This insight will provide an outline of the role of General Counsel (GC), and describe the ways in which a GC can add value to their corporation from the perspective of the board of directors and senior management.

GCs can use this information to help them communicate to their boards and senior management regarding their role in developing and implementing operational, managerial and financial strategies to facilitate good corporate governance.

**What is corporate governance?**

Corporate governance is a corporation’s overarching strategy to promote the sustainable growth of shareholder value while still considering the best interest of other stakeholders (including employees, customers, suppliers and creditors). Good corporate governance requires a system of checks and balances that facilitates accountability among the corporation’s management, business units and board of directors. The GC’s role includes managing the development and maintenance of the relationships between these various corporate stakeholders.

**What is the GC’s role?**

The GC’s main role is to provide legal advice to the corporation; however, the GC often plays other important roles within the corporation as well. These other roles may include:

a. Acting as a business partner and corporate officer of the executive management team;
b. Leading and managing the in-house legal department;
c. Acting as a representative of the corporation when dealing with third parties, including outside counsel; and
d. Being a key negotiator for strategic transactions.

The GC’s involvement in any of these roles will likely depend on the size of the organization. For larger corporations, the GC may play more of a manager/advisor role, whereas GCs in smaller organizations may be required to not only lead, but also do the legal work. Regardless of the size of the corporation, there seems to be a trend towards GCs taking on more roles and providing more significant contributions in each of their roles.

As a result of the many roles the GC may play, conflicts can often arise. This is especially true when the GC has to balance being a member of the corporation, a lawyer to the corporation, and maintain a working relationship with the corporation’s managers. However, an understanding of the GC’s role and obligations can help a lawyer navigate these competing demands and a well-informed GC can actually support and promote good corporate governance.

The GC’s role is continuously evolving and there have been substantial changes in the past 20 years. Specifically, GCs’ scope of responsibility is expanding as they become more integrated with the corporate side of the business. As
a result, the GC’s role has matured from strictly drafting and advising, to a complex and strategic position that requires the GC to consider a wide array of concerns, including business efficacy, when providing advice. As part of the GC’s integration into the business, the GC’s role as an employee and a member of senior management has also been evolving. As an employee, the GC is often required to be a member of, and manage, a corporate team, which requires a distinct set of skills that are not traditionally associated with lawyering. GCs are also often members of senior management. This provides the GC an opportunity to work closely with other senior managers, which can be advantageous for the GC and the corporation, as it allows the lawyer to develop a close working relationship with the other members of senior management, thereby building trust and confidence in the GC’s advice within a corporation’s various business units.

As technology continues to disrupt and reorganize how business is conducted, GCs are also starting to take on an enterprising role in managing their corporation’s external affairs and reputation. Again, this is a shift away from traditional legal work into a role where the GC is heavily involved in developing corporate strategies, and being the driving force behind corporate politics, public affairs, regulatory matters and ethics.

As made apparent above, GCs in Canadian businesses must be legal leaders, motivators and developers of legal talent within their corporation; they must be risk forecasters and managers; they must manage outside counsel in a financially responsible manner; and they must be creative and capable at making due with limited resources. Clearly, the role of GC carries with it a significant amount of responsibility. Unfortunately, it is not always clear.

Who is the GC’s client?

Ultimately, the GC represents the corporation; not the CEO or management. The GC is accountable to the corporation’s shareholders and other stakeholders, represented by the board of directors. While the GC has only one client, he or she must consider a wide array of liabilities, discrete business operations, and all past, present and future projects a corporation undertakes. This requires the GC to demonstrate competence and tenacity in all legal and non-legal contexts. As a result, the GC must possess a skillset that is adaptable and available on short notice to meet the corporation’s needs.

Balancing the interests of the different stakeholders can be challenging. A GC must always strike a balance between two priorities. On the one hand, if a lawyer fails to maintain independence from management, they may feel significant pressure to enable, rather than inhibit, corporate activities. This pressure can cause the GC to fail to advise of legal risks or issues adequately, which may result in the corporation engaging in activities that are counter to its best interest. On the other hand, when the GC does act out its role as the corporation’s voice of query or concern, if not done effectively, it may result in management engendering distrust or skepticism regarding the GC’s values or trustworthiness. This may undermine the GC’s ability to advise the board of what is best for the corporation.

The GC’s role within an organization will affect his or her ability to navigate these competing expectations. For example, including the GC in an executive role or as a business partner may help the GC be more effective at persuading directors to follow his or her advice because the other directors will know that the lawyer is exposed to the same risk of personal liability. However, including the GC in such a role may have the negative effect of increasing the pressure to facilitate corporate actions, when it may not be in the corporation’s best interest, rather than provide impartial advice. Alternatively, excluding the GC from a management role, while encouraging independence, may make gaining the trust of others more difficult.

Managing these competing expectations, while effectively advising the corporation, requires that the GC develop strong and effective relationships within the corporation, by communicating consistently and reliably about relationship boundaries and limitations, as well as highlighting shared interests. By clearly defining the relationships between the GC, the corporation, the board of directors and management from the outset, the GC can simultaneously form strong
relationships with his or her business partners and maintain professional independence as the corporate representative. Specifically, this will require setting out the GC’s role as an agent of the corporation rather than an agent of management, and highlighting shared interests among groups in order to facilitate the ability of all parties to achieve their mandates collaboratively and successfully.

It is important that a GC remains grounded and independent in the face of pressure from the various stakeholders of a corporation. If members within the organization view the legal department as a service to facilitate business, there may be a push to have lawyers report to the business, which is to be avoided. To maintain the independence of lawyers within a corporation, it is helpful to have lawyers report to lawyers and ultimately the GC. Further, when faced with competing demands and other pressures, if a lawyer’s obligations become unclear, a GC can fall back on the professional code of conduct and law society practice advisors for guidance. At all times, GCs should keep professional obligations arising from the code of conduct top of mind when advising the corporation and the various stakeholders within the corporation.

The GC and good governance

A key objective of a corporation is the sustainable and profitable growth of shareholder value and concomitant achievement of its operational, managerial and financial goals. Good governance is essential for achieving these objectives. Below are five ways a GC can support good governance for his or her corporation:

1. Corporate advocate and business advisor:

   **The pros:** This allows the GC to be fully immersed in the corporation’s business and specific transactions from the outset, which offers several advantages in regards to corporate governance. First, it allows the GC to structure business arrangements in ways that are favourable to the corporation’s long-term goals. Second, it allows GCs to be proactive in meeting the corporation’s needs in recruiting legal expertise and other areas. Third, it gives GC the complete context required to provide more meaningful advice that is sensitive to business efficacy concerns.

   **Things to watch out for:** There are some specific pitfalls that GCs should be aware of when they step into the role of corporate advocate and business advisor. GCs must clearly understand where legal advice bifurcates from business advice in order to preserve the protections afforded by solicitor-client privilege. Lawyers must also remain independent and keep their professional obligations at the forefront of their minds even when they are heavily involved in the management of the business.

   **Best practice:** Corporations should establish a standard operating procedure whereby the in-house legal department led by the GC is consulted on all decisions and arrangements that bind the corporation (e.g., contractual relationships, pitches, RFPs, etc.). Legal sign-off should be procured through a formal (but time efficient) process prior to engaging in material business decisions. This standard operating procedure protects communications exchanged between the legal department and management under solicitor-client privilege, without muddying the waters with business advice. In this way, when a GC is consulted on the business aspects of the decision outside of this protocol, everyone can be clearly put on notice that such communications may not be protected by privilege.

2. Director:

   **The pros:** The GC’s job is to provide advice and recommendations on issues engaging corporate interest, and the board’s job is to make decisions based on management inputs, including the advice of the GC. As a representative of the corporation’s stakeholders, the board should have a strong relationship and open communication with the GC,
who is one of the protectors of the corporation’s interests.

**Things to watch out for:** The GC represents the corporation itself, and is accountable to the corporation’s shareholders and stakeholders, ostensibly represented by the board of directors. The board is the GC’s ultimate client, and by sitting on the board, the GC is potentially put in the position of providing legal advice to him or herself.

**Best practice:** The board of directors should establish a standard operating procedure whereby the GC is regularly invited to participate in board meetings, and perhaps responsible for regular reports on material issues. This can be achieved without endowing the GC with official board membership. Facilitating a strong and open relationship between the GC and the board is tantamount to good corporate governance, and having the GC’s input readily available during board meetings may be beneficial. Of equal importance, however, is the maintenance of the GC’s professional independence, which can best be preserved by keeping the GC’s role clearly defined in the column of lawyer and not of client.

### 3. Corporate informant to management and the board:

**The pros:** The GC has a dual-reporting obligation to both the senior management team and the board of directors. Operationally, the GC generally reports to the CEO regularly, and the board of directors in the normal course of the corporation’s policies or when “up-the-ladder” reporting to the highest authority is required in special situations.

**Things to watch out for:** In order for a GC to adequately discharge this duty, he or she must report to management or the board based on the interests of the corporation, and not the personal interests of the corporation’s officers, employees or the lawyer. As a result, the GC may be perceived as an “internal whistleblower” causing other members or groups within the corporation to become reluctant to report issues to the GC for fear of becoming implicated in the problem.

**Best practice:** “Up-the-ladder” reporting protocols should be consistently communicated to fellow employees as a means to solve issues rather than point fingers. This way recognizes the GC as a problem solver and ally, rather than a cop or enforcer. Further, the GC should establish a routine schedule for communication with the CEO, such as in weekly or bi-weekly meetings, and with the board of directors, such as at each board meeting. This makes communications between the GC, and senior directors and officers routine and expected, and therefore, less likely to feed management anxiety or alarm. Additionally, management and the board can establish a communication protocol, which everyone understands and is aware of, for the GC to communicate immediately “up-the-ladder” in the case of emergencies or special situations.

### 4. Corporate secretary:

**The pros:** The role of corporate secretary is a natural fit for the GC, as it puts the corporation’s top lawyer in a position of advising the directors on discharging their duties under the law and ensuring the corporate record reflects the steps taken to do so.

**Things to watch out for:** Meeting minutes from board meetings may be producible by court order in a proceeding involving the corporation, and can serve as evidence of what transpired and the board’s deliberations. When recorded properly, board minutes may provide evidence that the board explored reasonable alternatives and discharged their duties appropriately, however, inadequate minutes can be problematic for members of the board.

**Best practice:** Board meeting minutes are critically important, and as a bare minimum, the GC should prepare the
minutes or supervise the process to ensure they are consistently prepared from meeting to meeting, and contain an appropriate level of detail.

5. Corporate ethicist:

The pros: A Corporate Social Responsibility (CSR) initiative or program helps a corporation strive for social accountability to various stakeholders, including the public, and takes into consideration the corporation’s impact on all aspects of society. This includes weighing the net impact on the economy, environment and community. As a member of a profession governed by a stringent ethical code of conduct, the GC is the requisite champion of the corporation’s ethical conscience, and is, therefore, in an excellent position to be the primary CSR advisor to the board and the executive leadership team. This, combined with the GC’s unique ability to traverse the business-law spectrum, enables the GC to understand all the entity’s legal demands and resources, making the role of corporate ethicist a natural fit for any GC.

Things to watch out for: As mentioned, GCs are increasingly taking on more substantive roles within their corporations. A GC who is already stretched thin should not take on too much additional responsibility without adequate staffing arrangements.

Best practice: The GC should assist the board and senior management team in identifying core ethical values of the corporation, and establish themselves as the lead ethical advisor to assist in creating an ethical environment for all of a corporation’s business dealings, both internally and externally (with employees/management/contractors/etc.).

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