



1025 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036-5425  
Tel 202.293.4103  
Fax 202.293.4701  
www.acc.com

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## **ACC's CLO THINKTANK EXECUTIVE REPORT**

### **“CLO AS GATEKEEPER”**

This Executive Report provides an overview of discussion results from ACC's CLO ThinkTank session titled “CLO as Gatekeeper” held in Toronto on April 24, 2008. ACC's CLO ThinkTank sessions are designed to provide a forum for CLOs who wish to exert greater leadership in their companies, at the bar, in the courts, and in the halls of government on emerging issues of greatest concern. Following is summary information on key topics and takeaways and discussion point highlights identified by these CLO thought leaders.

ThinkTank participants included the following legal leaders:

- Christopher A. Montague, Executive Vice President and General Counsel, TD Bank Financial Group
- David Allgood, Executive Vice President and General Counsel, Royal Bank of Canada
- Tom Bogart, Executive Vice President and Chief Legal Officer, Sun Life Financial Inc.
- Simon Fish, Executive Vice President, General Counsel & Secretary, Vale Inco Limited
- Judy Goldring, Senior Vice President and General Counsel, AGF Management
- Paulina Hiebert, Vice President – Legal and Corporate Secretary, The Brick Group
- Karin McCaskill, General Counsel and Corporate Secretary, Sobeys, Inc.
- Dorothy Quann, Vice-President, General Counsel and Secretary, Xerox Canada, Ltd.

### **KEY TOPICS**

Below is a list of key topics selected by the CLOs present as most interesting and discussed during this CLO ThinkTank session:

- **Roles of Gatekeeper and Enabler**
- **Training**
- **Organizational Structure**
- **Liability for In-house Lawyers**
- **Internal Audit**
- **Ethics and Compliance & the GC's Role**
- **GC's Relationship with the Board**

## KEY TAKEAWAYS

Thought leaders participating in this session described a number of ideas and practices. Listed below are some top themes and takeaways. Ideas on additional issues are described in the Discussion Highlights section below.

- **In-house lawyers need to balance their multiple roles, including roles as gatekeepers and enablers.** Participants discussed how in-house lawyers have multiple roles and how experience and judgment help lawyers execute their roles as both gatekeepers and enablers.
- **Tone-at-the-top and system-wide internal controls are important to support the notion of the role of General Counsel as a gatekeeper.** Participants discussed how ‘tone-at-the-top’ is important to effectively implement system-wide internal controls. They also discussed how having internal controls is important to supporting the notion of in-house lawyers as gatekeepers. General Counsel can set the tone for their legal team by clearly communicating expectations regarding reporting up concerns within the law department.
- **Training on the role of in-house lawyers, the General Counsel’s expectations regarding reporting-up and on business plans are important practices to help in-house lawyers develop in their roles as gatekeepers and enablers.** Participants discussed a broad range of initiatives to help familiarize in-house lawyers with the business to help cultivate enhanced awareness of business needs and legal judgment. Practices include: reviewing business plans and educating lawyers on their role as in-house counsel; developmental training assignments where lawyers move to the business side; having the General Counsel communicate expectations regarding reporting up on questionable matters and support from the General Counsel to resolve difficult situations; and asking during the interview process for thoughts on the relative roles of in-house lawyers and outside counsel.
- **Organizational structures vary—there is no one size fits all.** Participants described having various organizational reporting structures for lawyers that include regional teams of lawyers, business unit teams of lawyers, flat reporting structures where all lawyers report directly to the General Counsel, and having all lawyers across the company ultimately report organizationally to the General Counsel. Similarly, some organizations have separate compliance functions that report organizationally to the General Counsel, and others have separate functions without any reporting relationship. In addition, some of the participants also wear the Corporate Secretary hat; others do not.

## DISCUSSION HIGHLIGHTS

### ROLES OF GATEKEEPER AND ENABLER

Roles/Challenges; Need for Balance: Participants discussed the dual roles of in-house lawyers as gatekeepers and enablers. They noted a challenge regarding less experienced lawyers, and how they tend to focus more on the gatekeeper role rather than the enabler side, and how clients may not seek their help if they perceive them to be pure gatekeepers. Participants discussed a need to help in-house lawyers at all levels understand their dual roles and to find appropriate ways to achieve results. If the answer is ‘no’ to a client question, in-house lawyers need to explain why.

Roles/Tone-at-the-Top: Participants discussed how this is very important to help create system-wide controls. They also discussed difficulties in imposing expectations on in-house counsel to be gatekeepers if there aren’t corporate processes and controls to provide the appropriate structure and incentives for clients to properly involve legal counsel. It is hard to ask the legal team to be accountable if a company doesn’t have controls.

Roles/Enhanced Scrutiny Makes Easier to Give Tough Advice: Participants discussed how the corporate environment has changed, and how the enhanced publicity surrounding compliance and accountability and emboldens GCs to raise their hands in questionable situations.

Roles/Heightened Expectations for GCs as Gatekeepers: Participants discussed how there appears to be a heightened expectation that the GC will ensure that nothing goes wrong, and a corresponding heightened accountability to the public.

Roles/Three-Legged Stool: Participants discussed notion of three-legged stool in describing GC's role: trusted advisor, gatekeeper and protector of investors. Some of the participants noted a preference to view advisor and gatekeeper role as a combined role.

Roles/Organizational Structure: Participants discussed how organizational structure for the legal function might impact the lawyers' gatekeeper role. They discussed how centralized reporting structures (e.g., where all lawyers ultimately report into the General Counsel) could help facilitate this role.

Roles/Multiple Hats & Privilege: Participants described various practices implemented to help maintain privilege in light of the multiple hats, roles and titles for General Counsel. Practices include: (1) specifically stating that advice is being provided as the GC (rather than in a business or other officer capacity); (2) excluding business titles on signature lines for memos that are legal in nature; (3) including solicitor-client privilege legends on privileged communications; (4) formal retainer process for internal audit to perform investigative work.

Roles/Outside Counsel in Gatekeeper Role: One participant described a practice that allows clients to engage outside counsel directly (e.g., without first going through the law department); however, as part of this process, the retainer agreement with outside counsel imposes the gatekeeper role on outside counsel. The agreement also makes clear that the ultimate client is the company (not business unit A or B) and includes an expectation that matters will be brought forward to the General Counsel and business leaders as appropriate.

#### TRAINING

Training/Role of In-house Lawyer: One participant described practices that include reviewing business plans with less experienced lawyers and taking them through their roles and communications exercises to help educate them on their role. Participants also discussed the need to help newer lawyers in the department understand that they need to give legal advice and help participate in and own their legal decisions.

Training/Interview Process: One participant described including questions on how applicants view the roles of in-house and outside counsel as part of the interview process. In addition, one participant described a hiring process that includes having the General Counsel interview every lawyer that is hired (either in person or via phone).

Training/General Counsel Communicates Reporting-Up Expectations: Participants described the importance of telling lawyers on the team to come to the General Counsel for difficult situations for support and assistance. As part of this communication, lawyers understand that they can and the General Counsel will help them take matters up the chain if appropriate.

Training/Developmental Opportunities by Moving to Business Roles: Participants discussed whether current training and leadership assignments allow for/encourage lawyers to move outside of the legal function to develop an experiential basis. One participant discussed how this is encouraged within his/her organization: sometimes the lawyers don't come back to the legal department but this helps infuse a legal analytical thought process in the business; then they do come back, they can be better lawyers because

they are enriched with the benefit of having seen and participated on the business side. Another participant also described flexibility for lawyers to move from the legal function to the business function and back—but also noted that it’s hard to keep up with the demand from the business to raid lawyers to fill operational roles. One participant described implementing practices that require in-house lawyers to ‘leave their legal license at the door’ when they move to a developmental business assignment: they’re required to sign an agreement that states that they won’t give legal advice.

Training/Risk Management: Participants discussed how a continual set of experiences and judgment over time helps lawyers in their gatekeeper role. They also discussed the importance of helping lawyers learn how to manage risks.

## ORGANIZATIONAL STRUCTURE

Organizational Structure/Law Department: Participants discussed various organizational structures of their law departments. These structures include:

- *Centralized:* all lawyers ultimately report into the General Counsel; lawyers in the business units in non-legal roles are not authorized to give legal advice; General Counsel reports to the CEO.
- *Centralized:* law department is considered a ‘shared service;’ organizational structure recently changed; General Counsel of Canadian entity used to report organizationally to the CEO for the Canadian business entity, but now reports organizationally to the General Counsel for the U.S.- based entity.
- *Regional with Tacit Understanding that the General Counsel has Ultimate Responsibility for Legal Matters:* the organization has four key regions plus a corporate headquarters function: each region has its own legal and finance functions and heads of each regional legal team report to the regional presidents; however, there is a tacit understanding that legal matters are ultimately the responsibility of the General Counsel.
- *Business Unit Legal Teams with Deputy General Counsel for each Team Reporting to the General Counsel:* the company has three main business units plus a corporate headquarters function, and the law department is organized to have three teams of business lawyers to support each of the business units plus a corporate legal team. Each of the four legal teams has a Deputy General Counsel, who reports organizationally to the (the four Deputy General Counsel comprise the General Counsel’s leadership team). Lawyers sit on the respective business committees but they do not report organizationally to the chair of the committees; they report to the General Counsel.
- *Centralized; Flat Structure:* all lawyers report to the General Counsel; the General Counsel reports to the CEO (and dotted line to the Chairman of the Board)
- *Business Unit Legal Teams with all Assistant General Counsel Reporting to the General Counsel:* the company has four principal business units and each unit has a legal team with an Assistant General Counsel as the lead lawyer. In addition to the four business unit legal teams, a fifth team of lawyers provides services relating to corporate matters that cross the entire organization. All of the Assistant General Counsel report organizationally to the General Counsel. If the Assistant General Counsel is located outside of the headquarters location, may also report organizationally on a dotted line basis to the business unit leader.
- *Regional Legal Teams with all Lawyers Ultimately Reporting into the General Counsel:* the organization has regional businesses, and each business has a General Counsel. The General Counsel for the regional businesses all report organizationally to the General Counsel for the corporate division. The organization’s leadership team includes the General Counsel of each

of the business groups, the Chief Compliance Officer, the Head of Public Affairs, and the Corporate Secretary.

Organizational Structure/ Upward Reporting Relationships: Participants described their reporting structures. Most report to the CEO. One participant described having a number of reporting structures in recent years. Another participant described previously reporting to the CFO for a brief period of time but now reports to the CEO (and has a dotted line reporting relationship to the Chair of the Board).

#### LIABILITY FOR IN-HOUSE LAWYERS

Liability/Practice to Elevate Matters to GC: One participant described implementing a practice within the law department that encourages less experienced lawyers to elevate questionable matters to the GC. This practice is described as helping to eliminate some concerns regarding potential liability since lawyers feel comfortable that they can raise matters and seek support of the GC. The rationale provided in helping to address liability concerns expressed by members of the legal team is that the lawyers charged are generally at the higher levels (e.g., the GCs), so bring matters of concern to the GC and we will address and help find solutions for the more complex legal situations.

Liability/Standards vs. Attention: Participants discussed whether standards and thresholds for liability have changed or if the perception of an increase in liability is more directly related to an increase in attention on those matters where in-house lawyers are named as defendants. Participants discussed views, including a view that the basis for liability hasn't changed but that the likelihood that an in-house lawyer may be challenged and targeted for action may have increased.

Liability/Industry Impact: Participants discussed views on whether there are some industries where risk is viewed differently and whether this impacts the GC's role and perspective on risk. They discussed whether industries with higher levels of regulation have more infrastructure to help support the GC in her/his role as gatekeeper.

Liability/Protections for In-house Lawyers: Participants discussed approaches for insurance and indemnification for in-house lawyers. Several participants described obtaining a waiver (e.g., waive and pay approach). Most of the participants do not provide a separate written indemnification agreement for in-house lawyers. One participant described a practice that includes having the corporate insurance group obtain riders for provision of legal advice within the organization. Another participant described protections that include Directors and Officers insurance coverage and professional liability coverage purchased for lawyers (in this situation, in-house lawyers provide opinions on corporate financings).

#### INTERNAL AUDIT

Internal Audit/Auditing the Legal Function: Participants discussed the roles of the corporate internal audit function and whether internal audit ever performs audits of the law department. One participant noted an organizational structure that includes having internal audit report organizationally to the General Counsel. Participants described the importance of defining what internal audit may be auditing (e.g., is it the contract process, the outside counsel engagement process, roles in implementing the company's insider trading policy, etc...). Participants expressed a view that having internal audit perform an audit of the legal function may be acceptable if the purpose of the audit is to determine whether a corporate control is working effectively. In contrast, if the purpose of the audit is simply to examine 'free-form' what the law department is doing to determine whether internal audit would look at things differently, participants expressed less support for that type of review. Accordingly, role clarity was determined to be important. One participant described having internal audit perform an audit of the law department's performance against policies developed by the GC; this particular experience was described as positive—with the right people asking the right questions and achieving the right results.

Internal Audit; Role in Investigations: Participants described roles for internal audit in connection with administering the company's helpline and conducting internal investigations. For one participant's company, the chief Auditor and the GC are co-owners of the company's Ethics Helpline process. Together they decide how to handle matters and the appropriate path forward for follow-up. Another participant described having an internal investigations group and an internal audit group that may often conduct investigations of matters reported through the company's helplines. Participants discussed criteria they consider in determining whether to conduct an investigation using internal resources or outside resources as the lead: criteria for going outside include those matters that involve issues of higher potential reputational impact or higher risks or might require forensic sophistication.

#### ETHICS AND COMPLIANCE STRUCTURES & GENERAL COUNSEL'S ROLE

Ethics and Compliance/General Counsel's Role: Participants discussed views on whether the General Counsel's role should include responsibility for ethics and compliance. Different views were expressed, with some participants having organizational responsibility for the compliance function and others not having this type of organizational structure.

Ethics and Compliance/Responsibilities for Interpreting Questions on the Company's Code of Conduct: Participants discussed a range of practices and organizational responsibilities for handling questions of interpretation relating to the company's Code. One participant described having a Code that specifies contacts for questions on certain aspects of the Code (can be contacts within the compliance, human resources, legal or finance groups depending upon the nature of the code provision and question). Another participant described having an Ethics Committee that handles questions; the benefit for this approach is described as consistency in advice.

Ethics and Compliance/Global Considerations: Participants discussed whether they implement a single set of standards around the world. Participants described practices that include having corporate ethics standards that are primarily North American standards that are applied around the world. Some participants described a desire to infuse local flavor in setting standards locally, and a corresponding need for local standards to be consistent with the corporate standards.

Ethics and Compliance/Reputational Risk Committees: Some of the participants described having these committees and shared views on the value of having committees specifically on point for addressing matters that involve reputational risk.

Ethics and Compliance/Training: Several participants described having annual online compliance training modules for all employees within the organization. One participant described implementing a practice that includes having Board members sign off on compliance with the company's Code. Another participant discussed recently implementing practices that extend requirements to corporate contractors to comply with the company's Code of conduct and provide a written attestation regarding compliance. Participants discussed challenges associated with enforcing compliance by contractors with the company's code.

#### GENERAL COUNSEL'S RELATIONSHIP WITH THE BOARD

Relationship with the Board/GC and Corporate Secretary Roles: Participants described different practices as to whether the GC is also the Corporate Secretary. They described situations in which they are present at meetings in their Corporate Secretary role but get asked questions in their GC role. Practices include:

- *GC is Not Corporate Secretary; Goes to Board on Invitation:* One GC is not the corporate secretary and goes to the Board and Board committee meetings 'on invitation.' This GC generally goes to audit committee meetings and most of the GC's reports are made to the audit committee of the Board.

- *GC is the Corporate Secretary:* Another participant described being the corporate secretary and participating in all Board and committee meetings, except for executive sessions.
- *GC is Not Corporate Secretary; Goes to Board as Executive Officer and GC:* One participant described going to all of the Board and committee meetings even though the GC isn't the Corporate Secretary; this GC participates in these meetings in the capacity of both GC and as an Executive Officer of the company.

Relationship with the Board/Outside Counsel: Participants discussed whether and to what extent they include outside counsel in Board meetings. Most participants do not include outside counsel at Board meetings. One participant described taking outside counsel to an audit committee meeting to discuss a potential matter; the audit committee engaged outside counsel to conduct an investigation.

Relationship with the Board/Corporate Secretary for all Committees: Participants discussed the question of whether the corporate secretary also functions as the secretary for each of the Board committees. For some, the answer is yes. For one participant, each committee has a secretary and the secretary is an in-house lawyer—but the individuals are not the same and are not the same as the corporate secretary.

Relationship with the Board/CEO Participation in Committee Meetings: Participants discussed the extent to which the CEO participates in committee meetings. One participant shared that the CEO is a member of the Board and participates in all committee meetings, including audit committee meetings. Several participants stated that the CEO does not attend all committee meetings. One participant described practices that include having the CEO attend committee meetings only if invited. One participant described a practice for Board meetings that includes for the first 30 minutes: having the CEO present as the only corporate officer.

Relationship with the Board/Auditors and Audit Committee Meetings: Participants discussed whether auditors participate in audit committee meetings. One participant described having auditors at audit committee meetings. Participants discussed whether legal reports are given during audit committee meetings and whether outside auditors present are asked to leave. Participants described a range of practices. One participant described a practice that includes giving legal reports at audit committee meetings with outside auditors present when in Canada; but, in the US, outside auditors are asked to leave.

Relationship with the Board/Legal Reports: Participants discussed whether regular legal reports are made to the Board and if they're made at the full Board level or at the audit committee (or other committee level). Some participants described making regular legal reports. Participants vary on whom the legal report may be made to: some make the report to the full Board and some to the audit or other committee.

Relationship with the Board/Director Note-taking: Participants discussed various practices and policies regarding Director note-taking. One participant described a policy against taking notes. One participant described a policy that includes having all Board books destroyed except for one set of books that is kept as the corporate formal record. For that participant's company, the minutes describe the nature of the issues discussed and reflect questions asked by directors. One participant described having a policy on Director note-taking that includes: (1) notes are considered corporate documents and Directors are asked to keep them confidential; (2) policy includes preference that the notes be destroyed when the Director no longer needs them; (3) if notes are taken in the margin and a noted question gets answered, Directors are encouraged to continue to annotate the margin with the answer to the question.