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Through a series of interviews with expert legal practitioners, ***Crisis Management*** explores the key factors that businesses must consider when a crisis strikes, and how best to resolve it. Our global panel share their experiences of successfully navigating myriad crises and offer practical advice for preventing crises from arising in the first place.

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Summary

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The word "crisis" carries with it the notion of the sudden and unanticipated, at least at the time of the occurrence. Yet with careful evaluation, most businesses can identify key categories of likely crises. What should a business do in advance of a crisis striking to ensure that it is best prepared to navigate it?

What key themes underlie the risk management analysis in your jurisdiction (for example, regulatory notice, critical response time, emergency response coordination)? How might this analysis evolve over time, in light of any emerging or potential future risks?

In a crisis, stakeholder expectations of an accurate explanation are high and the interests of various third-party groups are not necessarily aligned. How does a business meet varying expectations of what to say and when to say it? How does a business maintain an open narrative while best minimising legal risk?

Many crises are critical because they involve the potential for widespread civil liability and multiple claimants. How can lawyers balance the need for early disclosure with long-term client protections? What challenges arise in the resolution of multiparty claims and how does a defendant determine its strategy to meet them?

Alongside managing the crisis is the imperative to maintain 'business as usual' or, at the very least, to maintain operations in unaffected areas to offset losses and liabilities arising from the crisis. How can lawyers help to establish what went wrong and minimise the impact of those issues on the underlying business?

How do lawyers advise clients on the timing and management of engaging third-party experts, including coordinating the review of draft work product and finalising submissions to relevant agencies?

How are AI tools both leveraged for efficiency and resisted due to privilege or other concerns in the provision of real-time crisis management advice?

THE INSIDE TRACK

What traits, skills and experience do you think are critical for a lawyer advising on crisis management?

In your opinion, what expertise, attitudes, behaviours and practices characterise an effective legal team charged with crisis management?

What do you personally find most rewarding and most challenging about advising in this area?

Profiles

ABOUT

Sarah Stothart is a partner in the dispute resolution group at Goodmans. She maintains a broad practice primarily divided between complex commercial, insolvency and intellectual property litigation. She also has experience advising and representing clients in competition disputes, technology disputes, data breaches and cybersecurity incidents, and regulatory proceedings involving energy and copyright. Sarah is licensed in Ontario and California and has appeared before all levels of Ontario and Canadian federal courts, arbitration panels, the Competition Tribunal, the Ontario Energy Board and the Supreme Court of Canada, as well as in the US before the Delaware Court of Chancery. She is an adjunct professor at the University of Toronto Faculty of Law, where she teaches legal research and writing.

Mark Dunn is a partner in the dispute resolution group at Goodmans.

He has acted as lead counsel to parties involved in complex disputes before all levels of court in Ontario, the Supreme Court of Canada and arbitral tribunals. Mark has significant expertise in corporate and securities litigation, including litigation arising from disputed proxy contests, class proceedings relating to alleged misrepresentations and class proceedings commenced under the Competition Act. Mark has also acted on a variety of shareholder disputes, including oppression claims, shareholder class actions and proxy contest litigation. He provides strategic advice to, and litigates on behalf of, companies, shareholders and directors. Mark also has experience with the quantification of large and complex damages claims. Mark has been recognised as a leading litigation lawyer by *Best Lawyers in Canada* and *The Canadian Legal Lexpert Directory*.

Q&A

THE WORD "CRISIS" CARRIES WITH IT THE NOTION OF THE SUDDEN AND UNANTICIPATED, AT LEAST AT THE TIME OF THE OCCURRENCE. YET WITH CAREFUL EVALUATION, MOST BUSINESSES CAN IDENTIFY KEY CATEGORIES OF LIKELY CRISES. WHAT SHOULD A BUSINESS DO IN ADVANCE OF A CRISIS STRIKING TO ENSURE THAT IT IS BEST PREPARED TO NAVIGATE IT?

While crises may once have been thought of as sudden or unexpected, the most significant corporate crises now arise from risks that are foreseeable in category, if not in precise form. Cyber incidents, regulatory investigations, workplace misconduct, supply chain disruptions and reputational events driven by social media are increasingly understood to be inherent features of the modern business environment. As such, avoiding crises entirely is no longer a realistic or possible goal. Instead, businesses should have plans in place to ensure that when crises arise, the business is prepared to identify them early, move through them and recover as quickly as possible, and then use the experience as a learning opportunity for the next crisis. Effective crisis management is also increasingly viewed as an extension of directors' and officers' oversight obligations, such that a demonstrable framework for crisis response can be critical not only for the crisis itself, but also to defending post-crisis scrutiny of board and management conduct. A business can implement the following legal and business strategies to prepare itself for a crisis.

Allocating risk through contract

A crisis is, in some sense, a significant risk that has materialised. From a legal perspective, companies can prepare for crisis by carefully considering whether they are managing and allocating risk appropriately.

One important way to allocate risk is by having appropriate contracts in place. Virtually every business uses contracts as tools to anticipate to anticipate and allocate risks between the contracting parties. When parties enter into contracts, they agree who will bear the risk of various outcomes. Thinking carefully about what contractual protections your business needs, or might need, can be a really important way to arm yourself with the tools that you need to address a crisis.

The covid-19 pandemic illustrated the importance of contracts when a crisis hits. Almost no one anticipated the potential disruption that the pandemic would cause. But some businesses incorporated strong force majeure clauses, or other similar terms, in contracts that significantly helped to mitigate the harm caused by the pandemic. These clauses, in general terms, excused one party from its obligations if those obligations became impossible to perform because of some outside force. A number of parties were excused from paying money (especially rent) while their businesses were closed by the pandemic.

Companies without contractual protections were frequently not able to use general legal principles to help them avoid the impacts of the pandemic. A number of parties argued that the pandemic made it impossible to perform contracts and tried to invoke the doctrine of frustration (a legal principle that allows a party to avoid performing a contract if exterior factors make performance impossible). These cases were largely unsuccessful.

One crisis management lesson to take away from the pandemic is that a little planning can go a long way. Many contractual terms that received little (and sometime no) attention when contracts were executed suddenly became critically important. In the years since the pandemic, force majeure and related risk-allocation provisions have been subject to heightened scrutiny. Many counterparties now expressly include or exclude pandemics, public health emergencies, economic tariffs or government shutdowns from such clauses, often narrowing their application or conditioning relief on strict notice and mitigation requirements. Businesses are also increasingly relying on material adverse effect clauses, change-in-law provisions and cyber-specific representations and indemnities to address risks that may not render performance *impossible* but still have severe operational or financial consequences.

This lesson does not, of course, apply only to huge risks such as the pandemic. Properly allocating risk before a crisis strikes should be done with respect to identifiable risks unique to a business's particular operations or market conditions. Where risks are not identifiable, establishing contractually agreed processes for responding to those risks is an alternative option – for example, agreeing to dispute resolution processes or notice and termination provisions. In an environment where not all risks can be anticipated with precision, contracts that establish clear processes for escalation, information-sharing and dispute resolution can be as important as provisions allocating ultimate liability. These mechanisms often become central tools in managing a crisis before it crystallises into litigation or regulatory enforcement.

Trust, but verify

A surprising number of crises arise, or grow, because parties do not enforce legal rights that they have. Many businesses, for example, negotiate for the right to receive detailed information from key counterparties, but then they do not enforce those rights. Failing to enforce rights promptly can, in some instances, lead to arguments that those rights have been waived or that a party is stopped from asserting them. In some cases, it can even lead to arguments that the failures to enforce are themselves actionable by third parties.

In a crisis situation, therefore, parties should be in constant review of changing scenarios that might trigger certain rights and should be prepared to evaluate the merits of exercising those rights. Engaging internal or external legal counsel at an early stage can help with this decision-making process. Also helpful are key metrics to identify that a business is in fact in a crisis situation and should be taking resources away from day-to-day operations to evaluate its options. Documenting not only the exercise of rights, but also the rationale for delaying or declining to exercise them, can be important in defending subsequent claims that a crisis was allowed to worsen through inaction.

Putting the right policies and teams in place

From a business standpoint, the business should make sure that it has a crisis response plan that categorises types and levels of potential crises and the specific response channels for addressing them as they arise. Similarly, it should have a ready crisis response team comprising internal and external representatives and a list of approved and conflict-free external advisers that can be activated quickly upon request. Advisers should include, depending on the type of business and type of potential crisis, lawyers, consultants, government relations, PR firms, cybersecurity and ransomware consultants, crisis communication personnel, etc.

WHAT KEY THEMES UNDERLIE THE RISK MANAGEMENT ANALYSIS IN YOUR JURISDICTION (FOR EXAMPLE, REGULATORY NOTICE, CRITICAL RESPONSE TIME, EMERGENCY RESPONSE COORDINATION)? HOW MIGHT THIS ANALYSIS EVOLVE OVER TIME, IN LIGHT OF ANY EMERGING OR POTENTIAL FUTURE RISKS?

The following current and emerging areas of risk are particularly noteworthy in Canada.

Data security and privacy risks have become among the most significant sources of corporate crisis in Canada. Some businesses will be particularly sensitive to the unauthorised disclosure of sensitive business information, or they may hold consumer information and risk financial or reputational harm if it is accessed illegally. Other businesses may rely heavily on specific systems that are vulnerable to a ransomware attack where hackers take control of the system and will only return it in exchange for payment.

In addition to the operational and reputational consequences of a breach, businesses now face an evolving regulatory landscape. Recently proposed federal reforms, including the Consumer Privacy Protection Act (which has to date not received parliamentary approval), signal materially higher administrative penalties and the introduction of a private right of action, reflecting a broader shift toward treating privacy compliance as a core governance obligation rather than a technical compliance exercise.

Online reputational risk is another trend that we are eyeing in Canada. Negative online reviews, or critical social media posts, can cause significant reputational harm to a business, and we have seen a number of cases where businesses have sued those posting negative reviews about them. These are usually framed as actions for defamation, which allow a plaintiff to recover damages caused by a defendant who disseminated harmful and untrue information.

Canadian courts will typically order the disclosure of IP addresses and other information required to identify individuals posting the allegedly defamatory reviews or making the allegedly defamatory social media posts. If the alleged defamer is located in Canada, they can be sued.

Defamation actions in Canada take time to prosecute, and that time can vary depending on where you are because some Canadian courts are still dealing with covid-era backlogs that make the process even slower.

The time it takes to prosecute defamation actions can be exacerbated by legislation aimed at preventing suits known as Strategic Lawsuits against Public Participation (SLAPP). Anti-SLAPP legislation permits a defendant to bring an early motion to dismiss an action, to allow baseless suits to be dismissed quickly. In practice, anti-SLAPP legislation has had the opposite effect. Anti-SLAPP motions are long and complicated. A successful anti-SLAPP motion will end the lawsuit more quickly than a trial, but many unsuccessful anti-SLAPP motions wind up making the case even longer and more expensive than it would otherwise be. Courts hearing anti-SLAPP motions will scrutinise whether a plaintiff can show real and tangible harm to its reputation at an early stage. As a result, businesses must carefully assess whether commencing litigation may itself exacerbate reputational damage or prolong public attention to the underlying dispute.

Shareholder class actions are another important risk applicable to public companies in shareholder litigation. The applicable provincial Securities Acts in Canadian provinces impose liability on public companies and, in some cases, the officers and directors of those companies for misrepresentations that cause a decrease in value of a company. The plaintiff shareholders are able to sue as a class without proving that each of them read or relied on the misrepresentation. The result has been that any company that discloses a significant error in its financial reporting risks a shareholder class action. Officers and directors are routinely named in these actions, and so it is important to have appropriate risk D&O insurance.

IN A CRISIS, STAKEHOLDER EXPECTATIONS OF AN ACCURATE EXPLANATION ARE HIGH AND THE INTERESTS OF VARIOUS THIRD-PARTY GROUPS ARE NOT NECESSARILY ALIGNED. HOW DOES A BUSINESS MEET VARYING EXPECTATIONS OF WHAT TO SAY AND WHEN TO SAY IT? HOW DOES A BUSINESS MAINTAIN AN OPEN NARRATIVE WHILE BEST MINIMISING LEGAL RISK?

Communication with key stakeholders is critical to navigating a crisis and emerging intact. There is sometimes a tension between the need to communicate and the risk the communication could undermine the business's position in future litigation or undermine efforts to manage regulatory relationships.

Depending on the nature of the crisis and the nature of the business, an effective crisis response can require creating a special committee or crisis response team, with regular

meetings, to engage with external legal and other advisers and be the central portal for decisions on communications. Regardless of whether there is a specific team or designated individuals, it is important that all key team members, both internally and externally, work effectively together with a clear hierarchy for decision-making. Perhaps most importantly, the team needs to have key priorities as their common goal, without competing agendas.

When assessing what to communicate and how to frame a narrative, from a strictly legal perspective, it is typically best to stay silent early in a matter because new facts almost always emerge over time. But it is usually wrong for a business to look at a crisis from a strictly legal perspective. It is also usually wrong for a business to look at a crisis without any regard for the legal perspective. Having advisers representing both perspectives is key.

Lawyers are experts in a specific kind of communication, but businesses can also benefit from diverse perspectives, experience and expertise. Public relations professionals, shareholder advisory firms and many others can have an important role to play. The key is to balance the need to communicate with the need to ensure the communication does not undermine legal efforts. It is important to identify the biggest risks posed by a crisis and assemble a team capable of addressing those risks. It is also important to have a complete picture of all stakeholders that need to be engaged and what is likely to concern them about the potential crisis.

Ultimately, businesses should do their best to be honest and build trust with employees, customers, shareholders and other potentially affected stakeholders, but they must take particular care to prepare messaging that is defensible and will not emerge as incorrect with the passage of time. Issuing carefully scoped, factual statements that reflect the organisation's knowledge at the time, coupled with caveats about current knowledge and a clear commitment to provide updates as additional information becomes available, can go a long way to achieving this balance.

Finally, businesses should make sure to preserve relevant documents and to document the steps taken and factors considered in response to a crisis. Crises evolve quickly and if it ever becomes necessary to justify a particular approach or decision, having records to establish why that decision was made can be very helpful.

MANY CRISES ARE CRITICAL BECAUSE THEY INVOLVE THE POTENTIAL FOR WIDESPREAD CIVIL LIABILITY AND MULTIPLE CLAIMANTS. HOW CAN LAWYERS BALANCE THE NEED FOR EARLY DISCLOSURE WITH LONG-TERM CLIENT PROTECTIONS? WHAT CHALLENGES ARISE IN THE RESOLUTION OF MULTIPARTY CLAIMS AND HOW DOES A DEFENDANT DETERMINE ITS STRATEGY TO MEET THEM?

The potential for litigation should always be on a business's mind when responding to a crisis. This is particularly true in circumstances where a business is potentially liable to large and unidentifiable groups of people, such as data security breaches, misrepresentations in securities filings, product liability issues and other issues otherwise subject to considerable public scrutiny. Class actions are a significant risk to businesses in Canada. Every Canadian province has class action litigation that allows multiple plaintiffs to sue as a class to recover losses suffered as a result of the same wrong, and Canada's federal court also has procedures to address class actions in certain specialised areas within its areas of expertise.

The Canadian class action landscape is, in some important respects, friendly to plaintiffs. Most class proceedings are "opt-out" proceedings, which means that everyone injured by a particular wrong (and who fits within the class definition) is a member of the class unless they opt out. Third-party litigation funding is legal and litigation funders are active in the Canadian market. Court approval for funding is required, but it is commonly granted.

Canadian class actions have two important stages. First, a class action has to be certified by the court. Second, the case proceeds to trial. Very few class actions proceed to trial and so certification is a critical step. Defendants often contest a variety of issues at the certification stage, including: whether the plaintiffs' allegations would (if proven) entitle them to relief; whether the facts support the existence of common issues that can appropriately be determined in a class proceeding; and whether a class action is the preferable procedure to determine the matter.

Class actions in Canada tend to proceed slowly and trials are rare. Most class actions settle, whether before or after certification. Settlement of class actions requires court approval, and the settling plaintiff must show that the proposed settlement is fair, reasonable and in the best interests of the class. If the case settles before certification, then the plaintiff must both certify the class (on consent, since the certification is for settlement purposes) and obtain settlement approval.

More generally in terms of determining strategy when a business does not yet know what liability it might face and where it might come from, key goals are to maintain optionality, preserve rights and have sufficient time to ensure full information has been gathered. A business should immediately take steps to preserve all relevant records, identify individuals with knowledge of events at issue and document key events. It is important that a business develop as clear an understanding of the merits of potential claims as possible, so that it can effectively determine its risk tolerance and strategy to respond to them. These steps would typically be undertaken with the assistance of internal or external counsel, both for the benefit of their legal advice, but also to ensure any work product or strategic discussion is covered by privilege.

One major challenge in a crisis situation is the uncertainty of knowing the number of potential claimants and when they might arise. Most litigation in Canada is subject to a two-year limitation period, so businesses can be relatively confident once that period has elapsed that they will not become subject to new claims. Within that two-year period, however, some plaintiffs may emerge earlier and others may wait. It is difficult to develop a strategy when the opponents keep changing.

To the greatest extent possible, therefore, a company should take steps to identify the scope or nature of possible claims or set in place a strategy for responding to unanticipated ones at an early stage. For example, in a data breach crisis, a business might be liable to all of its customers for breach of a common confidentiality clause and to members of the public for statutory or common law breaches. A business can take steps to ascertain potential claims arising from the former (by engaging with its customers on a business-to-business level) and can at least be aware of and develop a consistent approach for addressing substantially similar individual claims or a class action from the latter.

A business may find itself constrained in its choice of forum due to a multiplicity of claims. It can be difficult to arbitrate multi-party claims given the procedure's reliance on consent,

often making public court proceedings the default, but private dispute resolution is an option that can be pursued in certain situations.

Once disputes are known, a business must also contend with the prospect of conflicting or inconsistent decisions or resolving claims in a way that creates precedent for others. For this reason, it often makes sense to seek common resolution of disputes involving similar facts and issues, or to have them heard by the same decision-maker or with a joint or consecutive trial. Joint mediations can also be facilitated to seek creative resolutions on multiple fronts.

Settlement considerations vary across different claimants and a business may find it is within its interests to settle certain claims and not others. Settlement terms are generally subject to privilege, so the quantum of a payment and other substantive terms should not be disclosed to other claimants, though, of course, there are always risks of breach, especially in a case involving public scrutiny. A business should therefore be cautious not to set any "base level" of recovery that it would struggle to justify to other plaintiffs if it became known.

ALONGSIDE MANAGING THE CRISIS IS THE IMPERATIVE TO MAINTAIN 'BUSINESS AS USUAL' OR, AT THE VERY LEAST, TO MAINTAIN OPERATIONS IN UNAFFECTED AREAS TO OFFSET LOSSES AND LIABILITIES ARISING FROM THE CRISIS. HOW CAN LAWYERS HELP TO ESTABLISH WHAT WENT WRONG AND MINIMISE THE IMPACT OF THOSE ISSUES ON THE UNDERLYING BUSINESS?

Establishing separate committees or crisis response teams that are specifically delegated responsibility for the crisis can help in allowing other business units to maintain 'business as usual'.

Lawyers can assist a committee with determining an appropriate response to the crisis and path forward, and also with documenting what went wrong and how to avoid repeating similar issues in the future. To that end, collection and review of relevant documents is an important function of the legal team, as is conducting interviews with key individuals. Lawyers can also document the steps being taken in response to the crisis to ensure the defensibility of the crisis response down the line.

While lawyers can assist in many of the steps, it is important that there be "buy-in" from business leaders and that they either are involved with or regularly apprised of the committee's actions. Business leaders should be part of the solutions implemented and the historical review to ensure that the impression of how the crisis developed and how it can be avoided or mitigated in the future can be retained in the corporate memory.

HOW DO LAWYERS ADVISE CLIENTS ON THE TIMING AND MANAGEMENT OF ENGAGING THIRD-PARTY EXPERTS, INCLUDING COORDINATING THE REVIEW OF DRAFT WORK PRODUCT AND FINALISING SUBMISSIONS TO RELEVANT AGENCIES?

In Canadian crisis situations, third-party experts are often important, but lawyers should advise on both the timing and scope of expert involvement to balance the need for rapid technical insight against the risk of creating premature and/or discoverable work product.

Where specialised analysis is required – such as in cyber incidents, environmental events or accounting issues – early expert engagement may be critical. Counsel will often

recommend retaining experts through legal counsel with clearly defined mandates to support claims of privilege and to ensure that investigative work aligns with legal advice.

Lawyers also coordinate the review of expert draft work product to ensure consistency with known facts, legal positions and applicable regulatory frameworks. Acting as a central point of review reduces the risk of inconsistent messaging and helps ensure that final submissions to regulators are accurate, defensible and responsive to statutory requirements.

HOW ARE AI TOOLS BOTH LEVERAGED FOR EFFICIENCY AND RESISTED DUE TO PRIVILEGE OR OTHER CONCERNS IN THE PROVISION OF REAL-TIME CRISIS MANAGEMENT ADVICE?

AI-enabled tools are increasingly used in Canadian crisis management to enhance speed, scale and analytical capacity, but their deployment remains carefully constrained by legal, privilege and governance considerations.

For example, AI can assist with document review, data triage, timeline reconstruction and the rapid identification of key issues from large volumes of information generated during a crisis. In time-sensitive situations, these tools can help legal teams quickly surface potentially relevant communications, identify patterns or anomalies and support more informed early decision-making. Used appropriately, AI can reduce the burden on internal teams and external advisers, allowing resources to be focused on higher-value strategic and advisory work.

At the same time, counsel remain rightly cautious about using AI for substantive legal analysis or strategic deliberation during an active crisis. Key concerns include the potential erosion of solicitor-client privilege, uncertainty around data retention and third-party access, and the risk of sensitive or incomplete information being exposed. These risks are heightened where regulatory investigations or class actions are anticipated.

As a result, while AI use can be beneficial, it must be controlled and supervised and supported by clear internal protocols and human oversight. AI outputs are treated as assistive inputs rather than definitive advice, allowing organisations to capture efficiency gains while preserving legal protections and accountability.

The Inside Track

WHAT TRAITS, SKILLS AND EXPERIENCE DO YOU THINK ARE CRITICAL FOR A LAWYER ADVISING ON CRISIS MANAGEMENT?

Among the personal and professional traits a lawyer advising on crisis management must have are the abilities to remain calm and composed in high-pressure situations. They should not simply be a "reactive" and dispute-oriented practitioner, but also be able to maintain a holistic and pragmatic approach to their client's business. They must be able to triage highest urgency issues as compared to lower priority tasks, and delegate and manage effectively to ensure more long-term tasks such as document review and collection are being undertaken contemporaneously with addressing larger "fires". Finally, a lawyer at a full-service law firm will have more direct and timely access to the wide array of expertise

that is necessary to advise on an evolving crisis, though a lawyer with close relationships with external lawyers offering various types of expertise can offer this as well.

IN YOUR OPINION, WHAT EXPERTISE, ATTITUDES, BEHAVIOURS AND PRACTICES CHARACTERISE AN EFFECTIVE LEGAL TEAM CHARGED WITH CRISIS MANAGEMENT?

As above, the ability of the team to collectively undertake a holistic approach to the unique circumstances of a particular business, its ongoing operations and its legal risks, is crucial. The team should reflect a diversity of expertise and practice areas, from both the advisory and dispute resolution perspectives. They should also reflect a diversity of levels of experience, such that there are more junior members available to assist with larger projects and more senior members available to manage and delegate. The team should be able to work together effectively with a clear and established hierarchy for decision-making and reporting to the business.

WHAT DO YOU PERSONALLY FIND MOST REWARDING AND MOST CHALLENGING ABOUT ADVISING IN THIS AREA?

As lawyers and litigators, the most rewarding and most challenging aspects of this type of work are similar: the situations are always evolving quickly, there is no clear "answer" to the crisis, and there are a variety of directions a crisis can go depending on the paths chosen by the business. As lawyers, we have a wider variety of tools and options available to us in a crisis situation where the path forward is not prescribed. Crisis situations are also unique from litigation specifically, because we have the opportunity to learn the business more intimately and shape the context of the situation from which we may eventually operate if and when litigation arises. The advice we give must simultaneously be proactive toward future problems and reactive to those that have already manifested.

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