

THE ROLE OF THE CORPORATE SECRETARY IN GOVERNANCE

The purpose of this discussion paper is to provide a framework for evaluating how and where, within the corporate structure, there is a role for the Corporate Secretary to play in the new model for Corporate Governance.

To begin, please note that we refer to a section contained in the September 2006 discussion paper presented by Rob McLean and Ron McCullough entitled “The Evolution of Governance: A Scenario for Best Practices in 21st Century Governance”, wherein the authors present an overview of a relatively new role--that of the Corporate Governance Officer (CGO)/Secretary .

The aforementioned discussion paper clearly delineates a framework for the functions and responsibilities of this new and expanded role for a CGO/Secretary, which is outlined as follows:

A combination of functions with the responsibility and capability to:

- Assess and manage compliance in the governance domain;
- Gather the information needed to determine governance priorities and desired outcomes for oversight and/or added value relating to specific business processes;
- Manage governance processes, including a wide variety of activities and events;
- Track progress toward defined outcomes; and
- Manage the document and information flows needed to support all of the above activities.

The paper also discusses how the functions might be allocated across small and large corporations. For the purposes of this presentation, we will examine how many of the Corporate Secretary’s existing responsibilities and roles can be expanded to encompass key governance areas within the Board management and the Corporation.

Initially, a review of the overall Secretariat/Corporate Governance function is necessary in order to define what it is that the Secretary is responsible for and see how this fits into a Corporate Governance framework. To do this we will look to an internationally recognized body - the Institute of Chartered Secretaries and Administrators (ICSA).

C1.1 Governance Function and the Secretariat

The ICSA has established guidance for the Company Secretary’s Corporate Governance role, which is provided in the form of a job description, as follows.

Sample Corporate Secretary Job Description proposed by ICSA:

- Ensure the effective running of the activities of the Board and its committees;

- Keep under review all legal and regulatory developments affecting the Company's operations and make sure the Directors are properly informed of same;
- Ensure the interests of stakeholders are maintained when decisions are made, particularly those affecting employees, and update the Board on issues of policies and practices regarding Corporate Social Responsibility;
- Act as a sounding board for the Chairperson and the Directors on matters that concern them and take a lead in dealing with difficult interpersonal issues, such as removal of a Director from the Board;
- Act as a primary point of contact and source of advice/guidance for non-executive directors with regard to the company and its activities in order to assist their decision making process;
- Act as the conscience of the company by providing an enquiring voice in relation to Board decisions;
- Ensure compliance with listing rules and other regulatory codes and acts;
- Ensure that corporate disclosures are completed;
- Ensure the dissemination of regulatory news to the stock market (of course where this is the responsibility of the Investor Relations Officer or other representative, the Secretary's role may extend only to that of review and oversight on the behalf of the Board);
- Manage relations with investors with regard to corporate governance matters;
- Be responsible for new Directors orientation;
- Work with Officers and Directors to ensure that regulatory reporting is correct and does not lead to errors resulting in offences under various acts;
- Ensure compliance with statutory filing requirements, especially those relating to changes in Directors. Note: This may well be a joint function with the CFO and the IR Officer; and
- Arrange and manage the process of calling and holding Annual General or Special Meetings and advise the Board on matters to be raised at the meeting for shareholder vote.

The above are recognized to be general guidelines and will vary by company and perhaps country. These mentioned guidelines were slightly abbreviated from the original wording put forward by the ICOSA.

In addition to the above, let's look at certain areas that today are requiring governance management and reporting.

- 1) **Board Composition** – a CGO/Secretary can participate in documenting and assisting in the development of a Board framework to determine the level of independence of the Board from:
 - a) the Corporation's management
 - b) any related business interests or interests that could materially interfere with a Director's ability to act in the best interests of the Corporation.

- 2) **Assess and disclose the level of independence of all Board members** on an ongoing basis as defined by National Instrument 58-101 and as defined in National Policy 58-201.

To highlight the complexity of this governance process let us look at the basic definition of Independence for a Director.

To be *Independent*, a director must not have a material relationship with the Issuer or Corporation. A material relationship is one that could reasonably interfere with the exercise of a Director's independent judgement.

Some examples of Material relationships that would reduce a Director's level of Independence are as follows:

- a) the Director was an employee or officer of the Issuer in the last 3 years
- b) an immediate family member is or was an employee or officer in the last 3 years
- c) the Director was a partner of an employee of the Corporation's audit firm in the last 3 years and worked on the issuer's audit
- d) a family member who shares a home with the director was or is an employee or partner of the Issuer's audit firm in the last 3 years and worked on the issuer's audit.

The list of independence criteria is much more extensive than the aforementioned but this serves as an example of the extent and complexity of assessing Independence and therefore the need for a CGO/Secretary to monitor and report, according to regulatory requirements.

The CGO/Secretary can assist in the Director selection process and act as a link to provide composite information from outside consultants, the Human Resources Department and the Board Nominating Committee.

- 3) **Monitor and report on the Independence of Audit committees** as defined in the National Policy instrument 52-110.
- 4) **Disclosure of Corporate governance practices** as defined in National Policy 58-201 and in 58-101FI and 58-101F2 for Venture Issuers.
- 5) **Independent Chair** – as corporations move toward an Independent Chair for the Board, it will become increasingly important to have a CGO/Secretary who can maintain the vital communication link between the Board and the Company so as to enhance communication and stay up to date with corporate changes. Information gathering and dissemination will be increasingly important. Having a non-decision making link between the company and the Board will provide continuity and assist in timely, effective Board updates, thereby expediting decision making by the Board.

- 6) **Maintain and document details of Board expectations of management** – CEO, COO and CFO expectations should be documented and monitored to ensure measurement of performance can be done on an ongoing and timely basis.
- 7) **Act as a Board conduit for providing shareholder feedback** and Board communication to shareholders under an agreed communication policy. This will ensure consistent communication in accordance with company and regulatory disclosure policies.
- 8) **Board Position Descriptions** – the CGO/Secretary can assist in documenting job descriptions for the Board and in maintaining and using this as a tool in the Board performance evaluation.
- 9) **Board Mandate** or Charter– the development and maintenance of a Board mandate or Charter to ensure that Board decisions can be measured against it. This will be of vital importance in performance evaluation as well.. The Secretary can participate by ensuring it is current and that the Board is aware of its guidelines when decisions are made.
- 10) **Benchmarking Board and Company overall performance towards good Governance relative to other corporations.**
 Benchmarking can be facilitated with use of the Governanceexcellence.net website and its Governance Benchmarking tool. It allows a CGO/Secretary, in conjunction with the Board, to measure their various levels of good governance practices throughout the corporation and within the Board. This measurement is then ranked against an impartial Benchmark in the form of a survey and database. The benchmark ranks the degrees of progress toward achieving the optimal level of governance, in light of mandatory regulatory governance requirements as well as voluntary ones. This Benchmark survey process stores responses from a number of corporations and allows each user or participant to measure their level of success against that of the other respondents. The CGO/Secretary can make use of this tool to provide regular feedback to the Board and management, allowing them to see how they are progressing in their governance efforts.

C1.2 Governance Function/Secretariat Planning

To meet the needs of a Governance function that requires an individual, such as the Corporate Secretary, to be involved in planning in a variety of areas, the OSC's Dey Report recommends that processes in the following areas be properly documented and monitored:

- a) **Strategic Planning Process** – When does it start? How is it updated? How do the Directors and the Board as a whole get involved in reviewing and working with senior management to evolve a Strategic process that will be of value to a Corporation and will ensure that proper due diligence is done in evaluating courses of action and long-term corporate direction.

- b) **Risk Management Process** – What is it comprised of? Who oversees it? Are the corporate risk areas identified and updated? Is there a plan developed for ensuring ongoing oversight and review by the Board and is this plan monitored?
- c) **Corporate communications** – Is there a documented review process? Who handles the communications for various issues? Is it centralized versus decentralized, ie. via an Investor Relations or Public Relations Department or do various members of the management group take responsibility? Is there a review of major communications that are released and is it documented? How and when does the Board get involved in this process?
- d) **Documentation of Internal controls and management information systems** – determine the process for documentation and review and the ongoing timing. Are consultants involved in the process? What roles do management play in monitoring and how frequently are controls reviewed, documented and updated? Does the Board and or a Board committee (Audit) review on a regular basis?
- e) Board committee composition – level of independence and a majority of external directors.
- f) Director Compensation reviews.
- g) Board Independence – to be reviewed at a later point.
- h) Develop and maintain mandates for the Board and senior executives.

A subsequent review of the Dey Report in 2000 resulted in an expansion on the Dey Report recommendations which resulted in the Saucier Report. The Saucier report recommended a number of key Board issues to be addressed which would expand the need for a CGO/Secretary some of which are listed below:

- Director competencies and skills should be assessed when looking for Board candidates
- An independent Board leader is needed
- The independent Board leader should be accountable to the Board
- Outside Board members should meet regularly without management and chaired by the independent Board leader
- The independent Board leader should be accountable to the Board for assessment of the CEO and for succession planning
- The Board should contribute to the strategic planning process
- Independent directors must ensure that all shareholders are represented and that proper governance is carried out.
- A Board mandate and assessment process with disclosure should be instituted
- Audit committees should be composed solely of outside directors and have a committee mandate that is measured and disclosed
- External auditor should be accountable to the Board
- The audit committee should request and actively pursue an internal audit function.

All of the above areas require someone to plan, manage and coordinate the processes and information flow between the corporation and the Board. The CGO/Secretary is ideally positioned to perform in this capacity as the Secretary has regular access to

management. The CGO/Secretary can provide continuity and follow up for the Board on a regular basis.

To expand on certain key areas where the CGO/Secretary can participate in the planning/governance and administration processes directly related to the Board and Board activities as follows.

- 1) **Succession planning for Directors** – Working with outside consultants and the Board Nominating Committee, including perhaps the Corporation’s Human Resources Dept, a CGO/Secretary can act as a vital link in ensuring that the various participants in the process communicate and that actions are documented and progress reports compiled.
- 2) **Board Continuing Education and Professional Development** – This can be an ongoing process as the corporation evolves and as new laws and regulations affecting corporations are enacted. A CGO/Secretary can develop, maintain and manage a planned process for training. Elements of such a plan would include areas such as financial policies, existing controls, overview of corporate structure, extent of corporate business operations by product and location, education regarding the risks inherent in the business and what risk management program is in place, details on the various executives throughout the company, financial statements, products, legal issues for the company and suits in progress. Clearly given the scope of issues with which a Director will need to become familiar, there is a strong need to plan, document and manage this Director/Board education and development process.
- 3) **Board Performance measurement** – Perhaps a relatively new area for Boards is performance measurement for the Board and the Directors individually. A plan for evaluating the Board and Directors can range from hiring an outside consulting firm to review and document on a quarterly and semi annual basis to the CGO/Secretary being involved in assisting the Board to develop Performance measurement guides and tools. Once developed, the Secretary can then assist the Board on a regular basis to review their performance in meeting or achieving their Board Mandate, implementing plans with management, ensuring timely reviews of controls, strategic plans, legal issues, responsiveness to shareholder and environmental issues, committee effectiveness in areas such as controls or executive compensation.

C1.3 Governance Function/Secretariat Accountability

ICSA also promulgates guidelines for the Independence of the Company Secretary to ensure that the Secretary is independent from undue influence and pressure from Director(s).

The ICSA guidance note in this regard is as follows:

“Boards of Directors have a right to expect the company secretary to give impartial advice and to act in the best interests of the corporation. However it is incumbent on

Boards of Directors to ensure that the company secretaries are in a position to do so by ensuring they are not subject to undue influence by one or more of the Directors. If the Board fails to protect the integrity of the company secretary's position, one of the most effective built in internal controls available to the company is likely to be seriously undermined. The establishment of appropriate reporting lines for the company secretary will normally be a crucial factor in establishing that protection.”

The guidelines further recommend that:

- In matters relating to the Secretary's duties as an Officer of the company, the secretary, through the chairperson, should be accountable to the Board as a whole
- If the company Secretary has executive responsibilities additional to the Secretary's core role, then the Secretary should report to the CEO or appropriate Executive Director on such matters
- The Secretary's remuneration should be agreed to by the Board as a whole or by a remuneration committee of the Board on the recommendation of the Chairman or Chief Executive.

In the above guidelines the ICSA has provided a framework for overlaying the newly defined and redefined Governance guidelines and legislation into the Corporate Secretary's role. We can see in reflecting upon the CGO responsibilities as put forward by Rob McClean and Ron McCullough in their Governance discussion paper that the Secretary's role, as defined by ICSA, fits many of their recommended responsibilities for a Corporate Governance Officer (CGO).

We will now examine some of the specific areas that are governance related and fit with the CGO / Secretary role today.

C1.4 Staff Involvement in Governance

All staff should be aware of the corporation's code of ethics and have a resource to access in order to define aspects of that code as they progress through their careers in the corporation.

Some corporations have implemented “whistleblower programs” to allow employees to anonymously report known or suspected breaches of corporate standards and ethics. Internal resources or external services can be utilized for this purpose.

C1.5 Governance Recognition and Rewards

There will continue to be considerable discussion in the regulatory and business communities about the rewards and benefits resulting from “Good Governance”. To begin an examination of a few of the potential benefits, we will look both at financial and intangible rewards.

Financial Rewards:

- Enhanced shareholder and general market perception of the company with potentially higher share price;
- Avoidance of regulatory sanctions (fines and penalties) for failure to comply with reporting and other requirements as may be legislated;
- Avoidance of corporate losses resulting from a failure to properly examine a given business situation; and
- The cost to correct mistakes resulting from poor governance or business decisions can be avoided.

Enhanced shareholder perception of the Company as well as the general market view of the Company and its management could have a positive impact on a company's share price over time. Whether or not this is a provable assertion will need to be tested, but at the very least consider that a negative view of a Company and its management, by market analysts, shareholders and potential stock purchasers, will definitely create some unfavorable pressure to sell a stock with a consequent downward pressure on the stock price.

The avoidance of regulatory fines and penalties (failing to adhere to various aspects of legislation enacted regarding corporate activities) can be a significant savings not just for the company, but its Officers and Directors as well, where such fines and penalties can extend directly to them. Examples of this can be seen in the area of failure to disclose key corporate information or failure to fully disclose corporate information to the public without prior selective disclosure. Consider the SEC's Reg. FD (Full Disclosure), which in the USA has resulted in considerable penalties being imposed.

Preventing losses resulting from a failure to properly consider a business decision before implementation can also be a significant savings to a corporation. Consider an ill conceived acquisition or poorly designed product and the potential cost to a company that may result.

Avoidance of the potentially considerable costs to correct a poor decision. Some examples can be seen in the cost of honoring product warranty claims or in responding to lawsuits resulting from injuries caused by a Company's actions or products. Another key example would be in the area of patent infringement where there is not only the cost of the lawsuit but the subsequent court awarded payment resulting from a suit.

Intangible Rewards for Good Governance:

A few Intangible rewards for consideration follow:

- Enhanced Board confidence in their decisions;
- Enhanced management confidence in their ability to manage the business;
- Reduction in employee and shareholder issues to be managed;
- Possible reduction in risk and associated insurance costs; and

- Proper due diligence done on an ongoing basis, reduces the need for last minute corrective action where such actions can result in an associated loss of focus on real business issues and more productive activities.

These are just a few of the potential benefits that could result from consistently exercising Good Governance protocols.

C1.6 Governance Function and Secretariat Expertise

In this area we can look to the ICSA for guidance. ICSA, is an international body that has become a well recognized source for education and guidance in the areas of corporate administration and governance. With its early beginnings in the UK, ICSA has expanded into many countries around the world and developed a comprehensive course of study leading to a professional designation, either the ACIS or the FCIS.

The course of study encompasses the following key areas:

- Corporate Governance;
- Corporate Secretarial practices and administration;
- Financial and Management Accounting;
- Business management;
- Corporate Law;
- Strategic & Operations Management;
- Corporate Administration; and
- Corporate Financial Management.

The above outlines some of the key areas of understanding that would be required for a Corporate Governance Officer and Corporate Secretary.

Many designated Corporate Secretaries come from varied professional backgrounds, including lawyers, professional accountants and others. Their professional experience and designations are enhanced by the ICSA designations of ACIS and FCIS, which provide a recognized global standard in Corporate Governance and Administration.

Of course, knowledge of corporate governance and administration will always require updating and continuous learning as business practices change, as regulatory laws change or are more clearly interpreted and as the demands increase for greater corporate accountability to all corporate stakeholders, including officers and directors. ICSA provides this ongoing training to all members via their Association activities.

C1.7 Annual Budget for Governance

The cost of governance, compliance and Board management will increase as the need for governance and better corporate administration rises.

The Board, the CGO/Secretary and senior management should work together to identify the key areas in which governance costs will be incurred and develop a Governance Budget as part of the normal annual budgeting process.

Some key cost areas to be considered are as follows:

- Implementation of internal controls;
- Increased audit costs to review internal controls;
- Legal costs to review legislation and ensure the Corporation management and Board are aware of and are complying with any new or existing regulations;
- Consultants to review and advise on various courses of action , for example in the areas of product liability and review, insurance, controls, environmental issues
- Increased administration and documentation costs;
- Technology to enhance and permit real-time access to information for Board members; and
- New Board and administrative systems to better manage the flow of data and decisions and processes taking place between the Board and the Corporation and its management.
- Increased staffing for the Secretariat/CGO function to allow for the completion of governance related tasks and reviews

Concluding Remarks

Reflecting upon the outline for a CGO/Secretariat Role as identified at the outset of this paper and after having reviewed the many areas where the Corporate Secretary can integrate existing responsibilities within a governance environment, we can see where the authors Rob McClean and Ron McCullough were very prescient in anticipating a role for the Corporate Secretary as a Corporate Governance Officer. This new CGO will act in a capacity that ensures higher level corporate administration is executed in accordance with Good Governance practices and thereby accomplishes the objectives of a well run and governed business for the benefit of its stakeholders and the community in which they do business.