Chapter 1: Understanding Good Governance

The Guide to Good Governance (Guide) is designed to assist boards of public hospital corporations with implementing effective governance by reviewing leading governance practices adapted to the context and landscape applicable to hospital corporations in Ontario.

In This Chapter:

The *Not-for-Profit Corporations Act*

In October 2021, the Ontario government proclaimed into force the *Not-for-Profit Corporations Act*, which replaces the *Corporations Act* where it applies to hospitals. Minor amendments were made to the *Not-for-Profit Corporations Act* in October 2023. The *Not-for-Profit Corporations Act* makes several changes to the *Corporations Act* as it impacts corporate governance of not-for-profit corporations in Ontario. This Guide refers to some of the more significant changes that impact corporate governance.

< PREVIOUS VIEW

Defining Good Governance

While the entirety of this Guide ultimately defines good governance, the next section of this chapter focuses on reviewing the core components. These core components include a review of corporate structure, fiduciary duty, and board culture.

Corporate Structure

Generally speaking, the affairs of a hospital corporation are governed by its board of directors. The regulations under the *Public Hospitals Act* confirm the role of the board by providing that "every hospital shall be governed and managed by a board".

Hospital corporations are non-share capital corporations generally incorporated by articles of incorporation under the *Not-for-Profit Corporations Act* (formerly letters patent under the *Corporations Act*) or, in some cases, incorporated by special legislation. A hospital's corporate structure is also subject to, and affected by, the provisions of the *Public Hospitals Act*. In addition to these two pieces of legislation, a board should be more acutely aware of the requirements contained in the *Connecting Care Act*, the *Commitment to the Future of Medicare Act*, the *Excellent Care for All Act*, the *Freedom of Information and Protection of Privacy Act,* the *Personal Health Information Protection Act*, the *Broader Public Sector Accountability Act*, and the *Broader Public Sector Executive Compensation Act*.

The hospital's objects or purposes are set out in its constating documents: generally, its articles of incorporation under the *Not-for-Profit Corporations Act* (formerly letters patent under the *Corporations Act)*, or under special legislation. While these purposes may vary among hospital corporations, they typically include the establishment, maintenance and operation of a hospital. These purposes are considered charitable.

Hospital corporations have members and not shareholders. Distinct from a business or share capital company in which shareholders are entitled to a share of the company's profits by receiving dividends, a hospital, as a non-share corporation, has members who are prohibited by the *Not-for-Profit Corporations Act* from receiving financial gain. Members elect directors, appoint auditors, receive financial statements and approve certain fundamental changes, including amendments to by-laws. While many, if not most, public hospitals in Ontario have established closed membership models where the directors are also the members, it remains fundamental to understand the unique roles and obligations of both members and directors. There are actions that must be taken or confirmed by members, and actions that must be taken or confirmed by directors. These actions and confirmations are important and extend beyond mere formalities. A board member should be aware when they wear a director hat and when they wear a member hat.

Fiduciary Duty

Directors stand in a fiduciary relationship with the hospital corporation. The fiduciary duties owed by a hospital director to the hospital corporation are among the highest standards of conduct imposed at law. Among other things, directors are required to:

- Act honestly, in good faith and in the best interests of the hospital;
- Comply with the *Not-for-Profit Corporations Act*;
- Comply with the hospital's articles and by-laws;
- Discharge accountability obligations; and
- Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

→ Find Out More

Hospital accountability and stakeholder relations are discussed in Chapter 4. Directors' duties are discussed in Chapter 6.

Exercising care, diligence and skill of a reasonably prudent person in comparable circumstances is an objective standard of care but it is also context specific. The fiduciary duties owed by directors to the hospital also include the duties of loyalty, maintenance of confidentiality, avoidance of conflicts of interest, as well as the duty of corporate obedience.

Directors are not accountable for errors in judgment provided they have followed a reasoned and informed process and discharged their fiduciary duties, pursuant to what is called the "business judgment rule". The business judgement rule and directors' duties are more fully discussed in Chapter 6.

Board Culture

Exploring what constitutes good 'board culture' is best outlined by focusing on the practice of good governance itself. A board actively seeking to understand, implement and achieve good governance is more likely to demonstrate good board culture. Good board culture is more likely to exist when best practices are followed, corporate and internal structures are observed, and good governance is consistently a board's focus. That said, adherence to good governance practices will not, by itself, achieve good board culture. Board member cohesion, board chair leadership, continuous improvement efforts, the earned trust of management, and director candour also contribute heavily to good board culture.

→ Find Out More

Board culture is more fully discussed in Chapter 9.

Framework for Good Governance

Effective board performance requires a board to understand the three framework conditions conducive to, and supportive of, good governance. These framework conditions are outlined below and shown in Figure 1.1: Framework for Good Governance

1. **Board Quality –** The quality and diversity of the individuals at the table and the collective impact of their knowledge (i.e., **who** is on the board)
2. **Board's Role –** The areas in which the board exercises a governance role and the approach the board takes when exercising its role (i.e., **what** a board does).
3. **Board Structure and Processes –** The structures and processes implemented and observed by the board to perform its governance role (i.e., **how** the board does its work).

Figure 1.1: Framework for Good Governance

Condition #1 – Board Quality

The quality of a board inevitably impacts the effectiveness of the two subsequent framework conditions (board role and board structures and processes). Due to this impact, it is paramount for boards to be attentive to their quality. Board quality includes the following dimensions:

- Board size;
- Board composition (including the knowledge, experience, and attributes of the board);
- Recruitment (including the processes that the board uses to recruit and train its directors);
- Terms and renewal of directors;
- Onboarding and education;
- Feedback and evaluation of governance; and
- Individual director development.

Find Out More

These elements are more fully discussed in Chapter 7.

Condition #2 – The Board's Role

All corporate boards, regardless of industry, size, scope or composition, fundamentally have the same role. Effective performance of the board's role includes the following dimensions:

- Being explicit about the board's role as the governing body;
- Ensuring all directors understand the board's role and their individual duties as directors;
- Strategic planning;
- Ensuring individual directors discharge their own duties accordingly;
- Differentiating the board's role from the role of the chief executive officer, chief of staff, and management as clearly as possible; and
- Overseeing management, quality, risk management, and stakeholder engagement.

Find Out More

These elements are discussed in Chapter 2, Chapter 3, and Chapter 6.

Condition #3 – Board Structure and Processes

The structure and processes implemented and observed by a board are key to effective board performance. Relevant considerations when establishing and reviewing board structures and processes include the following:

- **Leadership** – The board chair, and other appointed officers, take on board leadership roles.
  - Consider the processes respecting the appointment of officers. This may include defining the roles and qualifications of officers, setting term lengths, and establishing the process for selecting officers.
- **Committees** – Board committees assist the board in performing work the board may not otherwise have been able to complete itself.
  - Consider the processes respecting committee formation, operation, and sunsetting. This may include distinguishing between standing and ad hoc committees, ensuring committees are not doing the work of management, determining and reviewing committee terms of reference, reviewing committee composition and selection processes, and ensuring efficient practices for board reporting and oversight.

- **Meeting Processes** – Meeting processes are an essential component of effective board performance. Meetings without clear direction or targeted outcomes countervail effective performance.
  - Consider how agendas are set, how directors have input into agenda setting, open board meeting and *in camera* meeting processes, how virtual meetings are managed, verification of minutes, and distinction between matters before the board (information, discussion, decision etc.).
- **Relationships and Culture** – Although less tangible, relationships among board members, and with management, are an important element in creating effective governance.
  - Consider how to build effective bonds between board members, how members interact on topical issues, assessing whether board members are comfortable sharing their opinions.

→ Find Out More

Matters of board structure and processes are discussed in Chapter 8 and board culture is more fully discussed in Chapter 9.

Board Responsibility for Governance

It is important that a board take ownership over the quality of its own performance. While external assessments exist through organizations such as Accreditation Canada and the Ontario Hospital Association, the board remains accountable to itself for ensuring the quality of its own performance. That said, while this accountability ultimately remains internal, its origins are externally tied through the fiduciary obligation of stakeholder accountability.

The entirety of this Guide is designed to empower boards to take ownership over the quality of their own performance. The chapters that follow will provide the insight, tools, and information necessary to action this element of good governance.

→ Find Out More

Hospital accountability and stakeholder relations are discussed in Chapter 4.

Directors' duties are discussed in Chapter 6.

Developing good governance is reviewed in Chapters 9.