



Ten Tips for Hospital Governance Compliance

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Overview

The Ontario Hospital Association (OHA), in partnership with Borden Ladner Gervais LLP (BLG), has developed this resource to provide individuals supporting hospital governance with 10 practical and frequently considered compliance tips. This resource offers processes that are effective, meet legal obligations and are aligned with sector best practices. This resource also references relevant Guide to Good Governance, Fourth Edition Form Templates. All templates can be accessed at: www.oha.com/GGG

Disclaimer

This resource provides a broad overview of applicable topics and governance best practices at the time of publication. It is not intended to be, nor should it be construed as, legal advice. As always, hospitals and health service providers are advised to seek and obtain legal and/or professional advice based on their individual situations, including existing policies, practices and communities served. The authors will not be held responsible or liable for any harm, damage, or other losses resulting from reliance on, or the use or misuse of, the general information contained in this resource.



Tip 1: Assess Meeting Type and What Considerations Apply

'Open' Board Meetings

Hospitals are private corporations and are not legally required to hold open board meetings. That said, hospitals are also broader public sector organizations and guided by principles of accountability and transparency. As a result, hospitals may opt (voluntarily or pursuant to policy) to hold board meetings open to the public and/or invited guests. Public portions of board meetings may include any subject matter, other than matters discussed *in camera* in accordance with the hospital's policies.

In Camera Meetings/Portions of Meetings

In an *in camera* meeting or portion of a meeting, individuals other than the board and/or specially invited guests are excluded from the meeting and asked to leave, typically pursuant to a policy. A board policy typically directs moving *in camera* when the potential harm from public disclosure of a matter is greater than the benefits of transparency.

Examples of matters commonly dealt with *in camera* include:

- Where personal information is or may be revealed
- Labour relations matters
- Litigation or potential litigation
- Solicitor-client privilege
- Contract negotiations or disputes
- Board self-evaluation
- Security of property and/or property purchase discussions
- Other matters the board considers confidential

It is important to note that Ontario's *Not-for-Profit Corporations Act, 2010* (ONCA) requires meeting minutes to be kept **for all board and committee meetings**.

This requirement includes portions of meetings that are held *in camera*. Hospitals should consider how *in camera* meeting minutes are distributed, retained, and distinguished from open portion minutes; again, this is typically set out in a policy.

'Meetings' Without Management

It is common practice for boards to 'meet' without management or ex officio directors after board meetings are adjourned. These are not board meetings and formal business cannot be conducted during these 'meetings'. These 'meetings' provide independent directors the opportunity to assess matters such as governance quality and adequacy of meeting materials, build cultural cohesion, and consider the timeliness of information coming to the board.

Relevant Guide to Good Governance, Fourth Edition Form Templates

- *Form 8.13: Sample Board Agenda*
- *Form 8.15: Meeting Minutes Best Practices*
- *Form 8.17: Sample Policy for Open Board Meetings*
- *Form 8.19: Procedure for Members of the Public Addressing the Board*
- *Form 8.21: Sample Policy for Meeting without Management*



Tip 2: Determine Appropriate Consent Agenda Use, in Context

Consent agendas are used to improve the efficiency of board meetings by approving multiple routine, non-controversial items with a single vote, without discussion. They allow for board approval of routine matters, where no debate is anticipated, while ensuring board business is recorded in meeting minutes. It is best practice for:

- Board meeting agendas to clearly indicate which matters are proposed to be adopted on consent.
- Supporting materials for consent agenda items to be clearly marked as such.
- Directors to ensure they have read and reviewed consent agenda materials in advance of the meeting.
- Directors to request removal of consent agenda items prior to, or at, the board meeting, if in their view additional debate or deliberation is required.

Board meeting minutes should set out, in full, resolutions enacted by way of consent. There are various acceptable approaches for this: for example, one motion for acceptance

of the entire agenda (deemed to include adoption of the items in the consent agenda), a declaration by the Chair that certain matters are adopted on consent, or a motion relating specifically to the consent agenda business.

The CEO and Board Chair should work collaboratively to set board meeting agendas and deliberately consider what items should, and should not, be included on the consent agenda.

Relevant Guide to Good Governance, Fourth Edition Form Templates

- *Form 8.14: Consent Agenda Policy*

Tip 3: Ensure Documents Accurately Reflect the Nature of Corporate Member Meetings

Under ONCA, the following business is conducted at the annual meeting of the corporate members:

- Consideration of the financial statements
- Consideration of the audit
- Election of directors
- Reappointment of the incumbent auditor

If any member business is conducted in addition to the above, the meeting is no longer just an annual meeting – it is an **annual and special meeting**, and any business in addition to the above is special business. Notices and corresponding documentation should indicate this, and for special business, the notice must state the nature of the business in sufficient detail to permit a member to form a reasoned judgment on the business and state the text of any special resolutions to be submitted to the meeting.

Relevant Guide to Good Governance, Fourth Edition Form Templates

- *Form 8.20: Annual Meetings of Members – Frequently Asked Questions*



Tip 4: Confirm Virtual Meetings are ONCA Compliant and Understand How Hospital Policies Deal with Specified Matters

ONCA provides that boards, committees, and corporate members may meet virtually, unless a corporation's articles or by-laws provide otherwise. The OHA's Prototype Corporate By-law (Prototype By-law) currently enables virtual meetings. For virtual meetings to be ONCA compliant:

- Directors must be able to communicate simultaneously and instantaneously; and
- Members must be able to reasonably participate.

Telephone or video calls meet these ONCA requirements but email or messenger applications, as sequential communication, do not. As a result of continued use of virtual meetings, it may be beneficial to either create, or revisit and refresh, a virtual meeting etiquette policy, which may include:

- 'Camera on' requirements
- Attending meetings in confidential, non-public locations
- Name display requirements
- Guardrails respecting body language, hand raising, muting, multitasking prohibitions, and other aspects of respectful conduct

Finally, the OHA's Guide to Good Governance, Fourth Edition and Prototype By-law permit the calling of secret ballots. Hospitals should consider how the calling of secret ballots will be handled in a virtual meeting and ensure mechanisms are in place to address ballot secrecy.



Tip 5: Implement Meeting Minute Retention Practices Aligning with the OHA's Record Retention Toolkit

ONCA requires that minutes be kept for all board and committee meetings. As noted above, this includes *in camera* portions of meetings – which should be kept separate from minutes of open portions of meetings to protect confidentiality.

Subject to other applicable freedom of information legislation considerations, only directors are entitled to see board minutes. In addition to maintaining separate open and *in camera* meeting minutes, hospitals are cautioned to consider the privileged nature of board legal advice. If/when legal advice is disclosed, privilege protections may be lost.

Meeting minutes serve as the primary, and sometimes exclusive, demonstration of a board's exercise of fiduciary duty in the case of litigation. As a result, minutes should be created shortly after a meeting to avoid unfavourable inferences of record curation if litigation were to arise.

Meeting minutes often undergo multiple drafts prior to being finalized. Once minutes are finalized, drafts are generally destroyed in accordance with applicable record retention policies (See the OHA's Record Retention Toolkit for commentary on transitory records). Exceptions to this practice do exist, however, such as in situations where there is a prospect of litigation, and applicable record retention policies should be consulted prior to destruction of meeting minute drafts.

Finally, artificial intelligence (AI) generated meeting transcripts may also be considered transitory records and thus deleted once they have served their short-term purpose and minutes are finalized (in accordance with applicable record retention policies). Hospitals should consider updating their record retention policies to ensure that AI generated board and committee meeting transcripts are considered transitory by the organization.

Relevant Guide to Good Governance, Fourth Edition Form Templates

- *Form 8.15: Meeting Minutes Best Practices*



Tip 6: Use Unanimous Written Resolutions as Needed and Where Appropriate

ONCA provides that certain resolutions signed by all of the directors entitled to vote at a Board meeting or a meeting of a committee of directors is as valid as if it had been passed at an actual meeting. Such a resolution must be unanimous, otherwise a meeting must be held in order to pass the resolution. Careful consideration should be given to the application of conflict of interest requirements in the context of unanimous resolutions. Further, while it depends on the circumstances, it is generally best for non-voting directors (e.g., CEO, Chief of Staff, Chief Nursing Executive) to sign and acknowledge that the resolution has passed, even if they are not voting on the matter. This approach ties corporate law requirements together with governance principles from the Public Hospitals Act to ensure independent directors have sufficient input from ex officio directors. Hospitals are advised to consult their by-laws and policies, as well as legal counsel where necessary, to ensure that ONCA unanimity requirements are fulfilled in a specific context.

ONCA also establishes certain instances in which the use of unanimous written resolutions is not permissible. These include:

- Where statements are given by a director resigning, or opposing their removal, if a meeting is called for the purpose of removal; and
- Where statements are given by an auditor resigning, or opposing their removal, if a meeting is called for the purpose of removal.

In addition, hospitals should carefully consider their by-laws and policies to determine whether meetings are specifically required for certain other matters.

While the best evidentiary basis of approval is for unanimous written resolutions to be signed in wet ink, the *Electronic Commerce Act* allows for email approvals if the approvals are express and clearly respond to the specific resolution in question in the affirmative. Director silence or non-responsiveness to a resolution circulated for unanimous approval does not constitute approval at law. If a resolution is passed unanimously in writing, the resolution, along with all director approvals, should be saved and stored with corporate records, in alignment with minute keeping practices.



Tip 7: Corporate Housekeeping - ONCA Record Keeping and Public Filings

ONCA contains several record creation and retention requirements, including respecting:

- A hospital's articles (letters patent, supplementary letters patent, articles of amendment, amalgamation, continuation etc.)
- Board, board committee, member, and member committee meeting minutes
- Board, board committee, member, and member committee resolutions
- Director consents to act
- Director registers including start and stop dates, addresses for service, and email address if they consented to accept information by electronic means (registers must include names of those who ceased to be directors within the preceding six years)
- Officer registers including start and stop dates, address for service, titles, and email address if they consented to accept information by electronic means (registers must include names of those who ceased to be directors within the preceding six years)
- Member registers including start and stop dates, addresses for service, membership class/group if there is more than one class/group, and email address if they consented to accept information by electronic means (registers must include names of those who ceased to be directors within the preceding six years)
- Financial statements of hospital subsidiaries
- Accounting records adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis
- Registers of ownership interests in land including each property, date acquired/disposed, and copies of deeds/transfers containing specified information

Hospitals must also update the public record in respect of their registered office, directors, and five most senior officers by filing annual notices of change and returns with the Ministry of Public and Business Service Delivery and Procurement, via the Ontario Business Registry (see the OHA's Guide to Statutory Compliance - Public Sector Accountability, Operations and Governance for additional information).

Finally, where a hospital is carrying on business under a name other than their corporate name, business name registrations must also be kept up to date under the Ontario Business Registry, in accordance with the Business Names Act. If a hospital is sued in its business name and that business name is not registered, the hospital cannot defend that claim unless it is granted leave of the court.

For more comprehensive information respecting retention periods for corporate records, see the OHA's Records Retention Toolkit.

Relevant Guide to Good Governance, Fourth Edition Form Templates

- *Form 6.7: Annual Director Declaration and Consent*

Tip 8: Ensure Conflicts of Interest are Appropriately Managed

ONCA outlines specific conflict of interest provisions applicable to directors and officers. Provisions in both instances require disclosure of a conflict where:

- Directors/officers are party to a material contract or transaction or proposed material contract or transaction with the hospital corporation; and/or
- Directors/officers have a material interest in a party to a material contract or transaction or proposed material contract or transaction with the hospital corporation.

Disclosure must include the nature and extent of the conflict.

Under ONCA, conflicted directors must:

- Not attend any part of the meeting where conflict is discussed so as not to influence or take part in any, discussions, deliberations, or decision making; and
- Not vote on any resolution to approve the respective contract or transaction.

When conflicted directors leave the room, meeting quorum floats downward to ensure the meeting remains legally constituted. There are some exceptions to this rule for contracts related to director remuneration, director indemnity and insurance, and contracts with affiliates. Hospitals are advised to consult their by-laws and policies, as well as legal counsel where necessary, to assess the nature and extent of these exemptions.

It is important to note that the hospital sector's approach to conflicts of interest is to impose broader requirements than ONCA (which requires, as outlined above, disclosure of material contracts and transactions). The Guide to Good Governance's Sample Conflict of Interest Policy defines a conflict as any situation where a director's duty to act in the best interest of the corporation is compromised, including actual, perceived, and potential conflicts. The best practice recommendation is that all conflicts of interest are treated in the same manner as under ONCA – whereby a director absents themselves from any discussion, and does not vote.

Relevant Guide to Good Governance, Fourth Edition Form Templates

- *Form 6.2: General Principles Regarding Conflict of Interest*
- *Form 6.3: Sample Board Policy on Conflict of Interest*

Tip 9: Make Use of Board Orientation Best Practice

Board orientation should cover topics that help situate incoming directors within the organization, legal and operational frameworks, existing governance structures and board operation, key stakeholders and relationships, and the broader health sector environment. A series of shorter sessions designed to accomplish these goals (60-90 minutes) will make it easier for directors to digest and assimilate the new information that they are receiving. Facility tours with integrated opportunities to ask questions of department leaders may also assist in engraining knowledge of hospital operations to support organizationally aligned board and committee decision-making.

Hospitals, and the legal and health sector environments around them, are continuously evolving. For this reason, it is key to review and update board orientation materials on an annual basis.

Finally, board orientation should be mandatory for all new directors, and available to all existing directors. As existing directors continue deepening their organizational and hospital governance knowledge, a board orientation refresher often proves to be beneficial. It is also best practice that the board chair, or other senior board member, participate in board orientation to reinforce messaging.

Relevant Guide to Good Governance, Fourth Edition Form Templates

- *Form 7.8: Sample Board Onboarding Topics and Materials*

Tip 10: Support Independent Skills-Based Board Recruitment

Board recruitment processes are vitally important to achieving governance objectives. Boards should focus on recruiting a knowledgeable, skills-based, independent, diverse and qualified board. Directors should be identified through transparent, board-approved selection processes. Such processes should:

- Identify board knowledge gaps
- Seek diversity in experience and perspective
- Consider director self and peer evaluation feedback
- Employ a variety of candidate identification methods (advertising, social media, search protocols beyond networks of current directors)
- Announce vacancies publicly
- Be transparent and publicly disclose processes
- Require application, interview, short listing, assessment against objective criteria, and make candidates subject to background and reference checks

In addition, prospective board candidates should know what is expected of directors including presence, preparation and participation. Hospitals should maintain a roster of candidates who are vetted and qualified to ensure ability to fill vacancies as they may arise on a regular or irregular basis. Finally, hospitals should consider what processes will be followed in the case where the board recommends more candidates than vacancies.

Relevant Guide to Good Governance, Fourth Edition Form Templates

- *Form 7.1: Sample Board of Directors' Knowledge and Experience Matrix and Inventory*
- *Form 7.2: Sample Guides for Director Selection*
- *Forms 7.3 and 7.4: Sample Applications for Board Membership (long and short forms).*
- *Form 7.6: Sample Board of Directors Nominations and Election Policy*
- *Form 7.9: Sample Board Peer Assessment Questionnaire*
- *Form 7.10: Board Evaluation Process Overview*

Additional Resources

Guide to Good Governance, Fourth Edition

Guide to Hospital Statutory Compliance

Record Retention Toolkit

Hospital Prototype Corporate By-law

Prototype Board-Appointed Professional Staff By-law

