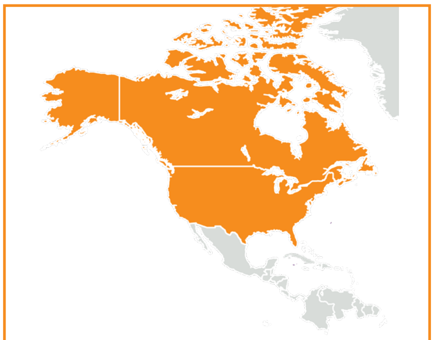
Directors' Liability Survey 2022

Regional overview, North America

Lawrence Fine, WTW



North America

The fact that cyber attack was rated in North America as the number one risk, as it was in four other geographic regions, not including Latin America, is not surprising. It's worth noting the next two ranked risks are also related to cyber, with cyber extortion in third position and data loss in second place and the two being closely related to each other since extortion creates an increased risk of data loss.

While North America has seen many headlines relating to cyber risks, particularly cyber extortion, it is still debatable whether in dollars and cents cyber-related risks for directors and officers deserve all three of the first three spots on the risk survey.

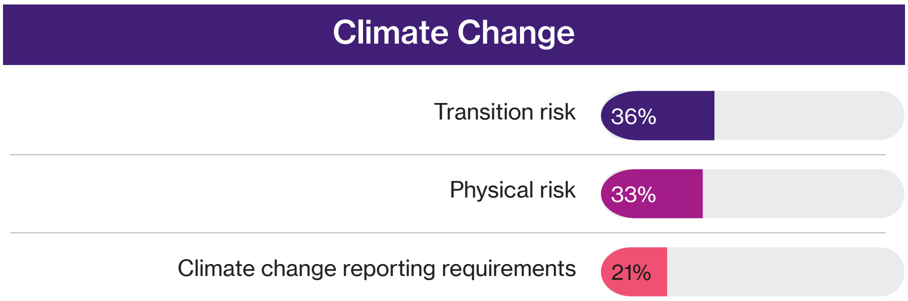
North America is the only region where the directors and officers rated 'return to work/COVID safety' and 'social engineering crime' as numbers four and five respectively. These two categories did not appear in any other region's top seven list. In the U.S. in particular, there has been more COVID-related litigation than in other regions, although perhaps not as much as many insurers may have anticipated. A rise in social engineering crime in the last few years has resulted in actions by some insurers to exclude such risks.

'Supplier business practices' came in as the sixth-ranked risk, compared to its fifth-place rating in Asia. (This was not a major factor anywhere else). It seems North American respondents may have anticipated the current global supply chain issues and the ripple effect these could create for indirectly effected companies.

The appearance of regulatory risk at the bottom of the top-seven ranked risks is surprising, given that 2021 saw record SEC whistleblowing activity and newly aggressive positions being announced by both the U.S. Department of Justice and Securities Exchange Commission (see separate article on regulatory risk in the U.S.).

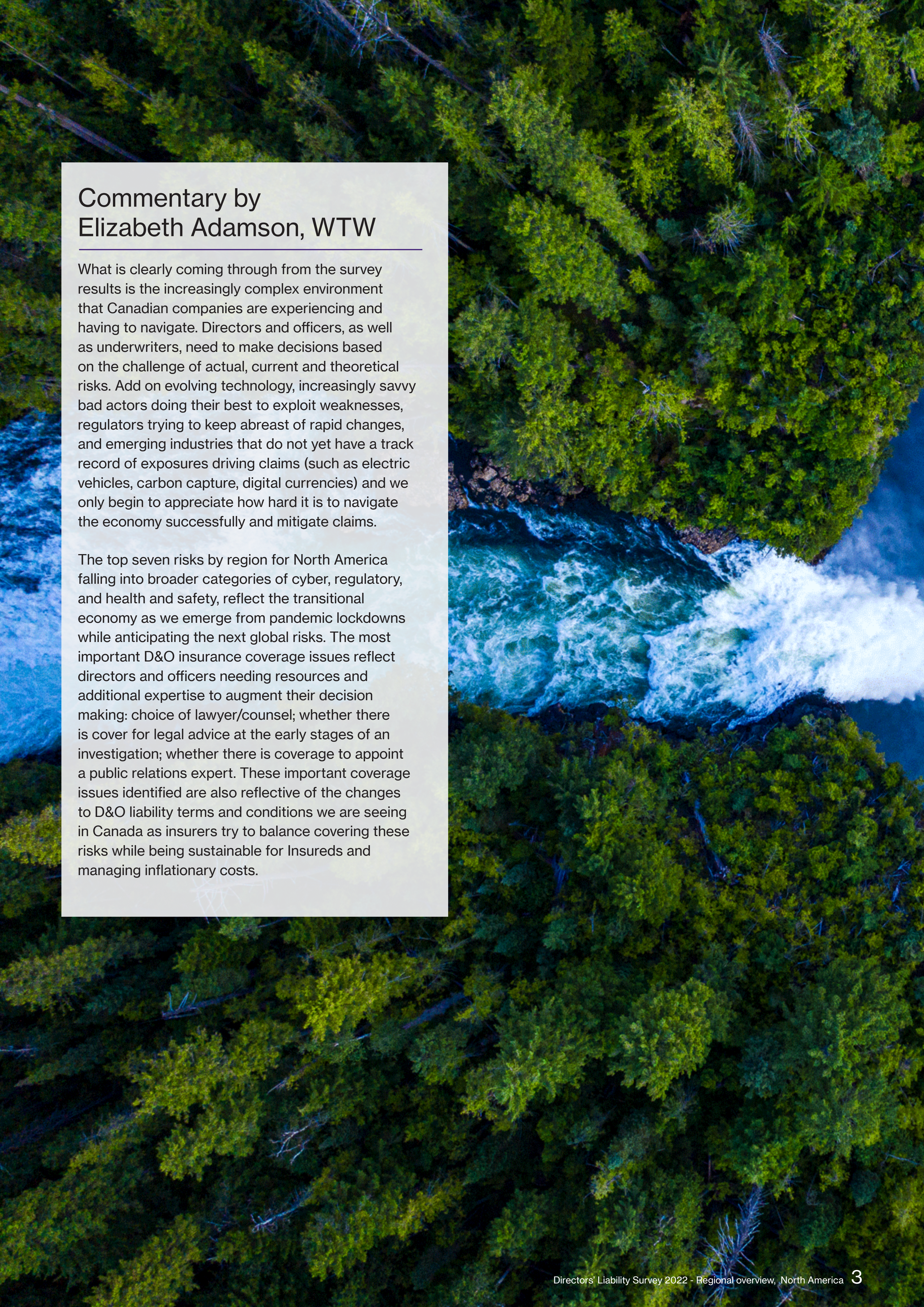
It also seems surprising shareholder class actions did not make the top list, with only 18% ranking it as “very significant” or “extremely significant”. This may be partly because of the recent drops in class action filing volume, although it did not rank highly as a risk last year either.

Just 18% of directors and officers rated climate change as “very significant” or “extremely significant” (lower than every other region). In a series of specific sub-questions relating to climate change, transition risk was rated at 36%, physical risk at 33% and climate change reporting requirements at just 21%. This is compared to percentages ranging between 41% in Great Britain to 73% in Asia. This is likely to change in reaction to anticipated further legal requirements concerning climate change disclosures being imposed by the SEC.



% of NA respondents who considered that each of these categories of climate change risk to directors were “Very significant” or “Extremely significant”. Note: only respondents who considered that climate change was at least “significant” were asked this question.

On the insurance coverage side, North America stands alone in rating choice of lawyer as the number one issue, even above the category of ‘how claims against directors and officers will be controlled and settled’. Not appearing in the North American top seven coverage concerns is ‘cost of legal advice at the early stages of an investigation’ which featured in all other regions’ top seven rankings. This suggests directors and officers in North America are more satisfied than their counterparts around the world in terms of protections for insured persons in the early stages, perhaps because of the proliferation of early triggering features such as informal inquiry and interview coverages.



Commentary by Elizabeth Adamson, WTW

What is clearly coming through from the survey results is the increasingly complex environment that Canadian companies are experiencing and having to navigate. Directors and officers, as well as underwriters, need to make decisions based on the challenge of actual, current and theoretical risks. Add on evolving technology, increasingly savvy bad actors doing their best to exploit weaknesses, regulators trying to keep abreast of rapid changes, and emerging industries that do not yet have a track record of exposures driving claims (such as electric vehicles, carbon capture, digital currencies) and we only begin to appreciate how hard it is to navigate the economy successfully and mitigate claims.

The top seven risks by region for North America falling into broader categories of cyber, regulatory, and health and safety, reflect the transitional economy as we emerge from pandemic lockdowns while anticipating the next global risks. The most important D&O insurance coverage issues reflect directors and officers needing resources and additional expertise to augment their decision making: choice of lawyer/counsel; whether there is cover for legal advice at the early stages of an investigation; whether there is coverage to appoint a public relations expert. These important coverage issues identified are also reflective of the changes to D&O liability terms and conditions we are seeing in Canada as insurers try to balance covering these risks while being sustainable for Insureds and managing inflationary costs.

Risk ranking overview – by region

How significant are the following risks for the directors and officers of your organisation (whether financially or reputationally).

Country of office	North America
Cyber attack	64%
Data loss	62%
Cyber extortion	54%
Regulatory risk (including threat of fines and penalties)	31%
Shareholder actions/disputes	18%
Anti-trust law/regulation	18%
Risk of a health and safety / environmental prosecutions	15%
Return to work/COVID-safety/vaccination status	38%
Risk of employment claims	31%
Risks posed by supplier business practices	33%
Breach of human rights within your business operations	10%
Board/ management/ company takeover or other forms of activism by shareholders or institutional investors	13%
Economic crime (your company/organisation as a victim)	23%
Bribery and corruption	10%
Risk of criminal penalties arising from breach of sanctions	18%
Social engineering crime (your organisation as a victim)	36%
Risk of other criminal proceedings	10%
Climate change	18%
Your company/organisation becoming a focus of a social media campaign	24%
Insolvency, bankruptcy or corporate collapse	3%
Risk of proceedings in a jurisdiction outside your organisation's main home jurisdiction	3%
Pensions liabilities	13%

(% of 'Very significant' or 'Extremely significant')
Source: Directors' Liability Survey 2022

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