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ACC's CLO THINKTANK EXECUTIVE REPORT

"CORPORATE BUSINESS INFORMATION MANAGEMENT- E-DISCOVERY & BEYOND"

This Executive Report provides an overview of discussion results from ACC's CLO ThinkTank session titled "Corporate Business Information Management: E-Discovery & Beyond" held in Toronto, Ontario on January 18, 2007. ACC's CLO ThinkTank sessions are designed to provide a forum for CLOs who wish to exert greater leadership 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, discussion point highlights, and follow-up initiatives identified by these CLO thought leaders.

ThinkTank participants included the following legal leaders in Canada:

- J-P. Bisnaire, Senior Executive Vice-President Business Development and General Counsel, Manulife Financial Corporation
- Kate Chisholm, Vice President and General Counsel, EPCOR
- Simon Fish, Executive Vice President, General Counsel & Secretary, Inco Limited
- Paul Guthrie, Vice President and General Counsel, Canadian Pacific Railway
- David Lewis, Vice President and General Counsel, Certicom Corporation
- Barbara Silverberg, Corporate Secretary & General Counsel, First Capital Realty
- Martine Turcotte, Chief Legal Officer, BCE, Inc

KEY TOPICS

Below is a list of key topics discussed during this CLO ThinkTank session:

- **Records Retention Policy & Procedures; Organizational Structure**
- **Litigation Practices; Electronic Discovery**
- **Email**
- **Board Minutes and Records**

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- **Text Messaging & Blogging**
- **Privacy**

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.

- **Records management policies set the framework, but training and implementation are critical to program success.** Practices and policies vary, but participants agree that just having a policy is not enough. They discussed practices that include records management training modules, certifications at the business unit level and implementing audits or dry-runs of practices to assess effectiveness.
- **Marriage between legal and IT is necessary for successful implementation of records management program.** While an organizational reporting relationship isn't necessary, good working relationships and coordination are crucial to successful program implementation. Having a common architecture and systems across the company also help streamline practices.
- **E-Discovery is time-consuming and costly; negotiations on scope and process are key strategic practices to consider implementing.** Participants discussed implementing strategies that include up-front negotiations among parties to set relevance parameters relating to the scope of electronic discovery and determine the ability for both sides to use 'crawlers,' which are viewed as a time and cost-saver. As part of these negotiations, the parties can: (1) identify the individuals within the organizations most likely to have relevant documents, (2) agree on key words to use for the e-searches, (3) agree to use the same crawlers, and (4) agree on claw-backs for privileged information and how to handle metadata.
- **Board minutes and records are requiring more time to prepare, and Director note-taking practices present education opportunities.** Participants described spending more time in preparing meeting minutes to reflect the substance of discussions. Practices vary with regard to Director note-taking, and include education and guidance on the need to be judicious in note-taking and guidelines with regard to the ability to remove notes from the meeting room.
- **Hand-held devices and portable technology present privacy and security challenges.** Participants discussed a range of encryption strategies, including centralized encryption, password-protection, biometrics, and limiting use of laptops to those who present business cases.

DISCUSSION HIGHLIGHTS

RECORDS RETENTION POLICY AND PROCEDURES

Records Policy & Procedures/Process for Developing: Participants described various practices relating to developing records management policies. One company identified an assistant general counsel as point person for reaching out to business units to determine the types of documents they had and the types of documents they need for business requirements. That company also worked with outside counsel to identify the applicable legal requirements for the various types of

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records. In addition, the company designated within each business unit, individuals to be part of the records management team. The CLO describing the above process noted that the policy itself is not lengthy, but that most of the work and the lengthier piece of the policy is the retention schedule (setting forth retention schedules for documents legally required to keep and for those that the business unit wants to keep for business purposes) attached to the policy. Implementation of the company's records management policy includes spot checks of compliance with the policy performed by the company's internal audit function. Participants described the importance of interaction and coordination between the law department and the company's IT function.

Records Policy & Procedures/Document Management Practices: Participants described a range of practices for managing documents. One company's policy includes a 30-day retention schedule for all non-exempt documents. Participants noted differences and challenges associated with where employees can save documents (e.g., on desktop, network, blackberries, document management/case-tracking systems, etc..). One company is moving towards a system that will only enable law department personnel to save documents in a case-tracking system and will eliminate the ability to separately save documents to the desktop. That company is providing a 6-month transition period to enable people to migrate to the new document management system. They also noted challenges in document management across the company—especially when employees and offices around the world don't share uniform filing systems.

Records Policy & Procedures/"Thin Client": One participant described moving to a 'thin-client' computing environment—employees only have monitors and keyboards on their desktops; all documents and information are stored on a common server/architecture. Migrating to a 'thin-client' architecture also meant shifting to an environment where laptop use was severely narrowed: those who need and want them need to present a business case in order to receive them. The participant noted that the law department faced resistance in imposing a document management system and that the 'thin client' approach enabled the program to be rolled out through the IT department as part of its capital equipment replacement cycle (scheduled to occur every three years). The CLO described the ability to implement electronic holds as 'immediate and invisible.' In addition, the 'thin client' environment enables the company to centrally manage electronic files (e.g., copy and park files relevant to internal investigations, etc..). The company includes a 'big brother clause' in its computer use policy to put employees on notice.

Records Policy & Procedures/Organizational Structure: One participant noted that the company's IT group reports through the legal function. Another participant described the importance of working closely with the IT group, and the ability to impose a document management system via a capital replacement program managed by that group. Participants discussed whether records management should be a business function, IT function, legal function or whether the law department's role is more appropriately to help the business frame the company's records management strategy. One participant described its corporate structure as very de-centralized and noted that the business functions would likely resist centralizing records management. That participant shared that the business units have the responsibility for keeping their records and informing the law department how to access any records they need. Participants discussed whether there continues to be a need for records management personnel at all, and one participant noted that they still have records management personnel yet they are fewer in number. That participant also noted that, while the records management personnel had traditionally reported to the company's facilities group, there had been a recent suggestion for these personnel to report to the legal department. One participant noted that the company plans to hire a Chief Knowledge Officer, and that knowledge officers within the company's various business units will have to certify compliance with the company's records management program. Another participant noted

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that each business unit has a records group that works with the company's global compliance group to coordinate records management practices.

Records Policy & Procedures/Training: Participants discussed whether their programs and policies include training components. One participant noted that the company's code of conduct addresses records management and its associated training modules include a module on records management. Another participant described a general guideline imparted to employees that 'they shouldn't type anything that they wouldn't want to appear in the newspaper.' Another participant described educating business unit personnel on the types of materials that qualify as a 'document' or 'record' and the importance of properly them. Another participant noted that the company includes messages around compliance on its intranet and that these types of messages should help ramp up awareness of records management.

Records Policy & Procedures/Document Destruction: Participants discussed retention and destruction schedules and practices as well as questions surrounding whether a document can ever truly be destroyed. One participant described practices that included keeping certain documents centrally located to manage their records retention and destruction. Participants also described the reasonableness of practices implemented and how that impacts due diligence defense assertions. Questions were raised about whether the movement of the marketplace wasn't suggesting a logical conclusion, and whether future policies would focus on either destroying everything or keeping everything—almost as a distinction without a practical difference.

LITIGATION PRACTICES; E-DISCOVERY

Litigation; E-Discovery/ Costs: Participants discussed the huge costs associated with performing electronic discovery. One participant noted that around 80% of costs in a recent litigation were for e-discovery.

Litigation; E-Discovery/ Common Architecture Benefits: One participant described features of a 'thin client' that include having a common architecture (e.g., all electronic documents go to a central server that the company controls). A benefit of the common architecture is that electronic holds can be immediate and invisible. The common architecture also helps centralize e-discovery efforts.

Litigation; E-Discovery/ Strategic Negotiations: Participants described the value of meeting early on with the opposing party to set relevance parameters relating to the scope of electronic discovery and determine the ability for both sides to use 'crawlers,' which are viewed as a time and cost-saver. As part of these negotiations, the parties can: (1) identify the individuals within the organizations most likely to have relevant documents, (2) agree on key words to use for the e-searches, (3) agree to use the same crawlers, and (4) agree on claw-backs for privileged information and how to handle metadata.

Litigation; E-Discovery/E-hold Process: One participant described hiring an external consultant to help implement a 'dry-run' check on the company's e-hold process. Working with the consultant, the participant helped develop potential litigation scenarios and to identify a team of lawyers, executives and information systems professionals to participate in the e-hold exercise. The goal of the exercise is to determine what is working well and areas to improve.

Litigation; E-Discovery/Timing for E-hold: Participants discussed issues around the timing for issuing an e-hold. Should an e-hold be issued any time there is an inkling of litigation if that litigation that meets certain thresholds or other triggers? Participants discussed that the decision

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may depend upon the circumstances and the specifics will likely help determine when a situation is ripe for an e-hold.

E-MAIL

E-mail/Challenges: Participants identified challenges associated with managing email, including the fact that some companies may have more than one email architecture to address. One participant's company has implemented a records management policy that includes a 49-day retention period for email as well as size limits for individual email accounts. Notifications are sent to individuals when they near their account capacity.

E-mail/Case-tracker: One participant's system being piloted within the law department requires any documents to be saved to a case tracker system, including e-mails. The system will include a freeze on the ability to save to the desk-top, and the law department is providing its staff with a 6-month transition period to migrate documents and emails to the case tracking program.

E-mail/ Computer Use Policies: Participants discussed whether their companies are implementing e-mail computer use policies. Participants noted challenges associated with computer use policies that prohibit using computers for personal use because these prohibitions are impossible to enforce.

BOARD MINUTES AND RECORDS

Board Minutes & Records/Practices Regarding Directors' Notes: Participants discussed practices regarding Director note-taking during Board meetings. One participant described a policy regarding Director note-taking. Specifically, the policy allows Directors to take notes and encourages them to be judicious in their note-taking. For that company, the Directors' notes may be kept until the draft minutes are circulated for comment. Once the minutes are final, Directors should then destroy their notes. The company consulted with outside counsel in developing its policy and invited outside counsel to attend the Board meeting when the new policy on Director note-taking was rolled out. Another participant described a practice that includes sending the Board Books out to Directors in advance of the session and encourages them to make any notes in their books. At the end of the meeting, the books are left behind and destroyed. The minutes serve as the official record and reflect what happened during the meeting.

Board Minutes & Records/Substance of Minutes: Participants describe how minutes are drafted to focus on the substance of discussions rather than noting administrative details such as the amount of time spent on a matter (e.g., 'the discussion was robust' rather than 'the discussion lasted for __ minutes'). One participant described being an advocate of fulsome minutes and noted the need and importance of spending time articulating the substance of the meeting. That participant discussed practices that include sometimes attributing particular statements or positions to specific Directors where the context makes it important to do so but also noted the need for careful consideration in deciding when to attribute statements to individuals. For that participant's company, the only records that remain following the final minutes are a clean copy of the Board Book and the final approved minutes. Participants discussed the importance of having balanced minutes that show the Directors did their jobs.

Board Minutes & Records/ Process: Participants described the importance of having a consistent process. One participant noted that, even if a process is ridiculous-- having it be consistently ridiculous may be more important than changing it mid-stream. Participants discussed whether standard processes used at their companies include collecting Board materials at the end of the meeting. Practices varied, with some collecting the Board materials and some not collecting but instead reminding of company policies and guidelines on note-taking.

TEXT MESSAGING & BLOGGING

Text Messaging & Blogging/Policies: Participants discussed whether their companies had policies on text messaging and/or blogging. They discussed whether having these policies is useful since compliance with the policy is difficult to monitor. The pros and cons of employee activity in communicating and benchmarking company work were discussed. One participant described a blogging policy that included external and internal components: for external blogging, there's an expectation of non-disparagement of the company; for internal blogging, entries require the employee to be identified.

Text Messging & Blogging/Establishing an Internal Blog: Participants discussed the value of having blogs—particularly for development companies where this type of exchange is part of the corporate culture and technical forums and creative solutions are part of the daily business process. They also noted that the newer generations of employees sometimes view these communications tools as essential. Participants saw employee blogs as a way to engage employees in business solutions but also identified issues to consider in determining whether to create a blog. These issues include: what types of information and communication may go into the blog, how will the information be saved, what are the rules of engagement, will individuals within the company be on point for monitoring and taking action on communications within the blog. Participants agreed that if companies launch internal blogs, there is a need to educate employees in advance of the launch—so that they can capture the upside and minimize the downside of having a blog.

PRIVACY

Privacy/Personal Devices: Participants discussed policies and practices relating to use of personal devices that are provided by the company (e.g., cell phones, Treos, Blackberries, laptops). One participant noted that its company tells employees to use judgment on personal use of the devices since they're property of the company and the company owns and may go through the devices for investigational purposes. Security issues for lost or stolen devices were discussed.

Privacy/ Policy on Sensitive Information: One participant described a policy that prohibited sensitive information from being taken out of the office. That participant shared that implementing the policy created challenges—especially for employees who need to make external client presentations as part of their work. Accordingly, information management practices were implemented to help address privacy concerns.

Privacy/Encryption: Participants discussed practices for encrypting communications via handheld devices, such as central encryption and/or password-protection. Some companies require password-protection features on blackberries. One participant described use of a USB stick that includes biometrics (e.g., fingerprint reader) to protect data on the device.

Privacy/ Organizational Structure: One participant noted an organizational reporting structure that includes having the privacy and records management functions report to the company's Chief of Global Compliance (who, in turn reports functionally to the CLO and also directly to the audit committee). As part of this structure, the company also has a Privacy Group/Committee (the company's Privacy Officer is also the Corporate Secretary). Another participant described its company's data security function as being driven by the company's corporate security and information technology functions. Legal support for privacy within that organization is provided by a privacy lawyer ombudsman within the company's regulatory group.

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Privacy/ Off-shoring; Outsourcing Considerations: Participants discussed range of privacy issues in connection with off-shoring (where the company performs the function itself but outside of the company's home country) and outsourcing (where there is a third party provider performing services). For the latter, participants described issues relating to vicarious liability for third party providers. Participants also noted the OSFI outsourcing annual certification requirements and their complexity and associated challenges in auditing compliance.

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