

Corporate counsel key to risk management

LUIGI BENETTON TORONTO

"It would be interesting to return to post-Enron days and read quotes saying how we need to clean things up," mused Blake Redding, co-founder of global legal consultancy firm VistaLaw International. "And here we are again, even worse."

Asking whether certain businesses effectively manage risk would be rhetorical at this point. But the crisis currently clouding headlines worldwide may spark one silver lining: a renewed interest in risk management.

"Money and risk are correlated," said Olivier Fischer, managing director of legal management software vendor Legal Suite Canada Inc. "If you manage risks, you have potential expenses under control."

And corporate counsel can play a major role.

"Any competent lawyer can

understand the scope of regulation," said Redding. "Then there is implementation — putting real systems and controls in place. In-house counsel should be involved since they know both the law and the company."

The field, however, is not as well understood as it might be, partly because of its inherent complexity. For instance, outside of common risk-types like regulatory and litigation, different companies face different types of risk. Avian flu and reliability of the electrical grid are two examples that don't trigger every company's radar.

Then there are political considerations. Since the speed of the leader determines the rate of the pack, staff will take its cues from the behaviour of top management.

"If top managers do not want to resolve the issues of risk management, corporate counsel will not get the mandate to deal with

Three steps to risk management

Companies that seek to implement and maintain effective risk management might separate their efforts into stages:

1. Establishing good corporate governance
2. Identifying risk and aligning risk appetite and strategy
3. Establishing policies for compliance, including ethics

risk," Fischer said.

Other obstacles can include the "everybody else is doing it" mentality, bonuses based on short-term results and the absence of disincentives, legal or otherwise, to certain risky behaviours.

Redding offers the acronym GRC: "Start with governance, then risk, then compliance," he said. "Also, implicit in compliance is that once you form policies, you start the

real work of educating, training, auditing, measuring and so forth."

Risk management initiatives can founder without a solid foundation.

"You have to get corporate governance right," Redding said. "Everything else — from the identification of risk to the establishment of controls to eventual audits and follow-up — will succeed or fail depending on how well the base structure exists."

As an example, Fischer mentions the handling of contracts. General counsel might help negotiate contracts "before signature," but assume others track the consequences of said contracts "after signature" (two intervals whose acronyms have been judiciously omitted from this article). "It's not counsel's mandate," he said of the after-signature period.

A further complication: chief legal officers can wear a number of hats, according to an Association of Corporate Counsel CLO Think-Tank Executive Report entitled "Enterprise Risk Management & The Law Department's Strategic Role." These hats carry labels like: chief compliance officer, ethics officer, chief regulatory officer and privacy officer, among others.

"Principles like accountability, transparency and good corporate citizenship are just the beginning,"

See **Risk** Page 21

OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

DIRECTOR, MEDIATION CLINICAL PROGRAM

Osgoode Hall Law School is at the forefront of clinical legal education in North America. Osgoode's clinical programs are instrumental in developing our students into reflective and socially engaged practitioners who realize the important role that law can play in helping to achieve social justice. Building on our existing strengths in Alternative Dispute Resolution and as part of our continued efforts to enhance our clinical education offerings, Osgoode Hall Law School is proud to announce the latest addition to its clinical curriculum: the Mediation Clinical Program.

Osgoode is seeking a dynamic and creative individual who is well versed in both the theory and practice of Alternative Dispute Resolution to head up this exciting new clinical program for a two-year term.

As Director of the Mediation Clinical Program and as a Visiting Professor at the law school, the successful candidate will be the principal instructor in the program, responsible for developing and delivering curriculum on the theory and practice of mediation, while also establishing and managing the Mediation Clinic.

The Director will have an LL.B. or J.D. and will have completed (or be completing) graduate work on a subject related to ADR. The successful candidate will also have some professional experience in the field of ADR. Prior teaching experience is a definite asset.

Please respond, in confidence, with a resume by March 20 2009 to: Mr. Kris De Napoli, Manager of Administration, Osgoode Hall Law School, 4700 Keele Street, Toronto, ON M3J 1P3 Fax: 416-736-5251, E-Mail: kdenapoli@osgoode.yorku.ca.

We thank all applicants, however, only those selected for an interview will be contacted.

YORK
UNIVERSITY
UNIVERSITY
redefine THE POSSIBLE.

OSGOODE
OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

Professional Development
LLM

Associate Director, Academic Programs Osgoode Professional Development

Osgoode Hall Law School is the only law school in Canada providing a full range of professional education for members of the legal profession. Through Osgoode Professional Development, it offers numerous non-credit Continuing Legal Education programs for both lawyers and non-lawyers, as well as a Part-time Master of Laws (LLM) and a full-time LLM in Business Law for International Students. Classes are held at our downtown Toronto Professional Development Centre.

Reporting to the Director of OPD, the Associate Director, Academic Programs, will be responsible for all OPD programming for which academic credit is granted. The Associate Director, Academic Programs, will lead and manage OPD's existing LLM programs, giving priority to providing a superior student experience. Development of new academic programs to meet emerging needs is also a priority. The Associate Director will be responsible for student and faculty recruitment and relations, and for compliance with all York University Faculty of Graduate Studies and Ontario Council of Graduate Studies requirements. The Associate Director will work together with Osgoode faculty to ensure the high quality of all programs.

The successful candidate will have an LLB, and an LLM or other graduate degree. Experience practising law, as well as solid people and administrative management experience are required. Exceptional interpersonal, team building and communication skills, and the ability to keep staff focused on service are also required. Work experience in a university setting, and knowledge of University and OCGS rules, regulations and processes, would be an asset.

Please reply, in confidence, with a résumé by March 6 to:

Wendy Currie-Mills, Associate Director, Finance & Administration, Osgoode Professional Development, 1 Dundas Street West, 26th Floor, Toronto, ON M5G 1Z3 E-mail: wcurrie-mills@osgoode.yorku.ca

We thank all applicants, however, only those selected for an interview will be contacted. York University is committed to Employment Equity and has implemented a policy of Affirmative Action.

Location: Downtown Toronto

YORK
UNIVERSITY
UNIVERSITY
redefine THE POSSIBLE.

Managing risk complex task

"There is a whole industry on risk identification, risk mapping and so forth," Blake Redding, co-founder of global legal consultancy firm VistaLaw International, said. "The big acronyms today are GRC (governance, risk and compliance) and ERM (enterprise risk management)."

Redding provided a list of resources for counsel who seek to shore up their firm's risk management approach, particularly on the international stage.

Organizations

- IFC - International Finance Corporation
- OECD - Organization for Economic Co-operation and Development
- ECGI - European Corporate Governance Institute
- COSO - Committee of Sponsoring Organizations
- European Commission – Single Market – European Corporate Governance Forum
- Hawkamah (the Institute for Corporate Governance)
- Centre for International Private Enterprise
- In-house counsel organizations (e.g. Association of Corporate Counsel and Canadian Corporate Counsel Association)

Shareholder groups

- European Association of Securities Dealers
- Council of Institutional Investors
- Euroshareholders

Redding also suggests academia, consultants, regulators and law firms as sources of information.

Risk

Continued From Page 20

Redding said. "You can't really advance until you start putting flesh onto those big principles. Risk management and compliance must be embedded in the core operations."

That flesh needs to come from within the firm as it recognizes risks honestly and builds consensus that the company must deal with them proactively. "If counsel stop and reflect on risk management within the organization, they can probably address 75 to 80 percent of what they need to do," said Fischer.

The remaining gap concerned Brett Curran during his previous career as a chief compliance officer. "What is out there that we don't know about?" he would wonder. "Are there other rules and regulations lurking out there?"

The current vice-president of GRC and Regulatory Practices at Axentis, a provider of on-demand solutions for enterprise governance, risk and compliance, cites a variety of external sources of rules, laws, standards and regulation, such as trade associations and specific jurisdictions, that would-be risk managers need to check.

Once the foundation of corporate governance is set, counsel can help draft risk management and compliance policies. Some will

enlist consultants at this stage. "There are two reasons to buy outside advice," Redding said. "To help you structure things and to CYA [cover your a**]."

"Obviously, the former is the best reason." Regulatory compliance may be the most straightforward type of risk to manage, thanks partly to the Enron fiasco.

"You often have detailed regulations to review and even regulators you can talk to," Redding said. "Other areas can be less clear-cut."

At this stage, "siloization" can derail the initiative. "We typically see several different departments looking for rules and regulations applicable to their role in the organization," said Curran. "For example, a chief information security officer looks at security-related laws and maybe some privacy. The privacy officer looks for privacy-related laws. People responsible for federal regulations such as anti-money laundering look at those laws.

"Each party creates their own methods for storing that information, for determining what information they are going to collect," Curran continued. "Then they use their own means and mechanisms to determine the impact on the organization.

"It isn't as effective when spread out over 14 separate document management systems," Curran quipped. ■

Tougher times ahead, advisory warns

Things are just going to get tougher for the legal community in 2009, according to a recent Hildebrandt International and Citi Private Bank client advisory. While some areas, such as bankruptcy and regulatory work, will be on the uptick most law firms can expect a decline in net income ranging from 5 to 15 percent, predicts the global professional services consulting firm. "Unfortunately," warns the advisory, "it is now clear that the general economic meltdown of 2008 will not be reversed quickly, and law firms will have to adjust to a new economic reality."

↓ ↓ ↓ 5 to 15% ↓ ↓ ↓

Uptick may not last

Labour

Continued From Page 18

allocation of tasks, reshuffled working hours and revised benefits. Reconciling new employer expectations with employee rights can be a tricky area.

Employers that feel compelled to impose new productivity demands as a result of the economic squeeze may find it more difficult to accommodate employee circumstances, says Bussière. As the number of layoffs increases, she raises the possibility that "some employees could feel targeted because of their special needs," thus triggering a possible rise in discrimination-related litigation.

Under human rights legislation applicable in Canada, employers have a "duty to accommodate" factors such as disability, religious belief, age and family. The extent to which they should accommodate individual needs without suffering undue hardship is still being defined by arbitrators, tribunals and courts.

Kenneth Alexander, a founding partner at Ball & Alexander in Toronto, specializes in employee claims. Over recent months, he has been receiving a high volume of calls.

His boutique firm is coping with rising demand by working with a network of lawyers representing employees.

Whereas before he dealt with a lot of contractual work resulting from new hires, now he is seeing more "raw, straightforward terminations." There is a sense, he says, of "fear and anxiety" among employees.

"People are definitely more worried in terms of being able to find another job. That leads them to maximize whatever severance pay they can get," he says.

Pension-related disputes are also on the rise. Laid-off employees approaching retirement age have had to deal with the disappointment of lower payouts on defined contribution pension schemes as a result of

plunging securities markets.

Alexander is not expecting his workload to diminish any time soon. He foresees a steady stream of class actions, wrongful dismissal cases, unpaid overtime claims and disability suits over the coming months.

While the frequency with which such cases arise is certainly a sign of the times, Bussière says that things haven't changed so much. "Attention shifts from one thing to the next depending on the economic climate, but the same issues are always there," she says.

"In a year's time, the economic climate may have totally changed and we'll see different issues. Last year, we were dealing with mergers and integration plans. Guess what, we don't do as much of that type of work these days."

With all the layoffs coming down the chain, particularly from companies with U.S. parents, Dye is expecting a "massive spike in unemployment." Last year, this spike brought bumper returns for Heenan Blaikie, with a number of staff recruited in their labour and employment practice area to keep up with the growing demand for expertise on recession-related labour issues, says Dye. But he is watching the deepening recession very closely, as it remains unclear how long this downturn will last and how deep the job cuts will be.

A recent survey by the Towers Perrin consulting firm, released in February, suggests that employers may have only just begun cutting back. Of the 246 Canadian firms polled, 18 percent were considering layoffs.

If the figures are shocking, it could be partly because labour markets are still exhibiting a delayed reaction to last year's upheavals. As Dye puts it, "Not many companies were prepared for the massive disaster that October was. By the time they'd figured anything out, the holidays were upon them, so I think a lot is just coming through now." ■

Announcements

Sébastien Huard

Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers
Emond Harnden LLP

LABOUR AND EMPLOYMENT LAW'S BEST PRACTICE
www.emondharnden.com

**OUR CLIENTS
GET THE BEST.
NOW IT'S
OUR TURN.**

Paul Marshall

