiduciaries, thereby creating an escalating liability environment.

It is predicted that the next decade could be very litigious for pension plans as today's employers try to develop well thought-out strategies to reconcile their long-term need to have a cost-efficient plan with their short-term volatility issues. Given the difficulty in reconciling these competing strategies, the anticipated failure may well result in litigation. Furthermore, increased merger and acquisition activity, particularly cross-border, combined with a lack of clarity in the case law, minimal legislation, and restrictive regulatory policies has created a risky legal environment for companies acquiring or disposing of pension plans and their associated liabilities.

Uncertainty over the rules for managing pension plans is a key issue emerging out of several recent court decisions. The Supreme Court of Canada's decision in June 2006 in *Buschau v. Rogers Communications Inc.*,<sup>1</sup> which held that a centuries-old common-law trust principal could not be used to force the termination of a pension trust, was a welcome relief to plan sponsors. However, the Court's ruling that pension plans are only subject to "applicable" trust principles, without enunciating which principles apply, leaves much uncertainty as to what the rules of the game are. Some clarity is evident from more recent decisions in late 2007 and early 2008, which show a continuing maturation of the case law as the judiciary delves deeper into the interplay between employment, contract, and trust laws in the context of pension benefits.<sup>2</sup>

The historical generation of large surpluses in pension plan assets has resulted in big money being at stake in the litigation. Since 2000, capital market difficulties have significantly reduced the market value of pension funds available to meet future obligations of corporate defined benefit plans. This, coupled with several years of low-equity returns followed by rock-bottom long-term interest rates and changing accounting rules, resulted in many companies shelling out significant portions of cash from operations to bridge the pension funding gap. This has led to underfunding, bankruptcies, and pension plan terminations. Not surprisingly, the deficit position of defined benefit plans has resulted in a number of high-profile corporate restructurings—Air Canada, Stelco, Inco Ltd., Bombardier, Algoma, and Canada Pension Plan to name but a few—with one of the biggest issues in those restructurings being pension liabilities and debts. Indeed, concern over unpaid pension plan contributions in bankruptcy and receivership situations resulted in amendments to Canada's insolvency law, which took effect in July 2008.<sup>3</sup> Pursuant to the new provisions, super-priority right status has now been given to certain unpaid pension plan contributions for any federally or provincially regulated pension plan. Furthermore, the rising cost of employee health and welfare benefits has led to reduction—and in some cases the cancellation—of benefits. Changes in benefits are a significant trigger of fiduciary liability exposure.

Employers and their employees, directors, and officers who serve as trustees of, have discretionary authority with respect to, or assist in the administration of any retirement plan or other employee benefit program (such as medical, accident, or group life plans)—hereinafter

<sup>1</sup> 2006, S.C.C. 28.

<sup>2</sup> See *Kerry (Canada) Inc. v. DCA Employees Pension Committee* (2007) ONCA 416, leave to appeal to S.C.C. granted, and *Burke v. Governor and Co. of Adventurers of England Trading into Hudson's Bay* (2008) ONCA 394.

<sup>3</sup> P.C. 2008-1316, C. Gaz. 2008.II.1746.

referred to as “plans”—have potentially devastating exposures and a genuine risk. As “fiduciaries”, these people must comply with detailed, complex, and stringent legal requirements; must act with the utmost care; and must avoid even the appearance of certain conflicts of interest. Day-to-day decisions will be scrutinized in hindsight, even if they were prudent at the time. If a wrongdoing occurs, potential damages can be enormous in light of the large amount of money controlled by or owing under such plans. Even the cost of defending pension class actions can be devastating. Pension trusts have been said to be “the quintessential class action”, the advantages of which are “incontrovertible”.<sup>4</sup> With class actions available across the country, and the increasing financial benefits of contingency fees, plaintiff law firms have become more organized, experienced, and specialized in this area of litigation. These factors, taken together with the looming “funding crunch” as baby boomers approach retirement, have resulted in fiduciary liability becoming the dragon now looming over the horizon.

## PRACTICAL APPLICATION

### Who Is a Fiduciary?

Those having a fiduciary relationship to the beneficiaries of a plan include any person or entity that exercises discretionary authority or control over the plan or its assets and any person or entity that makes decisions regarding the administration and the investment or management of the plan’s assets.

A fiduciary may be any of the following:

- the employer/plan sponsor
- the plan administrator
- officers and directors
- the pension committee
- a trustee or custodian
- an investment manager
- other consultants or advisors, including actuaries and lawyers.

### What Is Fiduciary Liability Insurance and Who Needs It?

Fiduciary liability insurance is designed to provide protection to the organization, subsidiaries, directors, officers, and employees—and the plans themselves—against losses that result from actions under two types of alleged wrongdoing:

1. Breach of fiduciary duty: violations of duties imposed upon fiduciaries by common, civil, or statutory law;
2. Wrongful administration: negligent errors or omissions in the administration of any plan.

Regardless of the size or the number of plan participants, every company needs fiduciary insurance if it sponsors a plan. The unique structure of and risks faced by multi-employer plans dictate that their insurance coverage should be underwritten and based on a specific policy form with features that address their individual needs. Oftentimes, this requires a manuscripted, as opposed to an “off the shelf”, solution. Persons or entities that have one type of professional liability insurance policy may not be covered for all potential risks under that one policy. Directors, officers, employees, and the employer/plan sponsor may serve in more than one capacity in an organization. The fiduciary responsibilities owed to the beneficiaries of a plan are separate and distinct from those responsibilities that are owed to corporate stakeholders in other areas of corporate governance. This dual role as corporate employer/director/officer and plan administrator/fiduciary may give rise to situations where the interests of the corporate employer conflict with those of the plan beneficiaries. It is not always clear in which capacity the person/entity may be acting. Such persons/entities may be insured

<sup>4</sup> Ormrod v. Hydro Electric (2001), 53 OR (3d) 285 S.C.J. See also Lloyd v. Imperial Oil Limited, (2008) ABQB 379.

under several different insurance policies, and a consideration of an insured's role and duties and the capacity in which it is alleged a wrongful act occurred is crucial to determine which type of insurance should respond to a particular loss.<sup>5</sup>

Although a fiduciary can delegate some of its responsibilities, it cannot thereby legally contract out of its fiduciary obligations. There is no statutory liability of directors in the event of bankruptcy for pension obligations; however, directors have the ultimate responsibility for all functions involved in the operation of the plan and the fund. It is thus necessary for companies with plans to obtain fiduciary liability insurance regardless of the nature of the plan and regardless of whether or not they have contracted out some of their fiduciary responsibilities, including delegation of administration of the plan to a third party.

A typical fiduciary policy is not intended to provide coverage to persons or entities outside the insured corporation, even though they may be performing fiduciary duties in respect of the plan. Thus, external lawyers, actuaries, investment advisors, third-party administrators, and so forth, are not typically covered under fiduciary insurance. It is increasingly common for plan sponsors to be required to assume contractual liability for third-party service providers, in the form of hold harmless and indemnification agreements as well as contractual limitations of liability. Such assumptions of liability will not typically be covered under fiduciary insurance. Rather, such exposures are more appropriately covered under a professional Errors & Omissions insurance policy, obtained by the third party itself.

## Triggering the Policy

Fiduciary insurance policies are “claims made” coverage, meaning that the policy that is in place at the time the claim is made is the one that responds to the loss, regardless of when the wrongful act occurred. This insurance is not intended to cover wrongful acts clearly known prior to the inception of the policy. Thus, the insurance underwriter will require that an application be completed which asks if the insured is aware of anything that could reasonably lead to a covered claim during the policy period (if there is, whether disclosed or not, there will be no coverage afforded for a subsequent claim). Similarly, prior claims and previous litigation are excluded from the future policy (see, Sample Fiduciary Liability Insurance Application, in Schedule A – attached)

The coverage provided is “third-party liability” coverage, meaning that a party separate from the insured must seek compensation for harm he or she has suffered, as opposed to the insured itself seeking recovery for the cost of correcting an error that it has discovered. The policy is written on an “all risks” basis, meaning that the policy does not provide a list of covered risks, one of which must occur for coverage to be triggered, but rather covers all breaches of fiduciary duty and errors in the administration of a plan. The policy is triggered when a “claim” that seeks the recovery of “loss” is first made during the policy period for a “wrongful act”.

The definition of “claim” within a policy may vary substantially, but will typically include

- a written demand for monetary damages;
- a civil proceeding commenced by the service of a complaint or similar pleading;
- a criminal proceeding commenced by the return of an indictment;
- formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigation order, or similar document.

<sup>5</sup> See, for example, *Slater Steel (Re)* (2008) ONCA 196, where the Ontario Court of Appeal held that audit committee members were not acting in the capacity of officers and directors when reviewing/approving actuarial reports but rather as agents and employees qua administrator and thus were not protected by bankruptcy protection orders. See also *Hydro Quebec* (2005) QCCA 304 CanLII, leave to appeal to the Supreme Court of Canada denied, where it was held that, in making a decision to change the benefit structure, the employer was acting in its capacity as corporate sponsor, and not as a fiduciary of plan.

The more broadly a “claim” is defined, the easier it is to trigger coverage. However, a broader trigger can have undesirable consequences, such as onerous implications when coupled with a stringent reporting requirement (for example, where a “claim” includes a verbal demand, and the policy requires reporting within the policy period). Furthermore, increased coverage also increases access to and thus depletion of policy limits, thereby necessitating a consideration of the appropriateness of the limits purchased.

Most policies allow the insured to provide a notice of circumstances that may give rise to a claim where a claim has not yet been made. Where the notice is accepted by the carrier, the carrier is obliged to treat a claim as if it had been made in the policy period in which the notice was given. This type of notice provision can be very useful where a policy is being terminated, where policy terms have changed significantly, or where limits have been depleted from one policy period to the next.

## **Indemnification**

The broad and expanding definition of “fiduciary” means that many individuals with responsibility in connection with a corporation’s plans have personal financial liability. The ability of a corporation to indemnify its fiduciaries with regard to their actions in connection with a plan is more limited than the rights of indemnity that a corporation may extend to its executives. The fiduciary is typically required to be acting in good faith and without gross negligence in order to qualify for an indemnity. In today’s environment of flagrant corporate malfeasance, there are more situations where the company is unable, or indeed unwilling, to indemnify costs incurred in defending claims. Given that indemnification may be an ineffective source of protection, fiduciary insurance may be the only prudent method of protection against the potentially large personal exposure facing fiduciaries.

To ensure the broadest indemnification protection, many corporations provide their directors and officers with well-drafted indemnification agreements. It would be wise for plan sponsors to consider indemnity agreements for their fiduciaries as well. However, as important as it is to provide well-crafted indemnification agreements, it is necessary to note that virtually all North American-based fiduciary policies contain a “presumptive indemnification” provision. Essentially, this provision provides that if a company is legally permitted to indemnify, the insurance carrier will presume that it has done so to the fullest extent allowable by law. In fact, the carrier will usually make this presumption whether or not the company has actually elected to do so.

Maximizing coverage for non-indemnifiable loss (i.e., where the insurance is the last defence between the fiduciaries’ personal assets and the liabilities) can be done in the following ways:

1. Priority of Payments Endorsement —prioritizes the payment of non-indemnifiable loss prior to the payments to the organization/plan itself, whether through reimbursement for indemnity payments to insured persons or coverage for the plan/sponsor organization itself
2. Dedicated Side A Coverage —dedicates limits for non-indemnifiable loss that will not be eroded for amounts indemnified by the insured organization or plan
3. Purchase Side A Difference in Conditions (DIC) Coverage —provides broad, dedicated coverage for non-indemnifiable loss. The coverage is designed to respond where traditional fiduciary policies will not. Although this coverage has caught much attraction of late in the world of directors and officers liability insurance coverage (D&O), it has not received as much attention in the fiduciary liability environment.

## **Types of Claims and Red Flag Situations**

Fiduciary liability exposures exist in both defined benefit pension plans (DB) and defined contribution pension plans (DC). Indeed, fiduciary risk relating to DC plans has been noted as a potential growth area for some time, with the United States experiencing an explosion in these types of claims over the past year. In Canada, there is a growing trend for companies to convert

from a DB to a DC plan. Many are doing so with the mistaken assumption that a DC plan, having removed the contractual promise to deliver a specified benefit, will remove most, if not all, fiduciary risk. The types of claims to which fiduciary insurance may respond include these:

### **In the DB Environment:**

- plan changes / amendments / transfers / windups—misrepresentations, breach of plan
- plan changes as a trigger for surpluses / deficits
- partial windups post-Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)<sup>6</sup>—issue of surplus distribution on partial plan windup
- asset transfer post Aegon Canada Inc. v. ING Canada Inc.<sup>7</sup>—issue of whether or not, upon merger of two plans, the surplus of one can fund the deficit of another
- expenses—what can be charged to the fund?<sup>8</sup>
- third-party service providers and indemnities
- improper selection, delegation
- U.S. litigation—Employee Retirement Income Security Act (ERISA) “tag-along” claims where the plan has investments in company stock and stock price drops as a result of financial misrepresentation.
- Fiduciary claim follows the securities action
- benefit changes relating to:
  - elimination of retiree health care
  - bankruptcy
  - mergers and acquisitions
- legislative and regulatory issues—Canadian Association of Pension Supervisory Authorities (CAPSA) Governance Guidelines and various provincial and federal changes or reviews of pension benefits legislation.<sup>9</sup>

### **In the DC Environment:**

- plan conversions<sup>10</sup>
- ‘passive’ plan members and default options (members who are not engaged in managing their accounts)
- communication to plan members
- providing discretionary investment advice
- failure to inform and educate
- providing erroneous information
- choice of investment options—including, most recently, subprime mortgage investment losses
- choice of service provider
- fees—appropriateness and disclosure
- conflicts of interest—particularly with investment advisors

<sup>6</sup> [2004], S.C.J. No. 51.

<sup>7</sup> [2003] O.J. No. 4755, leave to S.C.C. denied.

<sup>8</sup> Supra note 2, for example.

<sup>9</sup> Quebec Bill 30 (S.Q. 2006, c. 42), An Act to amend the Supplemental Pension Plans Act; Ontario Expert Commission on Pensions (established November 2006); Alberta and British Columbia’s Joint Expert Panel on Pension Standards conducting a joint review of their pension legislation (2007).

<sup>10</sup> See, for example, Nortel proposed class action filed in Ontario Superior Court, June 2008.

## Red Flag Situations

Some situations that signal red flags and thus demand particular scrutiny of fiduciary insurance include companies

- that are undergoing a downsizing/restructuring or those that are experiencing high merger and acquisition activity;
- that are being sold;
- that have had claims;
- that have had negative press;
- whose pension plans are under-funded;
- that have converted to cash-balance plans;
- with employer securities—including larger public companies and private companies with employee stock option plans (ESOPS);
- with stock in any company pension plan where the stock price has dropped lately.

## Fiduciary Insurance Terms and Conditions

Fiduciary policy wordings are not standardized and thus differ significantly between insurance companies. A thorough review of the policy with attention to detail in the negotiation of terms and conditions is key to obtaining appropriate coverage. Although much attention has been paid in the past 10 years to coverage under D & O policies, the same cannot be said of fiduciary insurance. Fiduciaries and insurance brokers acting on their behalf can benefit greatly from learning more about this specialized area of coverage and undertaking a detailed comparison of coverage terms offered (see, Sample Primary Fiduciary Policy, in Schedule B – attached)

The most common misconception about fiduciary insurance revolves around the issue of what is actually covered under the standard fiduciary policy. The confusion stems from the fact that benefits due under the plan are excluded from the definition of loss in virtually all fiduciary policies. A typical definition of “loss” in a fiduciary policy includes damages, judgments, settlements, and defence costs in connection with a claim. Carved out of the definition of loss, however, are benefits, or that portion of any settlement or award in an amount equal to benefits, due under a plan. The rationale for this is that paying benefits is the reason why the plan was set up—what it contractually obligates its fiduciaries and administrators to do. Paying benefits, therefore, does not involve harm to the plan, the plan sponsor, or its fiduciaries. Just because the benefit itself may not be covered under the policy does not mean that the expenses associated with defending the claim would not be covered. Additionally, many claims made against plans and their fiduciaries involve plan assets, as distinct from plan benefits. For example, claims that allege a breach of fiduciary duty in managing, investing, or allocating the assets of the plan are not claims for benefits but for assets. Although benefits may be paid out of plan assets, the plan assets are not themselves benefits. Claims that seek entitlement to surplus withdrawals or for failure to make contribution holidays are not seeking benefits as loss. It is important to note that most standard fiduciary policies also have exclusions that preclude coverage for loss, other than defence costs, associated with plan asset reversion or contribution holidays. Thus, a claim that alleges that a company has wrongfully reverted plan surplus to its own use or has wrongfully failed to make a plan contribution would have defence costs covered under the fiduciary policy, but would not have coverage for the amount of surplus that had been wrongfully taken, or the contribution amount owing.

The terms and conditions that come up for discussion with underwriters generally fall into one of two categories. The first includes those that have migrated from other Executive Risks lines of coverage (most notably D & O ). These include a priority of payments provision, non-rescindable coverage, severability, conduct exclusions, and others. The second consists of those terms and conditions necessary to tailor the coverage to a particular risk and includes items such as the basis for the insuring agreement and claims notification requirements. A common provision in

fiduciary policies is the so-called “hammer clause”. Most, if not all, fiduciary policies have a provision that requires the insured to obtain the insurer’s consent to settle a claim. Concerned that some insureds may view their policies as assets to spend, many fiduciary policy providers have a provision that allows the insurer, in circumstances where it wishes to accept an offer to settle but the insured refuses, to limit the insurer’s liability (i.e., bring down the hammer) to the amount for which it could have settled the claim plus costs (or some agreed percentage thereof) as of the date the written settlement was proposed.

A notable addition to fiduciary terms and conditions for companies that are subject to liability under the U.S. Internal Revenue Service rules requiring administration of plans in accordance with plan documents and legal requirements is an extension offered by at least one major carrier for plans that have undertaken a fiduciary compliance audit. At its most basic, a simple audit can result in coverage extension at no cost (and can help prepare a company for an enforcement audit). A more thorough operational audit can yield more meaningful coverage enhancements in exchange for additional premiums. This trend may prove to be of considerable benefit to plans and their fiduciaries. In Canada, although such a compliance audit is not mandatory, it is certainly powerful evidence of good governance and a strong underwriting consideration.

## **Types of Fiduciary Insurance**

A plan fiduciary has various insurance options available, some of which can result in overlapping coverage. A common misconception is that directors or officers who have coverage under a D & O policy are covered for all types of actions that might arise. The misconception arises from the capacity issue discussed above, under “What Is Fiduciary Liability Insurance and Who Needs It?”. To the extent that an executive is acting in a fiduciary capacity (as opposed to a corporate capacity) with respect to a plan, the D & O policy will not cover this exposure; in fact, it typically expressly excludes plan risks.

### **Employee Benefits Liability Insurance (Commercial General Liability Policy)**

This coverage can be purchased as an extension to a company’s general liability policy. It provides coverage for errors in administration of the plan, but not the broader risk of breach of a fiduciary duty.<sup>11</sup> This policy may provide broader coverage for loss, including benefits due under the plan (which would not typically be covered under a fiduciary policy, as noted above).

### **Fiduciary Liability Insurance**

Fiduciary liability insurance can be purchased on a stand-alone basis (or a mono-line form), meaning that it is the only coverage provided under the policy with the result that the entire limit of liability is dedicated to fiduciary exposure, or it can be purchased as a bundled product under a “multiple-line form”. In the latter situation, the limit of liability would be shared by all insureds under more than one insuring agreement—for example, combined D & O, employment practices liability, and fiduciary agreements. Furthermore, fiduciary insurance is available as an extension to a D & O policy, meaning that the limit of liability of the D & O coverage would be shared with the fiduciary coverage.

<sup>11</sup> See *Michelin North America (Canada) Inc. v. ACE INA Insurance*, [2008] O.J. No. 2328, where it was held that claims requiring an interpretation of the plan to determine entitlement to take contribution holidays were not covered under a CGL policy.

## **Limits and Capacity**

The determination of what limit of liability to purchase is an art, not a science. Factors to be considered include

- peer/industry benchmarking;
- plan asset size;
- the insured's capacity to retain risk;
- level of protection desired by fiduciaries;
- merger and acquisition exposure;
- the liability environment.

The fiduciary marketplace is unusual, in that rising demand (and rising prices, particularly in the United States) is not necessarily prompting increased supply. One reason is that a number of underwriters do not believe that they fully understand fiduciary exposures, particularly U.S.-based liabilities. Even as rates rise on many larger, global risks, some carriers appear reluctant to enter the marketplace or to offer capacity on lower layers in a fiduciary program.

Another factor is the limits management programs of many carriers, which limit themselves to an aggregate amount of coverage on larger risks. If their available \$10–\$20 million has already been utilized on a D & O policy, then this market may simply not be available on the fiduciary program. Efficient coordination of the available markets among the executive risks lines of coverage (especially D & O, fiduciary liability, and employment practices liability, to a more limited extent) is therefore critical for larger placements.

### **Pricing and Risk Differentiation**

Fiduciary underwriters largely define a company's fiduciary risk by consideration of

- whether the company is public or private;
- plan funding levels and assumptions (need to provide financial/actuarial statements);
- planned reductions in benefits;
- mergers and acquisitions;
- claims history;
- investment choices—whether employer securities are in DB plan, or whether the default options are in a DC plan;
- third-party service providers and contracts;
- indemnification provided to fiduciaries;
- global operations.

As suggested above, pricing on larger accounts, especially those in the United States with significant mergers and acquisitions activity and/or large helpings of employer securities in their retirement plans, continues to rise. While still measurable and more economical than D&O (on a price-per-million basis), it is expected that, given the growing exposures, fiduciary insurance rate increases will continue.

Global companies may face higher increases, as more stringent financial reporting standards may have required them in 2005 to disclose total international pension assets and exposures for the first time. As pension plan assets are a key basis for pricing fiduciary liability, the utilization of a global pension calculation, rather than merely using U.S. assets, may result in further upward pressure on pricing.

In order to secure the best terms and conditions, risk differentiation is crucial. A good marketing strategy would include

- meeting with the underwriting community well in advance of policy renewal or inception;
- emphasizing operational, financial, and plan governance procedures and strengths, including any governance audits;

- addressing any claims history;
- addressing any significant mergers and acquisitions plans;
- outlining and prioritizing reasonable expectations.

This chapter is intended to provide an overview of fiduciary liability insurance for general and illustrative purposes only. The material presented is not a complete or exhaustive analysis of legal liability exposures or risks, nor of fiduciary liability insurance coverage. The terms and conditions of fiduciary liability insurance are not standardized. The availability of insurance coverage to respond to any particular claim will depend on the specific facts and circumstances of the claim and the language of the policy as issued. Advice with respect to particular insurance needs or actual or potential legal liability must be obtained from an insurance broker or lawyer, respectively.

# SCHEDULE A

## Sample Fiduciary Liability Insurance Application



Executive Risk Insurance Services Limited

FIDUCIARY LIABILITY INSURANCE APPLICATION

NOTICE: THE POLICY PROVIDES THAT THE LIMIT OF LIABILITY AVAILABLE TO PAY JUDGEMENTS OR SETTLEMENTS WILL BE REDUCED BY AMOUNTS INCURRED FOR LEGAL DEFENCE. UNLESS DUTY-TO-DEFEND COVERAGE IS SPECIFICALLY PURCHASED, THE UNDERWRITER HAS NO DUTY TO DEFEND ANY CLAIM.

AMOUNTS INCURRED FOR LEGAL DEFENCE WILL BE APPLIED AGAINST THE RETENTION AMOUNT.

IF A POLICY IS ISSUED, IT WILL BE ON A CLAIMS-MADE BASIS.

I. GENERAL INFORMATION

1. Name of Parent Company:

\_\_\_\_\_

Address of Parent Company (Head Office Location):

\_\_\_\_\_

\_\_\_\_\_

2. Insurance Broker – Company:

Address:

\_\_\_\_\_

\_\_\_\_\_

Account Manager:

\_\_\_\_\_

Tel. No.:

\_\_\_\_\_

\_\_\_\_\_

3. Name and position of person completing this Application: Name:

\_\_\_\_\_

Position:

\_\_\_\_\_

4. Current Fiduciary Liability Insurance Policy, if included as an attachment, check here .

If not, please provide details, as outlined below of your most recent coverage:

Table with 2 columns and 6 rows: a) Name of insurance company, b) Limit of Liability, c) Self-insured retention, d) Policy expiration date, e) Premium (indicate one year or more), f) Pending and Prior Litigation Date

If this Application is to initiate coverage, check here .



16. Do you want to include all Subsidiaries?  Yes  No

If "Yes", please provide a list of all Subsidiaries to be covered including the following information:

- a) An organization chart illustrating percentage of ownership, directly or indirectly by the Parent Company of all Subsidiaries,
- b) A brief overview of their nature of business, and
- c) The date the Subsidiary was acquired or created.

17. Does the Parent Company, or any Subsidiary proposed for coverage presently act in the capacity as a General Partner in a Limited or General Partnership?  Yes  No

If "Yes", please provide details:

**II. PLAN INFORMATION**

Plan Name	Plan Type*	Date Established	Total Assets (Market Value)	Annual Contributions	Total Participants	Does the plan invest in employer securities? (Yes / No)

\*DC – Defined Contribution; DB – Defined Benefit; ESOP – Employee Stock Ownership Plan; ME – Multi Employer Plan; O – Other

**III. PLAN ADMINISTRATION for all plans to be covered\*\*:**

Plan Name	Plan Administrator	Legal Counsel	CA/CPA	Investment Manager	Actuary

\*\* If any changes have taken place in the last 3 years with regards to Plan Administration, please provide details.

1. Are any Plan benefits both existing and terminated provided by insurance (i.e. annuity, medical policy, etc.)?  Yes  No

If "No", please provide details

2. Are all Plan assets managed by a (non-employee) investment manager?  Yes  No

If "No", please provide details

3. Are limitation of liability provisions, including exculpatory clauses, or indemnity agreements utilized in custodial service agreements or contracts with professional service providers?  Yes  No

If "Yes", please provide details

4. a) Is there a written investment agreement with the investment manager?  Yes  No

If "No", please provide details

b) How often is the investment managers performance reviewed?

- c) Have you been provided with a copy of your investment managers Professional Liability Insurance policy?  Yes  No

If "No", please provide details

5. Are Plan funds loaned to the Parent Company or any subsidiaries?  Yes  No

If "Yes", please provide details:

6. Have any surplus funds been transferred from any Plans, or are there any plans to do so?  Yes  No

If "Yes", please provide details:

7. Has there been, or are there any plans by the Parent Company, or any Subsidiary to cease contributions to a pension plan?  Yes  No

If "Yes", please provide details:

#### IV. REGULATORY COMPLIANCE

1. Do all Plans meet regulatory requirements for eligibility, participation, vesting, funding and all other provisions under each Canadian province and/or territory and, where applicable, the Employee Retirement Income Security Act of 1974 of the United States (ERISA) and all rules and regulations adopted thereunder?  Yes  No

If "No", please provide details

2. Are all defined benefit Plans adequately funded in accordance with applicable statutes and/or regulations as attested to by an actuary?  Yes  No

If "No", please provide details

3. Are there any current outstanding delinquent contributions by any party?  Yes  No

If "Yes", please provide details

4. Have the Plans been reviewed to ensure that there are no violations of any plan agreement, prohibited transactions or party-in-interest rules?  Yes  No

If any were found, please provide details

5. Are there any events reportable to any regulator?  Yes  No

If "Yes", please provide details

## V. PLAN CHANGES

1. In the past 3 years, has any Plan or portion of any Plan been spun out (sold), transferred, merged or terminated or are there any plans to do so?  Yes  No

If "Yes", please provide details

2. In the past 3 years, have there been any amendments to any Plan, or have any amendments been contemplated, that have or would result in any change in the cost of pension plan expenses, including administrative charges?  Yes  No

If "Yes", please provide details

3. In the past 3 years, have there been any amendments to any Plan, or have any amendments been contemplated, that have or would result in any change or reduction of benefits, including but not limited to an increase in participant's cost?  Yes  No

If "Yes", please provide details

**VI. PLAN ACTIVITIES**

1. Has there been, or is there now pending, any claim(s) or regulatory proceedings against any Plan or the Parent Company or any of its Subsidiaries or any Fiduciary, Director, Officer or Employee thereof in relation to the Plans for which coverage is required, whether an insurance policy covered such claim(s) or not?  Yes  No

If "Yes", please provide details

2. Has any Fiduciary, Director, Officer or Employee been accused, found guilty or held liable for a breach of trust under ERISA or similar or equivalent U.S. or Canadian federal, provincial, state or local law?  Yes  No

If "Yes", please provide details

3. Has any Fiduciary, Director, Officer or Employee been accused or convicted of criminal conduct?  Yes  No

If "Yes", please provide details

4. Is any Fiduciary, Director, Officer or Employee, the Parent Company or any Subsidiary aware of any pending administrative or regulatory inquiry, investigation or communication which could give rise to a claim within the scope of the proposed insurance?  Yes  No

If "Yes", please provide details

**VII. LOSS HISTORY**

Date of Loss	Type of Allegation	Description of Allegation	Status of Allegation	Defence Costs	Indemnity Costs
				\$	\$
				\$	\$
				\$	\$

**VIII. CONTINUITY WITH THE PRIOR FIDUCIARY LIABILITY INSURANCE POLICY**

Note: This section only applies if you currently have Fiduciary Liability Insurance in force and if you are requesting continuity of coverage:

Continuity Date requested

If Continuity of coverage is being requested, please attach:

- a) a copy of the original application with the completed warranty statement from which continuity of coverage is being requested; and
- b) validation that such coverage has been continuously purchased from such date.

Note: The Underwriter will be relying upon the declarations and statements contained in such prior application and these declarations and statements will be incorporated in and form part of this policy.

**IX. WARRANTY INFORMATION**

No person proposed for coverage has knowledge or information of any facts, circumstances, acts or omissions which he or she has reason to believe might give rise to a claim that would fall within the scope of the proposed coverage, except as follows:

[Attach complete details, or if they have no such knowledge or information, check here:  as none.]

**IT IS AGREED THAT IF SUCH FACTS OR CIRCUMSTANCES EXIST, WHETHER OR NOT DISCLOSED, ANY CLAIM ARISING FROM THEM IS EXCLUDED FROM THIS PROPOSED COVERAGE.**



**X. ADDITIONAL INFORMATION (WHERE APPLICABLE):**

Please provide the following with the completed Application:

- Audited financial statements for all defined benefit and defined contribution plans;
- Most recent Actuarial Reports for all defined benefit plans;
- Most recent Form 5500 Schedule A and B for all ERISA plans except health and welfare plans (for US plans only);
- Most recent audited annual report and quarterly financial statements of the Parent Company;
- If there is an Employee Stock Option Plan (ESOP), please attach the most recent valuation statement for the ESOP; and
- A copy of the indemnity clause from the trust deed.



The undersigned persons declare that to the best of their knowledge the statements set forth herein are true and correct and that reasonable efforts have been made to obtain sufficient information from each and every natural person proposed for this insurance to facilitate the proper and accurate completion of this APPLICATION. The undersigned further agrees that, if between the date of this APPLICATION and the effective date of this Policy, (1) any material change in the condition of the Applicant is discovered, or (2) there is any material change in the answers to the questions contained herein, either of which would render this APPLICATION inaccurate or incomplete, notice of such change will be reported to the Underwriting Manager immediately and if necessary any outstanding quotation may be modified or withdrawn.

The signing of this APPLICATION does not bind the undersigned to purchase this insurance, but it is agreed by the Applicant and all persons proposed for this insurance that the particulars and statements contained in this APPLICATION and attachments and materials submitted with this APPLICATION (which shall be retained on file by the Underwriting Manager and shall be deemed attached to the Policy, if insurance is provided, as if physically attached thereto) are true and correct and will be the basis of this Policy and will be considered as incorporated in and constituting part of this Policy. It is further agreed by the Applicant and all persons proposed for this insurance that such particulars and statements are material to the decision to provide this insurance and that any Policy will be issued in reliance upon the truth of such particulars and statements. All such particulars and statements shall be deemed to be made by each and every one of the persons proposed for this insurance, provided that, except for any misstatement or omissions in this APPLICATION, or the attachments and materials submitted with it, concerning any matter which any person proposed for this insurance has reason to supposed might offer grounds for a future claim against him or her shall not be imputed, for purposes of rescision of the Policy, to any other persons proposed for this insurance who are not aware of the omission or the falsity of the statement.

PLEASE NOTE: ONLY DULY APPOINTED LICENSED BROKERS ARE AUTHORIZED TO SOLICIT APPLICATIONS FOR COVERAGE. BROKERS ARE NOT AUTHORIZED TO BIND COVERAGE. NO COVERAGE SHALL BE PROVIDED UNLESS THE UNDERWRITING MANAGER ACCEPTS THE APPLICATION AND BINDS THE COVERAGE IN WRITING.



# SCHEDULE B

## Sample Primary Fiduciary Policy



## Fiduciary Liability Insurance

Effected with certain Lloyd's Underwriters (hereinafter called the "Underwriter") through

Lloyd's Approved Coverholder ("the Coverholder"):  
**Executive Risk Insurance Services Ltd.**  
365 Bay Street, 12<sup>th</sup> Floor  
Toronto, Ontario, M5H 2V1 Canada



## DECLARATIONS

### FIDUCIARY LIABILITY POLICY

THIS IS A CLAIMS MADE POLICY. SUBJECT TO ITS TERMS, THIS POLICY APPLIES ONLY TO ANY **CLAIM** FIRST MADE DURING THE **POLICY PERIOD**, OR IF APPLICABLE, THE **OPTIONAL EXTENSION PERIOD** SET FORTH IN **CLAUSE XIII**. PROVIDED SUCH **CLAIM** IS REPORTED TO THE **UNDERWRITER** IN ACCORDANCE WITH THE TERMS OF THIS POLICY. AMOUNTS INCURRED AS **COSTS, CHARGES AND EXPENSES** SHALL REDUCE AND MAY EXHAUST THE LIMIT OF LIABILITY PROVIDED BY THE **UNDERWRITER** AND ARE SUBJECT TO THE RETENTIONS.

These Declarations along with the completed and signed **Application** and the policy with endorsements shall constitute the entire contract between the **Assureds** and the **Underwriter**.

**Policy No.:** {Response}

**Renewal of Policy No.:** {Response}

**Item A. Parent Company:** {Response}

**Principal Address:** {Response}

**Jurisdiction of Incorporation:** {Response}

**Item B. Policy Period:**

**From:** {Response} **To:** {Response}

Both days at 12:01 a.m. Local Time at the Principal Address stated in **Item A**.

**Item C. Limit of Liability:** \$ {Response} CAD each **Loss**  
\$ {Response} CAD in the aggregate for the **Policy Period**  
(including **Costs, Charges and Expenses**)

**Item D. Retentions:**

(I) \$0 Non-Indemnifiable **Loss** (except **Loss Avoidance Expenses and Expert Fees**)

(II) \$ {Response} Indemnifiable **Loss** (except **Loss Avoidance Expenses and Expert Fees**)

(III) \$ {Response} **Loss Avoidance Expenses and Expert Fees**

**Item E. Benefit Programs:** Any **Benefit Programs** sponsored, operated, maintained or administered by the **Parent Company** for the benefit of the employees of the **Parent Company** located anywhere in the world subject to the provisions of **Clause X. ADJUSTMENT CLAUSE**.

**Item F. Duty to Defend:**

(I) Duty of the **Assureds** to Defend {Response}

(II) Duty of the **Underwriter** to Defend {Response}





## FIDUCIARY LIABILITY POLICY

In consideration of the payment of the premium, and in reliance upon the statements in the **Application**, including any attachments and materials incorporated therein, and subject to all of the provisions of this policy, the **Underwriter** and the **Assureds** agree as follows:

### I. INSURING AGREEMENT

The **Underwriter** shall pay on behalf of the **Assureds**, **Loss** resulting from any **Claim** first made against an **Assured** during the **Policy Period** or, if exercised, during the **Optional Extension Period** set forth in Clause **XIII.**, for a **Wrongful Act** by an **Assured**, or, by any natural person for whose **Wrongful Act** committed, attempted, or allegedly committed or attempted such **Assured** is legally responsible, provided the **Claim** is reported to the **Underwriter** pursuant to Clause **VII. NOTIFICATION** of this policy, and subject to the other terms, conditions and limitations of this policy.

### II. DEFINITIONS

The following terms whenever used in this policy in boldface type shall have the meanings indicated.

A. **"Administration"** means:

1. giving advice, counsel or interpretation to employees regarding a **Benefit Program**;
2. undertaking the enrolment, termination or cancellation of a **Benefit Program**, or
3. maintaining or administering records or data in any form for the purposes of a **Benefit Program**.

B. **"Application(s)"** means:

1. the application for this policy or any policy of which this policy is a renewal or replacement, including materials and attachments prepared specifically for and submitted therewith, for this policy and for any similar policy in a series of policies issued by the **Underwriter**; and
2. if applicable, the written application and any materials submitted with the application by the **Assureds** to another Insurance Company or Underwriter in respect of the prior similar policy, shall be retained on file by the **Underwriting Manager** and shall be deemed to form part of the policy hereto, as if physically attached.

C. **"Assureds"** means:

1. the **Company**;
2. the **Benefit Programs**, and
3. the **Insured Persons**.

D. **"Attorney in Fact"** means:

Attorney in Fact in Canada  
for Lloyd's Underwriters  
1155 rue Metcalfe  
Suite 2220  
Montreal, Quebec H3B 2V6  
Canada

E. **"Benefit Program"** means:

1. any **Employee Benefit Plan**, or
2. any **Government Benefit Plan**.

F. **"Claim"** means:

1. a written or oral demand for monetary or non-monetary damages, injunctive relief or other relief;
2. a civil proceeding commenced by the issuance of a Notice of Action, Writ of Summons, Statement of Claim, Complaint or similar originating pleading;
3. a binding arbitration;
4. a criminal proceeding commenced by the laying of an information or the return of an indictment;
5. a formal administrative, adjudicative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document, or
6. a fact-finding investigation by the Superintendent of Financial Institutions, or the Minister of National Revenue, Canada Customs and Revenue Agency, the United States Department of Labor, the Pension Benefit Guaranty Corporation in the United States, or, any similar government agency anywhere in the world;

against any **Assured** for a **Wrongful Act**, including any appeal therefrom, but only from the date upon which any **Assured**, including the **Company**, is notified thereof.

G. **"Company"** means the **Parent Company** and any **Subsidiary** of the **Parent Company**.

H. **"Costs, Charges and Expenses"** means **(a) Defence Costs, (b) Loss Avoidance Expenses, or (c) Expert Fees** but shall not include:

1. salaries, wages, fees, overhead or benefit expenses of any kind associated with an **Assured**;
2. any amounts incurred in defence of any **Claim** for which any other insurer or underwriter has a duty to defend, or, otherwise has to afford reimbursement;
3. any premiums for an appeal bond, attachment bond, or similar bond.

I. **"Defence Costs"** means necessary and reasonable costs, charges, fees (including but not limited to legal fees and **Expert Fees**) and expenses incurred solely in defending or investigating a **Claim**, or, assisting the **Underwriter** in investigating a **Claim** pursuant to a request by the **Underwriter**.

J. **"Expert Fees"** means fees and costs charged by a third party actuary or pension benefit consultant resulting solely from the correction of an actual or potential breach of fiduciary duty constituting a **Wrongful Act**, but does not include (a) any fees arising from a plan audit or other routine expenses incidental to the administration of a **Benefit Program**, or, any fees incurred in respect of any fact, circumstance or situation known to the **Company** prior to the **Pending and Prior Litigation Date** as set forth in **Item J.** of the Declarations of this policy.

K. **"Employee Benefit Plan"** means:

1. any plan so defined by the Pension Benefits Standard Act, 1985, R.S. 1985, c.32 (2nd Supp), the Ontario Pension Benefits Act, R.S.O 1990, c P-8, or similar provincial legislation, which is operated for the benefit of the employees of the **Company**;
2. any medical or welfare benefit plan or disability benefit plan as defined by the Canada Health Act, R.S.C. 1985, c. C-6, the Ontario Health Insurance Act, R.S.O. 1990, c. H.6, or, any other similar provincial legislation;
3. any plans as defined in the Ontario Insurance Act, R.S.O. 1990, c. 1.8, or, similar provincial legislation;
4. any retirement compensation agreement, flexible employee benefit plan or registered supplementary unemployment benefit or stock ownership plan not subject to Canadian legislation if sponsored by the **Company** for the benefit of the employees or the directors and officers of the **Company**;
5. in the United States of America, any plan, including a welfare benefit plan, as defined in **ERISA**, and
6. any other plan, fund or program specifically included as an additional **Benefit Program** listed in **Item E. Benefit Programs** of the Declarations;

provided, however, **Employee Benefit Plan** shall not include any multi-employer plan as defined in the Pension Benefits Standards Act, R.S. 1985, c.32 (2nd Supp.), the Ontario Pension Benefits Act, R.S.O 1990, c. P.8 or **ERISA** or by the common, civil or statutory law of Canada, the United States of America or any province, territory, state or other jurisdiction anywhere in the world.

L. **"ERISA"** means the Employee Retirement Income Security Act of 1974 of the United States of America, as amended.

M. **"Fiduciary"** means any person or entity having fiduciary responsibilities with respect to the governance or management of a **Benefit Program** or the disposition of its assets, including, without limitation, a fiduciary as defined in **ERISA**, an administrator, a member of a pension committee or a member of a pension council as defined by the Pension Benefits Standards Act, R.S. 1985, c.32 (2nd Supp.) and, in the province of Quebec, a member of a *comité de retraite* as defined by the *Loi sur les régimes complémentaires de retraite*.

N. **"Financially Impaired"** means:

1. in Canada, the status of the **Company** resulting from (1) the appointment of a Receiver, Receiver Manager (either by Court Order, or, by means of a written document), conservator, liquidator, trustee, rehabilitator or similar official to take control of, supervise, manage, wind up or liquidate the **Company**, including without limitation, an order made under the Winding Up and Restructuring Act, R.S. 1985, c. W-11 ("WURA") under the Bankruptcy and Insolvency Act, R.S. 1985, c. B-3 ("BIA") or under any incorporating statute or (2) the making by the **Company** of a general assignment for the benefit of creditors under the BIA or similar statute providing for the assignment by debtors of assets for the benefit of creditors, or the making of a resolution by the directors of the **Company** to wind up its affairs under the WURA or under any incorporating statute; or (3) the commencement of any proceedings in respect of the **Company** under the Companies' Creditors

Arrangement Act, R.S. 1985, c. C-36 ("CCAA"), the proposal provisions of the BIA or any other similar statute;

2. in the United States of America, the status of the **Company** resulting from (1) the appointment by any state or federal official, agency or court of any receiver, conservator, liquidator, trustee, rehabilitator or similar official to take control of, supervise, manage or liquidate the **Company**, or (2) the **Company** becoming a debtor in possession; or
3. in a country other than Canada or the United States of America, the status of the **Company** resulting from events similar to those events referred to in (1) and (2) above pursuant to the law(s) of such other jurisdiction.

O. "**Government Benefit Plan**" means:

1. any government mandated benefit program for workers compensation, unemployment insurance or employment insurance benefits, social insurance, old age security, social security, Canada Pension Plan benefits, or disability benefits for employees of the **Company**; and
2. any other government-mandated benefit program listed in **Item E. Benefit Program(s)** of the Declarations.

P. "**Insured Person(s)**" means:

1. any natural persons who were, now are, or shall become duly elected or appointed pension committee members, trustees, directors de facto or otherwise, officers or employees of the **Company** or any **Benefit Program** or, with respect to a **Subsidiary** incorporated or a **Benefit Program** established outside Canada or the United States of America, their functional equivalents, or, any natural persons in an equivalent position in the event the **Company** is operating in a foreign jurisdiction; and
2. any other natural persons listed by specific endorsement. Any such coverage shall be subject to the terms, conditions and premium set forth in this policy and such endorsement.

Q. "**Interrelated Wrongful Acts**" means **Wrongful Acts** which have as a common nexus any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events or transactions.

R. "**Loss**" means the total amount which **Assureds** are legally obligated to pay on account of any **Claim** made against them for **Wrongful Acts** for which coverage applies, including, but not limited to **Defence Costs, Costs, Charges and Expenses**, damages, (including compensatory, aggravated, punitive and exemplary damages except to the extent the aggravated, punitive and exemplary damages arise by reason of any **Loss** excluded by **Clause III. Exclusions A.5.**, judgements, settlements, pre-judgement and post-judgement interest). **Loss** does not include (1) any amount not indemnified by the **Company** for which an **Assured** is absolved from payment by reason of any covenant, agreement or court order, or (2) matters uninsurable under the law pursuant to which this policy is construed.

S. "**Loss Avoidance Expenses**" means reasonable and necessary lawyer's fees or costs arising solely by reason of the need to correct an actual or potential breach of fiduciary duty constituting a **Wrongful Act**, provided such fees or costs are consented to in writing by the **Underwriter**.

T. "**Parent Company**" means the entity named in **Item A.** of the policy Declarations.

U. "**Policy Period**" means the period from the effective date and hour of this policy to the policy expiration date and hour as set forth in **Item B. Policy Period** of the Declarations, or its earlier cancellation date and hour, if any, or the end of the **Optional Extension Period** set forth in **Clause XIII.**, if purchased.

V. "**Policy Premium**" means the original premium and the fully annualized amount of any additional

premiums, other than the premium for the **Optional Extension Period** set forth in **Clause XIII.**, charged by the **Underwriter** for or during the **Policy Period**.

W. **"Subsidiary"** means any organization in which more than fifty percent (50%) of the outstanding voting securities representing the present right to vote for election of directors is owned, directly or indirectly, in any combination, by one or more than one **Company**.

X. **"Underwriter(s)"** means the Insurance Companies and **Underwriters** at Lloyd's of London, England whose names appear below. The following **Underwriters** have duly authorized Executive Risk Insurance Services Ltd., as the **Underwriting Manager**, to execute and sign this policy on their behalf under Contract No. N34327 in the following proportion:

Brit Syndicates Ltd. 90%  
Syndicate 2987 at Lloyd's

Pembroke Managing Agency Limited 10%  
Syndicate 4000 at Lloyd's

Y. **"Underwriting Manager"** means:

Executive Risk Insurance Services Ltd.  
365 Bay Street, 12<sup>th</sup> Floor  
Toronto, Ontario M5H 2V1  
Canada

The **Underwriting Manager** is the authorized agent of the **Underwriter** and is not a party to this contract. The **Underwriting Manager** cannot be named as a party to either an arbitration in accordance with Clause **XIX. ARBITRATION** of this Policy nor can the **Underwriting Manager** be added as a party to any litigation undertaken in accordance with Clause **XVIII. NO ACTION AGAINST THE UNDERWRITER** of this Policy.

Z. **"Wrongful Act(s)"** means:

1. any breach of the responsibilities, obligations or duties imposed upon **Assureds** in their capacity as a **Fiduciary** of a **Benefit Program** under the Pension Benefit Standards Act, R.S. 1985, c.32 (2nd Supp.) or **ERISA** or by the common, civil or statutory laws of Canada, the United States of America or any province, territory, state or other jurisdiction anywhere in the world;
2. any other matter claimed against the **Company** or an **Insured Person** solely because of their service as a **Fiduciary** of any **Benefit Program**; or
3. any negligent act, error or omission solely in the **Administration** of any **Benefit Program**.

### III. EXCLUSIONS

#### A. Exclusions Applicable to All Loss

The **Underwriter** shall not be liable for **Loss** resulting from any **Claim** made against any **Assured**:

1. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, any fact, circumstance or situation:
  - (a) which has been the subject of any written notice given under any policy of which this policy is a direct or indirect renewal or replacement; or
  - (b) underlying, alleged in or relating to any written demand for monetary damages or other relief or any civil, criminal, administrative or regulatory proceeding pending against any **Assured** on or prior to the **Pending and Prior Litigation Date** set forth in **Item J.** of the Declarations for this policy;

2. based upon, arising out of, directly or indirectly resulting from, or in consequence of, in connection with or in any way involving, actual or alleged sickness, bodily injury, mental anguish, emotional distress, sickness, disease, death, false arrest, false imprisonment, damage to or destruction of tangible property, including intellectual property, and loss of use thereof, or for libel, slander, defamation, harassment or invasion of privacy;
3. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, any **Wrongful Act** by a **Benefit Program** or any **Assured** of such **Benefit Program** to the extent the **Wrongful Act** occurred when the **Company** was not a sponsor of or participant in such **Benefit Program**;
4. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, any fraudulent act or omission or any willful violation of any statute, law or regulations by such **Assureds** as determined by a judgement or other final adjudication adverse to the **Assured**;
5. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, any **Assured** gaining in fact any personal profit, remuneration or financial advantage to which such **Assured** was not legally entitled, provided, however, this exclusion shall not apply unless a judgement or other final adjudication against such **Assured** establishes that such **Claim** was brought about or contributed to by having gained any personal profit, remuneration or advantage to which such **Assured** was not legally entitled;
6. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving liability of others assumed by any **Assured** under any written, oral, express or implied contract or agreement; provided this exclusion shall not apply to the extent (i) the **Assured** would have been liable in the absence of such contract or agreement; or (ii) the liability was assumed in accordance with or under the trust agreement or equivalent document pursuant to which the **Benefit Program** was established;
7. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving any actual or alleged intentional failure of any **Assured** to comply with any law with respect to any **Government Benefit Plan**; provided this exclusion shall not apply to any actual or alleged obligation of any **Assured** pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 of the United States of America, as amended;
8. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, actual or alleged seepage, release, dispersal, transportation, emission, pollution, irritants, mould, vapour, soot, acids, alkalis, infectious or medical waste, asbestos, noise, silica, Sudan 1 dye or contamination of any kind, including but not limited to the treatment, removal or disposal, of waste of any kind including radioactive, toxic, explosive, or nuclear material waste or any other substance defined or identified on a list of hazardous substances issued by or pursuant to the Canadian Environmental Protection Act, the United States Environmental Protection Agency, the United States Atomic Energy Act of 1954 or any federal, provincial, state, county, municipal or local counterpart thereof; provided, however, and subject to all other terms, conditions and exclusions of this policy, this exclusion shall not apply to any **Loss** payable to any **Insured Person**:
  - (a) which is on account of any **Claim** brought by any plan member of an **Employee Benefit Plan** of a **Company** in his or her capacity as such;
  - (b) which represents **Costs, Charges and Expenses** for **Claims** brought, commenced and conducted in the territorial limits and jurisdiction of Canada;

and provided, further, that with respect to (a) and (b) above, the **Parent Company** either is not permitted or required, or fails or refuses by reason of any financial impairment, to indemnify an **Insured Person**. For the purposes of this coverage grant, the memorandum, articles, shareholder and Board of Directors

resolutions of the **Parent Company** shall be deemed to provide indemnification to the **Insured Persons** to the fullest extent permitted by law.

Notwithstanding the limits of liability noted in **Item C. LIMIT OF LIABILITY** of the Declarations, the coverage afforded for an **Insured Person** above shall not exceed five million dollars (\$5,000,000 CAD) for **Loss** during the **Policy Period**.

It is further agreed that the coverage afforded under (a) and (b) above, shall not apply with respect to **Claims** made after the **Policy Period** but deemed to have been made during the **Policy Period** because such **Claims** arise out of circumstances noticed to the Company during the **Policy Period** pursuant to Clause **VII.B. NOTIFICATION** of this policy.

9. based upon, arising out of directly or indirectly, resulting from, or in consequence of, or in connection with, or in any way involving, directly or indirectly, discrimination in violation of any law other than **ERISA**;

## **B. Exclusions Applicable to Loss Other Than Defence Costs**

The **Underwriter** shall not be liable for that part of **Loss**, other than to the extent the **Claim** gives rise to any **Costs, Charges and Expenses**:

1. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, actual or alleged civil or criminal fines or penalties, punitive or exemplary damages, or the multiple portion of any multiplied damage award; provided this exclusion shall not apply to the five percent (5%) or less, or the twenty percent (20%) or less, civil penalties imposed upon an **Insured Person** as a **Fiduciary** under Section 502(i) or (l), respectively, of **ERISA**;
2. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, actual or alleged return or reversion to the **Assured** of any contribution or asset of any **Benefit Plan**;
3. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, actual or alleged failure to collect from employers or the failure to fund contributions owed to or in respect of a **Benefit Program**, unless the failure is because of the negligence of an **Insured Person**; or
4. based upon, arising out of, directly or indirectly resulting from, or in consequence of, or in connection with or in any way involving, actual or alleged benefits which are due or to become due under a **Benefit Program**, or benefits which would be due under a **Benefit Program** if its terms complied with all applicable law; provided this exclusion shall not apply to the extent that (i) the **Assured** is a natural person and the benefits are payable by such **Assured** as a personal obligation, and (ii) recovery for the benefits is based upon a covered **Wrongful Act**.

## **C. Severability of Exclusions**

No fact pertaining to or knowledge possessed by an **Assured** shall be imputed to any other **Assured** for purposes of applying the **EXCLUSIONS** set forth in **Section III**. Only facts pertaining to or knowledge possessed by the Chairman, Chief Executive Officer, Chief Financial Officer, Chief Legal Officer, President or Lead Trustee shall be imputed to the **Company** to determine if coverage is available.

## **IV. LIMIT OF LIABILITY, RETENTIONS AND ORDER OF PAYMENTS**

- A. The **Underwriter** shall be liable to pay the amount of **Loss** as set forth in **Item C. LIMIT OF LIABILITY** of the Declarations in excess of the amount of the applicable Retentions up to the Limit of Liability, it being warranted that the remaining percentage of **Loss** shall be uninsured. The Retention applicable to **Item D. RETENTIONS** shall apply to **Loss** payable if indemnification by the **Company** is required by law or is legally permissible to the fullest extent permitted by law, regardless of whether or not actual indemnification is made, unless the **Company** is unable to make such actual indemnification by reason of being **Financially Impaired**.

- B. The amount shown in **Item C. LIMIT OF LIABILITY** of the Declarations shall be the maximum aggregate Limit of Liability of the **Underwriter** under the policy.
- C. More than one **Claim** involving the same **Wrongful Act** or **Interrelated Wrongful Acts** shall be deemed to constitute a single **Claim** and shall be deemed to have been made at the earliest of the following times:
1. the time at which the earliest **Claim** involving the same **Wrongful Act** or **Interrelated Wrongful Acts** is first made; or
  2. the time at which the **Claim** involving the same **Wrongful Act** or **Interrelated Wrongful Acts** shall be deemed to have been made pursuant to **NOTIFICATION** Clause **VII.B**.
- D. In the event of **Loss** arising from a covered **Claim** for which payment is due under the provisions of this policy, then the **Underwriter** shall in all events:
1. first, pay **Loss** for which coverage is provided under this policy for any **Insured Person**, then any **Benefit Program** under this policy; and
  2. then, only after payment of **Loss** has been made under this policy, with respect to whatever remaining amount of Limit of Liability is available after such payment, shall payment for the **Company** be made for such other **Loss** for which coverage is provided under this policy.
- E. Any payment of **Loss** by the **Underwriter** shall reduce the Limit of Liability. The **Company** may elect through an authorized **Assured** to decline or defer payment under the Insuring Agreement. The **Underwriter** shall have no obligation to pay **Loss** after exhaustion of the Limit of Liability regardless of whether the **Company** has declined or deferred payment.

## V. DEFENCE AND COOPERATION

### A. DUTY OF THE **ASSUREDS** TO DEFEND

If at the inception of this policy, the **Assureds** elect for the Duty of the **Assureds** to Defend, as provided for in **Item F.(I)** of the Declarations of this policy, then the **Assureds** are deemed to have the duty and obligations to defend any **Claim** for which coverage exists and the **Underwriter** has no duty to defend the **Claim** under any circumstances.

The **Underwriter** shall have the right to effectively associate with the **Assureds** regarding the defence and settlement of such **Claim** including, without limitation, the selection of appropriate defence counsel and the right to participate in settlement negotiations; and

The **Underwriter** shall advance, no more than once every 90 days following submission, any **Costs, Charges and Expenses** in excess of the applicable Retentions in **Item D. Retentions**, in relation to a **Claim** entailing a **Wrongful Act** provided that to the extent it is determined that any such **Costs, Charges and Expenses** are not covered under this policy, the **Assureds** agree to reimburse the **Underwriter** for any non-covered **Costs, Charges and Expenses**.

### B. DUTY OF THE **UNDERWRITER** TO DEFEND

If at the inception of this policy, the **Assureds** elect for the Duty of the **Underwriter** to Defend, as provided for in **Item F. (II)** of the Declarations of this policy, then the **Underwriter** shall have the duty and obligation to defend any **Claim** for which coverage exists. The Duty of the **Underwriter** to Defend shall cease upon exhaustion of the **Limit of Liability** as outlined in **Item C.** of the Declarations and upon exhaustion of the Limit of Liability the **Assureds** must assume the duty to defend the **Claim** without further obligation upon the **Underwriter**.

**Costs, Charges and Expenses** incurred by the **Underwriter** or by an **Assured** are part of and not in addition to the applicable Limit of Liability and the payment by the **Underwriter** of **Costs, Charges and Expenses** reduces the Limit of Liability.

The **Assureds** agree not to settle or offer to settle any **Claim**, incur any **Costs, Charges or Expenses** or otherwise assume any contractual obligation or admit any liability with respect to any **Claim** without the prior written consent of the **Underwriter**. The **Underwriter** shall not be liable for, and any applicable Retention shall not be depleted or exhausted by, any settlement of **Costs, Charges or Expenses**, assumed obligation or admission which the **Underwriter** has not expressly consented to.

The **Underwriter** shall not unreasonably withhold its consent as referenced in this section.

## VI. ALLOCATION

In the event a **Claim** involves both **Loss** covered by this policy and loss not covered by this policy, either because a **Claim** against an **Assured** includes both covered and uncovered allegations, or, because a **Claim** is made against both an **Assured** and other parties not covered under this policy, the **Assureds** and the **Underwriter** agree that the **Underwriter** shall allocate such amounts as follows:

- A. 80% of all **Defence Costs**, excluding **Expert Fees**, in respect of such **Claim** which shall be allocated to covered **Loss**, unless: (1) the **Underwriter** and the **Assureds** mutually agree to a higher percentage of **Defence Costs**, excluding **Expert Fees**, or, (2) a Court of competent jurisdiction has decided that a higher percentage shall be reimbursed as **Defence Costs**, excluding **Expert Fees**, under this policy. No **Defence Costs** shall be allocated to the **Company** to the extent that it is unable to indemnify the **Assureds** by reason of insolvency or bankruptcy or statutory law.

This predetermined allocation of **Defence Costs**, excluding **Expert Fees**, shall be final and binding and shall not apply to or create any presumption with respect to the allocation of any other **Loss**.

All **Defence Costs** allocated to covered **Loss** shall be advanced by the **Underwriters** as set forth in Clause V.A. **DEFENCE AND COOPERATION**.

- B. with respect to all **Loss** other than **Defence Costs** the **Company** and the **Assureds** shall allocate such amount based upon the relative legal exposures of the parties to such matters.

If the **Assureds** and the **Underwriter** cannot agree on such an allocation, the parties shall submit the dispute to binding arbitration in accordance with the **ARBITRATION** provisions contained in **Clause XIX** of this policy.

## VII. NOTIFICATION

- A. The **Assureds** shall, as a condition precedent to their rights to payment under this policy, give the **Underwriter** notice in writing of any claim as soon as practicable, but in no event later than forty five (45) days after the end of the **Policy Period** or, if exercised, prior to the expiry of the **Optional Extension Period** set forth in Clause **XIII**.
- B. If during the **Policy Period** an **Assured** first becomes aware of any circumstances which could reasonably give rise to a **Claim** for a **Wrongful Act** and gives written notice of such circumstances and the other information referenced below to the **Underwriter**, then any **Claims** subsequently arising from such circumstances shall be considered to have been first made during the **Policy Period** in which the circumstances were first reported to the **Underwriter**. Any such notice of circumstances shall include a description of the circumstances, the nature of the alleged **Wrongful Act**, the nature of the alleged or potential damage, the names of actual or potential claimants and **Assureds** involved, and the manner in which the **Assureds** first became aware of the circumstances.

All notices given under any provision of this policy shall be in writing and given by actual delivery, prepaid

express, courier, registered or certified mail or fax properly addressed to those persons enumerated in **Item I. Notification Pursuit to Clause VII.** of the Declarations.

- C. Notice to any **Assured** may be given to the **Parent Company** at the address shown in **Item A. Parent Company** of the policy Declarations.

Notice to the **Underwriter**, provided for in this Clause shall be given to the firms as shown at the address specified in **Item I. Notification Pursuant to Clause VII.** of the policy Declarations.

## VIII. FAILURE OF PARENT COMPANY TO INDEMNIFY

If the **Parent Company** is permitted or required by common or statutory law, but fails or refuses to advance **Costs, Charges and Expenses** or indemnify the **Assureds** for **Loss**, then any payment by the **Underwriter** of such **Costs, Charges and Expenses** or other **Loss** under this policy shall not be reduced by any Retention amount. In that event, the **Parent Company** shall reimburse and hold harmless the **Underwriter** for such **Costs, Charges and Expenses** or other **Loss** up to the applicable Retention amount set forth in **Item D. Retentions** of the Declarations for this policy.

## IX. WARRANTY CLAUSE

It is warranted that the particulars and statements contained in the **Application** are the basis of this policy and are to be considered as incorporated into and constituting a part of this policy.

By acceptance of this policy, the **Assureds** agree:

1. that the statements in the **Application** are their representations, that they shall be deemed material to the acceptance of the risk assumed by the **Underwriter** under this policy and that this policy is issued in reliance upon the truth of such representations; and
2. that in the event that the **Application** contains misrepresentations made with the actual intent to deceive, or contain misrepresentations (including statements and financial calculations or forecasts) which materially affect either the acceptance of the risk hazard assumed by the **Underwriter** under this policy, this policy shall be void and of no effect whatsoever with respect to those **Assureds** who made or had knowledge of such misrepresentations.

In granting coverage to any one of the **Assureds**, the **Underwriter** has relied upon the declarations and statements in the written **Application** and upon any declarations and statements in the original written **Application** submitted to any other Insurance Company or Underwriter in respect of prior coverage. All such declarations and statements are the basis of such coverage and shall be considered as incorporated in and constituting part of this policy.

With respect to the declarations and statements contained in the written **Application(s)** for coverage, no statement in the **Application** or knowledge possessed by any **Insured Person** shall be imputed to any other **Insured Person** for the purpose of determining if coverage is available; provided, however, any fact pertaining to or knowledge possessed by the Chairman, Chief Executive Officer, Chief Financial Officer, Chief Legal Officer, President, or Lead Trustee shall be imputed to the **Company** to determine if coverage is available.

## X. ADJUSTMENT CLAUSE

### A. Acquisition or Creation of Another Organization or Benefit Program

If during the **Policy Period**:

1. the **Company** acquires at least 25% of shares in another organization or creates another organization, which as a result of such acquisition or creation becomes a **Subsidiary**;
2. the **Company** acquires any organization by merger into or consolidation with the **Company**; or

3. the **Company** acquires or creates a **Benefit Program**, such organization, **Benefit Program** and their **Assureds** shall be covered under this policy but only with respect to **Wrongful Acts** committed, attempted, or allegedly committed or attempted after such acquisition or creation for a

period of 90 days for any **Claim** otherwise covered under this policy, unless the **Underwriter** agrees, after presentation of a complete **Application** and appropriate information, to provide coverage by endorsement for **Wrongful Acts** committed, attempted, or allegedly committed or attempted by such **Assureds** prior to such acquisition or creation beyond such 90 day period.

Notwithstanding the foregoing, no coverage shall be afforded pursuant to Clause **X. ADJUSTMENT CLAUSE** with respect to any employee stock ownership plan or any **Assureds** thereof unless the **Underwriter**, by specific endorsement hereto, agrees to afford such coverage. Any such coverage shall be at the terms and conditions and for the premium set forth in such endorsement.

If the fair value of all cash, securities, assumed indebtedness and other consideration paid by the **Company** for such acquisition or creation exceeds twenty five percent (25%) of the total assets of the **Company** as reflected in the **Company's** then most recent consolidated financial statements, the **Company**, as a condition precedent to coverage being afforded to such **Assureds**, shall:

1. give written notice of such acquisition or creation to the **Underwriter** as soon as practicable;
2. provide the **Underwriter** with such information in connection therewith as the Underwriter may deem necessary;
3. pay any reasonable additional premium required by the **Underwriter**; and
4. accept any notified alteration in the terms of this policy.

#### **B. Acquisition of Parent Company**

If, during the **Policy Period**, any of the following events occurs:

1. the acquisition of the **Parent Company**, or of all or substantially all of its assets, by another entity, or the merger or consolidation of the **Parent Company** into or with another entity such that the **Parent Company** is not the surviving entity;
2. the obtaining by any person, entity or affiliated group of persons or entities of the right to elect, appoint or designate at least fifty percent (50%) of the directors of the **Parent Company**; or
3. the responsibilities of the **Parent Company** for the **Administration** of, or as a **Fiduciary** of any **Benefit Program** is fully assumed by any other entity and or person;

coverage under this policy will continue in full force and effect with respect to **Claims** for **Wrongful Acts** committed, attempted, or allegedly committed or attempted before such event, but coverage will cease with respect to **Claims** for **Wrongful Acts** committed, attempted, or allegedly committed or attempted after such event. In such case, the **Assureds** shall give written notice to the **Underwriter** of such **Benefit Program** termination as soon as practicable together with such information as the **Underwriter** may require. In such case the **Assureds** shall have the right to elect an extension of coverage in the manner provided in Clause **XIII. OPTIONAL EXTENSION PERIOD.**

#### **C. Cessation of Subsidiaries**

If before or during the **Policy Period** an organization ceases to be a **Subsidiary**, coverage with respect to such **Subsidiary** and its **Assureds** shall continue until termination of this policy. Such coverage continuation shall apply only with respect to **Claims** for **Wrongful Acts** prior to the date such organization ceased to be a **Subsidiary**.

#### **D. Termination of Benefit Program**

If before or during the **Policy Period** a **Benefit Program** is terminated, coverage with respect to such **Benefit Program** and its **Assureds** shall continue until termination of such policy. Such coverage continuation shall apply with respect to **Claims** for **Wrongful Acts** committed, attempted, or allegedly committed or attempted taking place prior to, on or after the date the **Benefit Program** was terminated.

## XI. CANCELLATION CLAUSE

1. By acceptance of this policy, the **Assureds** hereby confer upon the **Parent Company** the exclusive power and authority to cancel this policy on their behalf. The **Parent Company** may cancel this policy by surrender thereof to the **Underwriter**, or by registered mailing to the **Underwriter** written notice stating when thereafter such cancellation shall be effective. The registered mailing of such notice shall be sufficient notice and the effective date of cancellation stated in the notice shall become the end of the **Policy Period**. Delivery of such written notice shall be equivalent to registered mailing.
2. The **Underwriter** may cancel this policy only for non-payment of premium by registered mailing to the **Parent Company** written notice stating when, not less than 15 days thereafter, such cancellation shall be effective. The registered mailing of such notice shall be sufficient notice and the effective date of cancellation stated in the notice shall become the end of the **Policy Period**. Delivery of such written notice by the **Underwriter** shall be equivalent to registered mailing. If the foregoing notice period is in conflict with any governing law or regulation, then such period shall be amended to afford the minimum notice period permitted thereunder.
3. If this policy is cancelled pursuant to Section 1., of this clause, the **Underwriter** shall retain the customary short rate proportion of the premium hereon, as determined by the **Underwriter**. If this policy is cancelled pursuant to Section 2., of this clause, the **Underwriter** shall retain the pro-rata proportion of the premium hereon. Payment or tender of any unearned premium by the **Underwriter** shall not be a condition precedent to the effectiveness of cancellation.

## XII. COMPANY AUTHORIZATION CLAUSE

By acceptance of this policy, the **Assureds** agree that the **Parent Company** will act on their behalf with respect to the giving of all notices to the **Underwriter**, the receiving of notices from the **Underwriter**, the payment of the premium and the receipt of any return premium.

## XIII. OPTIONAL EXTENSION PERIOD

- A. If this policy is terminated or not renewed, for any reason other than for non-payment of premium, by the **Parent Company** or by the **Underwriter**, then any **Assureds** shall have the right, upon payment of an additional premium calculated at that percentage shown in **Item H.1.** of the Declarations of the total premium for this policy, to an extension of the coverage granted by this policy with respect to any **Claim** first made during the period of time set forth in **Item H.2.** of the Declarations after the policy expiration date, but only with respect to any **Wrongful Act** committed before the termination date of this policy.
- B. As a condition precedent to the right to purchase the **Optional Extension Period**, the total premium for this policy must have been paid. The right to purchase the **Optional Extension Period** shall terminate unless written notice together with full payment of the premium for the **Optional Extension Period** is given to the **Underwriter** within 45 days after the policy expiration date. If such notice and premium payment is not so given to the **Underwriter**, there shall be no right to purchase the **Optional Extension Period**.
- C. In the event of the purchase of the **Optional Extension Period**, the entire premium shall be deemed earned at its commencement.

- D. In the event the **Optional Extension Period** is purchased, it shall terminate forthwith on the effective date of any contract of insurance or indemnity which replaces the coverage afforded by this policy through the **Optional Extension Period** either in whole or in part, and in the event the **Optional Extension Period** is so terminated, the **Underwriter** shall not be obliged to refund any premium, to the **Assured**, court appointed liquidator or any bankruptcy trustee, for the unexpired period of such **Optional Extension Period**.
- E. The exercise of the **Optional Extension Period** shall not in any way increase the Limit of Liability of the **Underwriter**.
- F. The **Optional Extension Period** is not cancellable by the **Assureds**, their assignees or the **Underwriter** after payment of the **Optional Extension Period** premium.
- G. The offer of renewal terms and conditions or premiums different from those in effect prior to renewal shall not constitute a refusal to renew or a non-renewal.

#### XIV. TERRITORY AND VALUATION

Unless otherwise endorsed, this policy extends to **Wrongful Acts, Claims** or **Loss** incurred anywhere in the world.

Unless otherwise stated, all premiums, Limits of Liability, Retention, **Loss** and other amounts under this policy are expressed and payable in the currency of Canada. If judgement is rendered, a settlement is concluded or **Loss** under this policy is stated in a currency other than Canadian dollars, payment under this policy shall be made either in such other currency (at the **Underwriter's** option and the **Assured's** agreement) or in Canadian dollars at the rate of exchange published in *The Globe and Mail* on the date the final judgement is reached, the amount of the settlement is agreed upon, or, the other element of **Loss** is due, respectively.

#### XV. SUBROGATION

In the event of any payment under this policy, the **Underwriter** shall be subrogated to the extent of such payment to all the **Assureds** rights of recovery, including without limitation, an **Assureds** right to reimbursement or advancement from the **Company**. The **Assureds** shall execute all papers required and shall do everything necessary to secure and preserve such rights, including the execution of such documents as are necessary to enable the **Underwriter** to effectively bring suit in the name of the **Assureds**, and shall provide all other assistance and cooperation which the **Underwriter** may reasonably require.

#### XVI. ALTERATION, ASSIGNMENT, HEADINGS AND INTERPRETATION

No change in, modification of, or assignment of interest under this policy shall be effective except when made by a written endorsement to this policy which is signed by an authorized representative of the **Underwriter**. The titles and headings to the various parts, sections, subsections and endorsements of the policy are included solely for ease of reference and do not in any way limit, expand or otherwise affect the provisions of such parts, sections, subsections or endorsements.

In this policy, the singular includes the plural and vice versa.

#### XVII. OTHER INSURANCE

This policy shall be specifically excess of any other valid and collectible insurance (including but not limited to any insurance which is stated to be primary, contributory, excess, contingent or otherwise or under which there is a duty to defend), unless such other insurance is specifically stated to be in excess of this policy. In no event shall this policy be construed to contribute rateably with any such other insurance.

This policy shall not follow the terms of any other insurance.

## XVIII. NO ACTION AGAINST THE UNDERWRITER

No action shall lie against the **Underwriter** unless, as a condition precedent thereto, the **Assureds** shall have fully complied with all of the terms of this policy, nor until the amount of the **Assureds'** obligation to pay shall have been fully and finally determined either by judgement against them, or, by written agreement between them, the claimant and the **Underwriter**. Nothing contained herein shall give any person or organization any right to join the **Underwriter** as a party to any **Claim** against the **Assureds** to determine their liability, nor shall the **Underwriter** be impleaded by the **Assureds** or their legal representative in any **Claim**. Assignment of interest under this policy shall not bind the **Underwriter** unless its consent is endorsed hereon.

## XIX. ARBITRATION

Any dispute between an **Assured** and the **Underwriter** arising in connection with or relating to this policy, including allocation of **Defence Costs**, shall be submitted to binding arbitration in accordance with the the Ontario Arbitration Act, 1991, S.O. c. 17 in either Ontario or the jurisdiction of the **Parent Company** as indicated on the

Declarations. The **Parent Company** may select either jurisdiction. The arbitration panel shall consist of one arbitrator selected by the **Assureds**, one arbitrator selected by the **Underwriter** and a third independent arbitrator selected by the first two arbitrators. If all parties to the arbitration consent, the arbitration can proceed with a single arbitrator.

In any such arbitration, each party will bear its own legal fees and expenses and the costs and expenses of the arbitration, including the arbitrators, shall be shared equally by the parties to the dispute unless otherwise agreed.

## XX. ESTATES AND LEGAL REPRESENTATIVES

This policy shall afford coverage for **Claims** for the **Wrongful Acts** of **Insured Persons** made against the estates, heirs, legal representatives, or assigns of such **Insured Persons** who are deceased or against the legal representatives or assigns of such **Assureds** who are incompetent, insolvent or bankrupt to the extent that in the absence of such death, incompetence, insolvency or bankruptcy, such **Claims** would have been covered by this policy.

## XXI. SPOUSAL OR DOMESTIC PARTNER LIABILITY

If a **Claim** is made against any **Insured Persons** lawful spouse or domestic partner solely by reason of (i) such spouse's or domestic partner's legal status as a spouse or domestic partner of the **Insured Person**, or (ii) such spouse's or domestic partner's ownership interest in property which the claimant seeks as recovery for alleged **Wrongful Acts** of the **Insured Person**, all **Loss** which such spouse or domestic partner becomes legally obligated to pay by reason of such **Claim** shall be treated for purposes of this policy as **Loss** which the **Insured Person** becomes legally obligated to pay on account of such **Claim**. All terms and conditions of this policy, including without limitation the Retention, applicable to **Loss** incurred by such **Insured Person** in respect of the **Claim** shall also apply to such spousal or domestic partner loss. This coverage extension does not apply to the extent the **Claim** alleges any wrongful act or omission by the **Insured Person's** spouse or domestic partner.

## XXII. ENTIRE AGREEMENT

By acceptance of this policy, the **Assureds** agree that this policy embodies all agreements existing between them and the **Underwriter** or any of their agents relating to this insurance. Notice to any agent or knowledge possessed by any agent or other person acting on behalf of the **Underwriter** shall not effect a waiver or a change in any part of this policy or estop the **Underwriter** from asserting any right under the terms of this policy, nor shall the terms be waived or changed except by written endorsement or rider issued by the **Underwriter**, and executed by an authorized representative of the **Underwriter**, to form a part of this policy.

## XXIII. SERVICE OF SUIT

It is agreed that in the event of the failure of the **Underwriters** to pay any amount claimed to be due hereunder, the **Underwriter**, at the request of any person or entity insured hereunder will submit to the jurisdiction of any

court of competent jurisdiction within the territorial jurisdiction of Canada and will comply with all requirements necessary to give such court jurisdiction. Nothing in this Clause constitutes or should be understood to constitute a waiver of the rights of the **Underwriter** to commence an action in any court of competent jurisdiction in the territorial jurisdiction of Canada, to remove an action commenced outside the territorial jurisdiction of Canada to a Canadian court, or to seek a transfer of an action commenced in one province or territory of Canada to a court in another province or territory as permitted by the laws of Canada or of any Canadian province. It is further agreed that service of process in such suit may be made upon the **Attorney in Fact**, and that in any suit instituted against the **Underwriter**, that they will abide by the final decision of such court or of any appellate court in the event of an appeal.

The **Attorney in Fact** is authorized and directed to accept service of process on behalf of the **Underwriter** in any such suit and/or upon the request of any person or entity insured hereunder to give a written undertaking to such person or entity that they will enter a general appearance on behalf of the **Underwriter** in the event such a suit shall be instituted.

#### **XXIV. THIS CLAUSE APPLIES ONLY TO THE PROVINCE OF QUEBEC**

The parties to this policy mutually agree this policy and any related documents can be prepared and executed in English. Les parties conviennent que la présente convention et tous les documents s'y rattachant soient rédigés et signés en anglais.



**NOTICE TO ASSUREDS Pursuant to the Freedom Of Information And Protection of Privacy Act, 1987**

**IMPORTANT**

The notices below applies to insurance contracts containing non-automobile legal liability coverages in provinces where statistical data relating to such contracts must be reported to the Superintendent of Insurance and Lloyd's Canada.

**LEGAL AUTHORITY FOR COLLECTION**

Insurance Act, R.S.O. 1990, c.I.8, section 101(1).

**PRINCIPAL PURPOSE FOR WHICH PERSONAL INFORMATION IS INTENDED TO BE USED**

Information collected by Underwriters from Assureds or supplied to Assureds pertaining to the attached document will be used:

- to compile aggregate statistical data to be used in monitoring trends in the insurance industry;
- to develop statistical exhibits to be used in monitoring the insurance industry;
- to respond to requests for customized statistical information on the insurance industry;
- to respond to inquiries on statistical information made to Office of the Superintendent of Insurance; and
- to use and disclose such information for purposes which are consistent with the previous clauses.

**THE PUBLIC OFFICIAL WHO CAN ANSWER QUESTIONS ABOUT THE COLLECTION IS:**

Manager, Statistical Services  
Financial Services Commission of Ontario  
5160 Yonge Street, 17<sup>th</sup> Floor  
Box 85  
North York, Ontario  
M2N 6L9

Telephone (416) 250-7250  
Fax (416) 590-7070

**Notice concerning Personal Information**

By purchasing insurance from certain Underwriters at Lloyd's, London ("Lloyd's"), a customer provides Lloyd's with his or her consent to the collection, use and disclosure of personal information, including that previously collected, for the following purposes:

- the communication with Lloyd's policyholders
- the underwriting of policies
- the evaluation of claims
- the detection of prevention of fraud
- the analysis of business results
- purposes required or authorised by law

For the purposes identified, personal information may be disclosed to Lloyd's related or affiliated organizations or companies, their agent/mandataries, and to certain non-related or unaffiliated organisations or companies.

Further information about Lloyd's personal information protection policy may be obtained from the customer's broker or by contacting Lloyd's on 514-861-8361 or through [info@lloyds.ca](mailto:info@lloyds.ca).

Executive RISK