Corporate Governance for In House Legal Counsel

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Introduction
In recent times, it has become commonplace for in house Counsel (“General Counsel”) to assume additional responsibilities within a Company or Group of Companies such as the Corporate Secretary and/or Chief Compliance Officer. The reasons for this approach are very clear. Businesses are now operating in an increasingly regulated environment.

The role of the corporate secretary (or company secretary) has evolved in the 21st century beyond its formative highly administrative role, to assume a heightened focus on corporate governance. Compliance, as a major risk area of any organization, now has greater prominence and therefore the heightened focus. Regulatory compliance requires knowledge of the legal and regulatory framework and ensuring that businesses operate within that framework. Anti-money laundering and counter terrorism financing is even more important than before requiring greater understanding of the laws as they evolve and implementation of robust Anti Money Laundering policies. This is the environment in which a General Counsel operates and a legal background is often times leveraged in each of these three distinct areas.

These distinctive roles carry separate legal and regulatory obligations. This article will explore some of the cautions for in house Counsel to navigate and mitigate potential conflicts of interests which can arise given various obligations to be discharged and the reporting responsibilities. In short, governance for in house Counsel.

Obligations of multiple roles and reporting responsibility
The General Counsel and Chief Compliance Officer roles are management appointments subject to an employment contract with the company. The duties for those functions and the reporting lines are usually detailed in a job description. As part of the management team, General Counsel is expected to understand the client’s business and to actively participate in the day to day operational decision making. There are different reporting structures for the General Counsel and the Chief Compliance Officer depending on the requirements of the particular company.

I have however frequently observed a structure where General Counsel and the Chief Compliance Officer (either as joint or separate roles) report either to the Chief Executive Officer or other senior executive with portfolio responsibility for Legal and Compliance. Incidentally, in Jamaica, the Proceeds of Crime Act requires the Nominated Officer (similar to the Chief Compliance Officer) to report directly to the Board on Compliance related matters. The Chief Compliance Officer would therefore have a legally required reporting line to the Board as well as a contractual reporting line to an Executive or Senior Management.
General Counsel's role
Quite apart from the obligations imposed by the terms of employment (incorporating the job description), as General Counsel and a practicing attorney-at-law, Counsel’s conduct is subject, in Jamaica, to the Legal Profession (Canons of Professional Ethics) Rules, 1978 as amended from time to time. The Chief Compliance role emanates from legal and regulatory requirements which outline the duties and obligations of the Chief Compliance Officer. Violations of either the professional or legal requirements may ultimately result in severe personal sanctions.

Corporate Secretarial role
The Corporate Secretarial role is, on the other hand, a board appointment, pursuant to the constitutive documents of the employing company and applicable company legislation. The Board appoints a Company Secretary on certain terms and conditions and determines the remuneration for such service. This is usually provided for in the Company’s constitutive documents. The Companies Act of Jamaica requires every company to appoint a company secretary. It also interestingly, imposes a duty on directors of publicly listed companies, to appoint a company secretary who appear to them to possess the requisite skill, knowledge and experience to serve in that capacity. The failure of the directors’ judgment will result in serious personal liability for those directors.

While the duties of a company secretary are not outlined in the Companies Act of Jamaica, there are several offences to which the company secretary can be held liable as an officer of the company. Any possible violation by the Company Secretary in the execution of the duties could create personal liability for the company secretary and the directors of the Company. Similarly, any decision of the Board (in which the secretary takes no part) could potentially create personal liability for the Company Secretary.

Consequent on the appointment by the Board, the Company Secretary reports directly to the Board Chairperson and plays a key advisory role on governance related issues independent of management. The Company Secretary is therefore the independent liaison between the Board and management and must ensure that the Board is supplied with all pertinent and relevant information on the Company’s internal controls, operations and risks. This independence is critical for the Board of directors to repose trust and confidence in the company secretary.

From the internal company perspective, the General Counsel, with multiple roles within the organization, will therefore have differing obligations to discharge for each of these roles and differing reporting obligations. Each of these reporting lines and differing obligations can give rise to potential conflicts of interests. As the key advisor to the Chief Executive Officer (or other senior executive), General Counsel must provide by way of examples, general legal advice on commercial transactions, general advice on pending legal and regulatory changes and the implications for the operations of the business, opinions on potential litigation or litigation by or against the company or general views on the business. General Counsel may also be an active member of the Executive or senior Team of the company and would have knowledge of non legal related matters within the company. General Counsel is therefore a key advisor with significant insight into confidential matters.

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1 Sections 172 (2) and 172 (4) of the Companies Act of Jamaica, 2004
Chief Compliance Officer’s role
In the capacity of Chief Compliance Officer, General Counsel will report to Management however its statutory duty also requires direct reporting to the Board to update the Board on the effectiveness of the compliance program of the company. An ineffective compliance program may lead to regulatory directives, revocation of licenses and personal liability for directors and the Compliance officer.

Based on the above roles, the reporting universe for a multifaceted General Counsel would be as follows:-

- **General Counsel** - Chief Executive Officer/other senior executive
- **Compliance Officer** - Chief Executive Officer & Board of Directors
- **Company Secretary** - Board of Directors only

The General Counsel may also have reporting responsibility to the Executive for specific matters and to the Board for Board related matters. Undergirding these reporting responsibilities are the requirements of the Canons of the Legal Profession, other legal and regulatory obligations. As a management officer and an officer of the company (company secretary), the Companies Act of Jamaica imposes a higher standard of care on the person who occupies both positions.

Cautions for specifically identified areas of potential conflict
In order to highlight the appreciation for governance for in house Counsel, I have isolated for exploration some specific examples of potential conflicts of interest and to suggest some cautions.

**Illustration 1 – representing related parties within a Group of Companies**
Overlaying the multiple roles of General Counsel is the additional complexity of working within a Group of Companies with several different subsidiaries locally and overseas. Invariably, the legal and corporate services of General Counsel, are leveraged within the Group of Companies for operational efficiency purposes. Companies within the same Group enter into commercial transactions or related party transactions, requiring respective Board approvals.

In those circumstances, General Counsel has several obligations to discharge to: (i) the employing company as a management officer, (ii) as Company Secretary to the Board of Directors of the Company who appointed the Company Secretary and its shareholders, particularly if there are minority shareholders; and (iii) as the legal advisor in the transaction.

Care should be taken to ensure that as General Counsel within a Group, that you act for one of the related entities within the Group and another Counsel within the Group (who is not appointed Company Secretary for the company you are acting for) or an external Counsel act for the other related entity. You will have to ensure that the General Counsel does not end up acting for related entities within the same Group and this is prudent even if the consent has been obtained from the companies.

By being mindful of and implementing these safeguards, General Counsel will discharge the obligations of the Canons of the Legal Profession\(^2\) which preclude counsel from

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\(^2\) *Canon IV (k) of the Legal Profession (Canons of Professional Ethics) Rules, 1978* states that “...An Attorney shall not accept or continue his retainer or employment on behalf of two or more clients if their interests are likely to conflict or if the independent professional judgment of the Attorney is likely to be impaired.”
acting for two clients in the same transaction\(^3\). The rationale is clear. Each client has a
different interest in the same transaction and counsel is therefore incapable of serving
both interests simultaneously in the best interest of each client. As company secretary,
you also have the obligation under the Companies Act of acting in the best interests of the
company to which you were appointed. In order to effectively discharge that duty it
would be prudent not to simultaneously act for a related entity in the same transaction.

**Illustration 2 – Potential conflicts of interest with multiple reporting lines**

Inherent conflicts of interest can arise where multiple roles are assumed within an
organization. Where General Counsel is both a member of management and an officer of
the company, the potential for conflicts of interest becomes greater. As Company
Secretary you are required to be independent and immunized from any management
influence in the discharge of your function and reporting to the Board.

The General Counsel is simultaneously, the key advisor to the Chief Executive Officer
and to the Chairperson of the Board. The Chief Executive Officer may be the only
executive director on the Board where the majority of the directors are non-executive
directors. General Counsel is the only other person who is a part of the Board who is also
a part of management and is aware of issues worthy of Board reporting.

Where the relationship between the Board and management is satisfactory and
functioning well there is less likely to be an environment fraught with conflicts of interest
for the Company Secretary. Where however there are issues as between the Chief
Executive Officer and the Chairperson of the Board (or other directors) in relation to the
management of the company or performance related issues, this creates a complex
environment for the Company Secretary. This situation becomes tricky for a Company
Secretary, also a member of senior management/Executive team with reporting to the
Chief Executive Officer, or other senior executive, who reports directly to the Chief
Executive Officer. Given this reporting structure General Counsel can be easily hindered
in the role as General Counsel and as Company Secretary and may risk termination.

In this situation, the potential for conflict of interest will increase as General Counsel
serves two distinct masters in a time of crisis and potential mistrust. The Company
Secretary will invariably be caught in the middle and must at all times act professionally,
discharging its duties. Where those duties converge and give rise to conflict, the caution
would be to immediately disclose the conflict and to retain an independent third party to
provide expert professional advice.

One way of approaching such a situation prior to a crisis situation is for the Board to
appoint an independent professionally certified Company Secretary from the
outset. An external Company Secretary is not a management officer responsible for any
day to day function within the Company and will be immunized from any potential
management influences. This solution will eliminate any potential for conflict or a
General Counsel having to navigate between the Chief Executive Officer and the Board
and risk being terminated by the Chief Executive Officer or removed by the Board.
Consideration can be given to appointing Charted Secretaries or external professionally
trained secretaries similar to the external auditor appointments. That Company Secretary
would report to the Board and the shareholders (of publicly listed companies).

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\(^3\) **Canon IV (m)** states: “In all situations where a possible conflict of interest arises, an Attorney shall
resolve all doubts against the propriety of multiple representation.”
Alternatively, the Board can appoint another internal Counsel as Company Secretary. This structure will allow the internal and external Company Secretary to advantageously leverage legal, governance and compliance related services of a General Counsel.

**Illustration 3- Applicability of Legal Profession Privilege**

There is no question that communications between an in house Counsel and the company to which Counsel is employed; its client, are subject to legal professional privilege. The notable exception is where legal advice is being given for the commission of a criminal offence. During the course of litigation, parties are required pursuant to the Rules of Court and Court Orders, to disclose all relevant documents irrespective of whether those documents are adverse to its case. One of the exceptions to withholding disclosure of documents is legal professional privilege. That is confidential information between a client and his attorney-at-law.

General Counsel must therefore be mindful, when assuming multiple roles within the same company, of the circumstances in which legal professional privilege will apply to communications between General Counsel and the client. This privilege extends to communication between an attorney and the client and does not extend to any other role assumed by General Counsel within the Company or Group of Companies, which is not of an attorney/client nature.

The authority of **Alfred Crompton Amusement Machines Limited v Customs & Excise Commissioners**[^4] is instructive on the extension of legal professional privilege to in house Counsel. The brief facts of that case are that an application was made by the plaintiff for the inspection of documents held by the Customs and Excise Commissioners to discover whether calculations of taxes were correct. The Commissioners swore an affidavit identifying documents supplied to them by others containing confidential information about the affairs of persons other than the plaintiff who were not parties to the litigation. Much of the material appeared to have been provided by those persons to the Commissioner of Customs and Excise pursuant to their statutory powers. Lord Denning found in favour of the plaintiff after holding that although the Commissioners were not entitled to Crown privilege they were entitled to claim privilege on other grounds.

On the commissioners' appeal and a cross-notice by the company, the court at the end of the hearing asked to see the documents to assist them in determining the issues. In allowing the appeal, it was held that salaried legal advisers, whether barristers or solicitors, employed by a government department or commercial concern, had precisely the same duties and privileges as lawyers in independent practice, and therefore professional privilege was attached to all the communications between the officials and their legal department both in the ordinary course of work and when litigation (which included arbitration) was anticipated.[^5]

In relation to salaried legal advisers, Lord Denning had this to say:[^6]:

“The law relating to discovery was developed by the Chancery Courts in the first half of the 19th century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself.”

[^4]: [1972] Q.B. 102
[^5]: Ibid. p 103.
[^6]: Ibid. p 129.
like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer...They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges. I have myself in my early days settled scores of affidavits of documents for the employers of such legal advisers. I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege: and I have never known it questioned...The validity of it has never been doubted.” (emphasis added).

The reasoning for the decision in the case was that although the communications of a corporation with an in-house legal adviser were internal to the corporation, the adviser was performing the same function as the lawyer in independent practice. As a result, communications from customers, management and employees to in house counsel and vice versa may be protected from inspection by the doctrine of legal professional privilege.

This privilege is however applicable in defined circumstances and guidance on its applicability is provided by Lord Denning:

“...I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.”

The principle in the Alfred Crompton case was adopted by the Supreme Court of Canada in R v Campbell and Binnie J had this to say:

“A comparable range of functions [to those undertaken by lawyers in private practice] is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems.”

Based on the principles enunciated in the above authority, the legal professional privilege will not apply where General Counsel: (a) receives information or provides advice on management related functions (b) receives information or provides information to the Board as the Company Secretary as part of the company secretarial function and (iii) receives or provides information in the capacity of Chief Compliance Officer. The only information flow which will be cloaked in legal professional privilege is communication by or to the General Counsel to or from the client. Only where documents are provided to General Counsel on an ongoing basis and in contemplation of litigation or during litigation that this privilege is likely to apply and documents withheld from disclosure.

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7 Ibid p. 129
8 [1999] 1S.C.R. 565 at page 602
General Counsel, while assuming multiple roles, will have to be mindful of this important fact and constantly determine for what purpose or in what capacity advice is being given or information is being received from the client. It is noteworthy that part of the company secretarial function is minute taking during board meetings which may record advice or comment of the company secretary as that person is also counsel. Minutes of Meetings are open by inspection to the public and by the regulators and such comments or advice would not benefit from privilege. Similarly, no privilege would apply where the company secretary provides advice to the Board in that capacity and consideration may be given in those situations to retaining external counsel to provide that advice in order to benefit from legal professional privilege.

**Governance Guidelines for In House Counsel**

In conclusion, where there are multiple roles being undertaken, General Counsel has to be mindful of the legal, regulatory and reporting obligations and ensure that potential conflicts of interests are avoided. I recommend a three point approach to governance guidelines:

**Starting Point – New & Existing Roles**

A simple starting point would be to prepare a compliance matrix to detail the various roles and the corresponding legal and regulatory obligations of each role within the organization. This will clearly define the obligations for each role and highlight the areas most susceptible to conflict of interests. Once those areas are isolated, a structure can be formulated to mitigate those potential conflicts and to determine whether legal professional privilege becomes applicable or not. Next, dissect the reporting responsibilities for each role and then ascertain whether or not there are any overlapping or conflicting duties owed to each of the reporting lines. Apply the same approach of finding the best structure to mitigate conflicts to preserve good governance for in House Counsel.

**Reflection Point – Inclusion in overall Governance Structure**

Given the complexity of the environment in which corporations and Groups of Companies operate and the evolution of the existing and new roles, consideration may well be given to incorporating a formal governance framework for Corporate In House Counsel. This policy would provide guidance for best practices on the assumption of various roles and reporting lines within the organization. The Policy will establish parameters, the objective of which is to strengthen the overall governance framework of the organization.

**Legislative move – Governance for Corporate Counsel**

Lastly a more radical approach may be to amend the Companies legislation to include specific duties to be undertaken by the Company Secretary, as we have seen in the Corporate Governance Code, and to provide reporting responsibility guidelines within the organization for multiple roles.

The development in this area is significant as are the risks which are great and I anticipate that sometime in the future this may become a reality. In the interim, General Counsel should constantly review their roles and reporting structures and advice being received or given to ensure that at all times you are acting in the best interest of the company and discharging your professional responsibilities so as to mitigate the potential for conflict. After all, the governance of the entire organization is reposed in you and that includes your various roles.

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Julie’s legal experience also spans the public sector in Jamaica, having practiced for 5 years in the Litigation Division of the Attorney General’s Chambers, Ministry of Justice, as Assistant Attorney General (May 2006 to May 2008) and as Crown Counsel (April 2003 to May 2006) defending and initiating action on behalf of the Government of Jamaica before several local courts and the Judicial Committee of the Privy Council. She has also worked with the Financial Sector Adjustment Company Limited (FINSAC), a government owed entity, as Attorney–at-Law and Company Secretary for a period of 5 years.

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Disclaimer: The views expressed in this article are my own personal views and are not the views of Scotiabank Jamaica.