**SOAR Annual Conference: Toronto - November 7, 2013**

**Session Summary: Concurrent Plenary C – Regulatory Blast 2013: Risk Management in the Public Sector**

Moderator: **Monica Kowal,** Ontario Securities Commission

Speakers: **Peter Heimler,** KPMG**; Freya Kristjanson,** Cavalluzzo Hayes Shilton McIntyre & Cornish; **Andy Rankine,** Strategic Management Solutions Unit-Ministry of Agriculture, Food and Rural Affairs.

*This session focused on Enterprise Risk Management (ERM) in the public sector and addressed why risk management in the public sector matters and some of its fundamentals, the Ontario government’s accountability directives, OMAFRA’s experience in introducing ERM and the OSC’s risk management initiative, the risk of regulatory liability (e.g. claims of regulatory negligence), recent developments in the law and some techniques for managing litigation risk.*

**Peter Heimler:**

 Mr. Heimler discussed risk management and how it works in the public sector.

The irony with risk management is that as we become more sophisticated we become more confident and this leads to problems. The phenomenon of epistemic arrogance is that we overstate what we know and understate what we do not know about risk factors. We often confuse risk management with performance management.

The Importance of Risk Management

What is risk? It is something that impacts and or prevents an organization’s ability to meet its objectives. It is of particular importance in the public sector that we preserve the moral presence around risk management to avoid moral decline and decay. Public sector is made more complicated because we are concerned not only with the bottom line but stakeholder interest groups, taxpayer satisfaction levels etc. We must do more with less.

Enterprise Risk Management (ERM)

ERM is a process for managing the myriad of risks an organization faces: It is a “set of expectations among leadership, stakeholders, and the board about which risks the organization will and will not take; a way to fulfill a fundamental responsibility of a company’s board and leadership.” It is an organization-wide approach to the identification, assessment and management of risk in a cost-effective manner. It is a dynamic process which is focused on an organization’s strategy, performance and value propositions. A lack of strategy and a lack of risk governance cause problems. Mr. Heimler highlighted the fact that small dollar losses can have a larger reputational fallout than in the private sector.

ERM Drivers

It is important to make risk management a part of what you do on a day-to-day basis. There are three important drivers:

1. Governance
* Board assurances
* Meet regulatory and disclosure requirements
1. Strategy
* Provide a competitive advantage versus industry peers and capitalize on emerging patient care trends
* Re-align strategy through evaluation of prioritized risks
1. Performance
* Improve accountability and transparency
* Improve operational and project performance
* Reduce costs
* Reduce case flow volatility and enhance service delivery

Guiding principles for ERM

Risk Management is about planning and decision making, ensuring that organizations consider the potential impacts both good and bad of their plans and decisions. Risk management is multi-level, meaning that risk identification and assessment must take place at multiple levels of organizational planning and decision making. Risk management must also be embedded within existing management routines, an ongoing responsibility of all organizational management and decision-makers. Risk management is about people and culture and you must avoid working in a cultural vacuum from the decisions that you are making – think about behavioural economics as being on the new frontier. Risk management is also context specific-- the risk facing any particular organization can only be truly understood, analyzed, assessed or managed by those who understand the context best. You should engage your staff with the deepest understanding of the context to assist in risk analysis and management efforts.

Framework slide and risk based strategic management model

Slides were shown demonstrating the ERM framework. Mr. Heimler indicated that a missing ingredient is the cultural aspect of risk management. He also showed a slide on a Risk Based Strategic Management Model: a multi-year strategic planning process.

Decision-making biases as a part of emerging risk management trends

Mr. Heimler concluded by discussing the biases we bring to decision-making processes. Most governing bodies are not introspective enough as individuals or as a group to factor this into their decision-making process. They often have excessive confidence. The five biases discussed included action oriented biases (excessive optimism, overconfidence, competitor neglect), interest (misaligned incentives, inappropriate attachments, unclear corporate goats), group dynamics (group think and sunflower management), stability (loss aversion, status quo bias), pattern recognition (confirmation bias, and recency bias).

**Andy Rankine:**

Mr. Rankine discussed the experience of the Ontario Ministry of Agriculture, Food and Rural Affairs in introducing Enterprise Risk Management.

The Drummond Report – They wanted to be better at being proactive, wanted a better tool for strategic planning and decision making.

On top of introducing ERM, they wanted to develop opportunities that were not antonyms of risk. They knew ERM was a good business practice in that it provided a better, more consistent identification of threats and opportunities.

OMAFRA’s current and desired state

OMAFRA sought three outcomes: 1) the information and tools available to assist senior management (which was achieved); 2) increased awareness (also achieved); 3) the implementation of recommendations regarding the next phases of ERM, namely, the governance structure and resourcing embedding ERM tools and processes throughout the Ministry (this is still under consideration).

The results of the assessments concluded that OMAF/MRA should continue to implement ERM given the following:

* It is a good business practice
* The results of Phase One were positive – i.e. 90% recommended
	+ Outcomes have helped to inform transformative and priority projects
	+ Most participants became strong supporters of ERM
* The Office of the Provincial Controller is exploring ERM
* The ERM initiative could partially address staff comments about perception of risk averse culture

The difficulty in implementing ERM is that it requires a long-term commitment. There are problems initially with converting people to it because it is a lot of extra work. What is needed is a better, more consistent identification of risks, opportunities and strategies and the creation of an effective tool.

Activities Supporting Key Outcomes

* Each of the project teams assembled to conduct ERM processes always included legal, audit, and finance at a minimum.
* The group composition was broad in order to avoid group think

Tools

Customized approach to ERM that consists of scalable tools that have been tested throughout the ministry

* Five-step process
* Launched website
* Network of trained users
* Third party facilitation

Currently

* ERM is part of Controllership Action Plan
* Staff not only seem to understand the approach but the negative halo going with this is not necessarily accurate. Part of a daily discussion and approach to governance.

ERM - Experience

Benefits:

* Higher level of awareness of concepts
* Consistent language and mental models
* Consistent identification of threats, opportunities and strategies to address
* Results shared and integrated
* Development of five-year plan
* 5-step process, four have been used:
	+ Validate objectives and context
	+ Identify risks
	+ Assess and prioritize risks
	+ Identify opportunities
	+ Assess opportunities
	+ Reporting and monitoring

Lessons learned:

Implementation requires a long term commitment to:

* Prepare and implement architecture
* Develop competencies of staff members
* Integrate findings into annual business planning cycle, program policy and recourse decision-making
* Initiative owners must
	+ Define assessment objectives
	+ Decide who will be participating
	+ Determine structure and schedule of the assessment

The last several slides were sped through due to time constraints: the methodology used by them, themes of risk assessments across strategic priorities, opportunities (collaboration and coordination within the organization, within ministries, between governments, etc.) state objectives, tips on how to get started, risk classification categories.

**Freya Kristjanson:**

Whereas the first two speakers talked about organizational approach and the challenges of delivering on the mandate, Ms. Kristjanson focused instead on regulatory negligence as a specific risk to be managed. If your risk management fails, what happens?

She opened with an introduction into regulatory negligence as an aspect of tort law—something you can be sued for. In respect of public law, it relates to actions and duties, it is a private law remedy for deemed failure or substandard action. The areas in which public authorities are being sued are the following:

* Responding to complaints
* Investigations and inspections
* Standard setting
* Regulating and monitoring
* Making representations
* Warning or notifying
* Enforcement

Liability in negligence is a form of accountability. Regulators should strive to ensure they do not create harm. People who get involved in public service are there for good reasons. Part of their work is making sure they do not cause people wrong.

Ms. Kristjanson then went into an overview of the case law in the area of regulatory negligence discussing the cases of *Taylor v Canada, Cooper, Edwards, Finney, Hill, Fullowka*.The major question is the situations in which public bodies owe a private law duty of care. It is a struggle to balance the accountability to the general public and that to individual members of the public. It depends on the proximity between the body and the individual claiming a breach.

Proximity – Duty of Care

* Step one: Is the relationship so close that they should have had this individual in mind as someone who would be harmed?
* Step two: Are there residual policy concerns, e.g. conflict between duty owed to the public generally vs. individuals?

Proximity – Regulatory Negligence

* First, look at the applicable legislative scheme
* Secondly, examine the specific interactions between the regulator or governmental authority and the plaintiff, e.g. representations you create about what you will do which may create new liabilities and duties.

What does this tell us about risk management? You should build this into your risk management strategy. Things to consider that may bring about liability include:

* public representations to a particularized group
* licencing, reporting, monitoring or investigation powers may give rise to complaints of negligence
* If you can provide evidence that a “true” policy decision was made you may protect yourself from liability

Ms. Kristjanson concluded her presentation by stating that legal opinions really should be sought.

**Questions asked by participants:**

1. Please elaborate on the risk of group think.

Peter Heimler: It’s a challenge. It is a cultural thing, when you become part of the governing body of an organization it is incumbent on you to become introspective. This ties back to decision theory. The best decisions come from heterogeneous groups. If we structure our bodies to be diverse and representative of varying interests, but culturally allow it to be dominated by one interest, you’ve given up on the scientific basis of decision theory. As governors we have to sit down and say “the rules of engagement are: xyz.” When you start to see group thinking unfold you must step back and put an end to this.