

Standing Committee on Public Accounts

First Report 2004

Governance

1. Governance refers to the decision-making structure of an organization: who gets to make what decisions and how different decision-makers interact with, and report to, others inside and outside that organization.

2. All the entities covered by this report were created by legislation to exist at arm's length from government. 'Arm's length' means that although all the entities examined in this report are ultimately responsible to a minister of the Yukon Government, an appointed board of directors and a president or chief executive officer are responsible for the day to day operations of that entity. The Commissioner in Executive Council, the Cabinet, appoints the board members.

3. Pursuant to Section 4 of the *Corporate Governance Act*, the minister responsible can also provide direction to the boards of the Yukon Development Corporation, the Yukon Housing Corporation and the Yukon Liquor Corporation through directives and an annual protocol agreement. Section 4(2) says, "the Minister and the government corporation shall negotiate annually a protocol about performance expectations for the corporation to meet and roles of the Minister, board, and president, respectively, in the work of the corporation; the protocol becomes effective when agreed to by the Minister and the corporation." There is no requirement that these protocols be made public.

4. Of some note regarding governance are the roles of the minister responsible for the Yukon Liquor Corporation and the board of directors of the Yukon Liquor Board. The president of the corporation informed the Committee that "The minister...is specifically excluded in the legislation from matters relating to authorization of licenses." Similarly, the board's primary role "is in matters of licensing and appeals, as opposed to operations."¹ In this sense the board of directors does not govern that corporation in a manner similar to that of the other boards discussed in this report.

5. The Public Accounts Committee appreciates that all the entities examined in this report are somewhat different from one another and, consequently, their governance structures are different. The methods of representation on boards of directors in some cases reflect sectoral stakeholders, in others the general public. The Committee respects the fact that these differences reflect the different purposes, natures and mandates of these entities.

¹ Transcript of Public Accounts Committee public hearings, February 5, 2004, page 3-2.

6. Nonetheless, all these entities should strive for a clear governance structure where lines of authority and reporting are obvious. The Committee notes that the Yukon Development Corporation is currently re-evaluating its governance structure with an eye towards clarity.

7. The Committee believes public discussion should be a fundamental aspect of any review of governance models. This would ensure that any changes would be thoroughly debated and widely understood. Through such discussion it should be made clear to the public how decisions are made and how these entities expect to account to the public. Such public discussion would also be an exercise in accountability, which in and of itself, should be a goal of any governance model.

Criteria for appointment

8. The criteria for appointment to a board of directors, as laid out in the legislation establishing an entity, rarely speak to specific skills, knowledge or experience required of a board member. Legislation describes the governing board in terms of the number of members and that there is to be a chair, vice-chair, etc. The *Housing Corporation Act* and the *Liquor Act* don't address the composition of board membership in any greater detail. Other Acts do.

9. Some Acts establish a board composed of a demographic cross-section of Yukoners, though some are broader than others. Section 9(2) of the *Yukon Development Corporation Act* stipulates that members are to be appointed "in a manner consistent with the Umbrella Final Agreement (UFA)." Section 22.6.2 of the UFA requires the Yukon "ensure that the Board of Directors of the Yukon Development Corporation is generally representative of the Yukon population" though this is not defined in any more detail. Section 22.6.3 of the UFA requires the Yukon to "make best efforts to structure the Board of Directors of the Yukon Energy Corporation so that at least one-quarter of the directors are Yukon Indian People." During the public hearings, the Chair of the Yukon Development Corporation told the Committee that the boards of directors of the Yukon Development Corporation, the Yukon Energy Corporation and the Energy Solutions Centre Inc. are the same people.²

10. Section 5 of the *Hospital Act* also looks for a demographic cross-section of Yukoners. It therefore requires that the Yukon Hospital Corporation board of directors achieve gender parity and be composed of members nominated by Yukon First Nations, communities other than Whitehorse, the Council of Yukon First Nations, the City of Whitehorse, medical staff, non-medical staff, the public at large and the Yukon public service.

11. Section 6(1) of the *Yukon College Act* requires the Cabinet to appoint individuals "so as to achieve on the board equitable representation of the

² Transcript of Public Accounts Committee public hearings, February 4, 2004, page 2-9.

diversity of educational groups and interests in the Yukon.” The Act then mentions specific groups that must be represented on the board, including Yukon First Nations, community campus committees, college students, and college employees.

12. The *Workers’ Compensation Act* provides that the Workers’ Compensation Health and Safety Board be composed of those stakeholders most affected by the Board’s operations. Section 106(1)(b) requires “an equal number of members representative of employers and workers” be appointed. As far as required knowledge is concerned Section 106(9) requires “that (board) members be familiar with the purpose and objectives of the compensation system under this Act.”

13. The Committee respects the differences in models of representation. The Committee also respects the fact that, to a greater or lesser extent, the representation on boards is designed specifically to include members of the public who are not specialists in the field of endeavour in which the entity is engaged.

14. However, the Committee believes all the entities covered by this report should consider the demands on board members and the skill sets required for them to do their job. This observation is not a criticism of current board members. Nor is it meant to suggest that those who nominate or appoint members ignore skills, knowledge and expertise during the selection process. It recognizes that governance has become more complex and it may be time to re-evaluate the criteria for appointment.

15. Given that board members are Cabinet appointees, some of the responsibility for re-assessing the criteria for appointment rests with the Cabinet. However, the Committee believes the Cabinet should consult with boards of directors and the public before any change is made in this regard.

Recommendation #1: That the Cabinet, in consultation with the boards of directors and the general public, review the criteria for appointment to these boards of directors.

Method of appointment

16. The Public Accounts Committee also considered the method by which individuals are appointed to these boards of directors. Of particular concern was the method of appointing the chairs of the boards of directors and the president or chief executive officer of the entities in question.

17. The Committee notes that other governments – Canada, New Brunswick, Nova Scotia, Ontario and Quebec – have moved, to a greater or lesser extent, toward involving parliamentary committees in the processes by which individuals

are nominated and/or appointed to entities analogous to those examined in this report.

18. The current process of having individuals responsible to the minister that appointed them may be viewed as part of the accountability process. However, the Committee believes accountability can be maintained by the minister's ability to issue directives or orders-in-council to direct these individuals where that is appropriate.

19. The Committee notes that Standing Order 45 of the *Standing Orders of the Yukon Legislative Assembly* allows for the establishment of a Standing Committee on Appointments to Major Government Boards and Committees. If established, this committee could, "review nominations and recommend appointments to...(the) Yukon Development Corporation Board of Directors...(the) Yukon Energy Corporation Board of Directors...(the) Yukon Workers' Compensation Health and Safety Board...(and the) Yukon Lotteries Commission." Standing Order 45 also allows that the Standing Committee could "review other appointments proposed by the Executive Council that are referred to it by the Executive Council."

20. The Standing Orders could be changed to allow the Standing Committee to review all the kinds of appointments discussed here.

21. It should be noted that the power of the Standing Committee, as envisioned by the current Standing Orders, is to review nominations. The power to nominate and the power to appoint still rest with the Cabinet.

22. Further, the Committee believes such appointments should be made based on a clear and established set of qualifications. Standing Committee review of nominations could help ensure that the best-qualified candidates are appointed.

23. The Committee wishes to emphasize that the desire for a new appointment process is not a reflection on the current board chairs and operational heads of these entities. It is merely a means of enhancing accountability, public input and public confidence in these entities.

Recommendation #2: That the Cabinet review the method of appointment of the chairs of the governing boards and the operational heads of these entities.

Recommendation #3: That the Legislative Assembly consider establishing a Standing Committee on Appointments to Major Government Boards and Committees.

Training of board members

24. As legislation does not require that board members be recruited based on skill sets, knowledge bases or governance experience, consideration should be given to the amount and kind of training they receive once appointed. The evidence given to the Committee indicates that some entities are providing more training than others are. For example, the Yukon Hospital Corporation has an annual process where a professional is brought in to provide “governance process coaching.” This individual provides one or two days of training each year. The Yukon Hospital Corporation also takes “that opportunity to invite other organizations in Whitehorse or in the Yukon to actually join us in that training.” The Committee was informed that individuals from Yukon College had participated in these training opportunities. Yukon Hospital Corporation also has a training manual for board members. In this way, Yukon Hospital Corporation feels it is “providing training to previous, current and new board members.”³

25. One specific issue of concern to the Public Accounts Committee is the information and training board members receive regarding any financial liability they may have for the operations of their entity. During the public hearings the Committee was informed that there has not “been significant training on director liability” and that the issue “isn’t covered specifically” during the training sessions for new Yukon Housing Corporation board members.⁴ There was recognition that the corporation “should probably include a component of that in (its) upcoming board training sessions.”⁵

26. The Committee acknowledges that certain elements of training will be specific to each entity. Nonetheless, there are elements common to governance of all these entities. Joint training sessions could be fertile ground for sharing best practices, economizing on the cost of training, and allowing board members to become familiar with the operations of other, similar, boards.

Recommendation #4: That the entities examined in this report confer on best practices for the training of board members; and that training regarding the potential financial liability of board members be a part of that process.

Performance accountability processes

27. In its investigation the Committee observed a variety of mechanisms used by these entities to outline, measure and report on their performance. There are various ‘benchmarking’ criteria, business plans, strategic plans, work plans, and one-year operational plans, to name a few.

³ Transcript of Public Accounts Committee public hearings, February 5, 2004, page 3-9.

⁴ Transcript of Public Accounts Committee public hearings, February 3, 2004, page 1-11.

⁵ Transcript of Public Accounts Committee public hearings, February 3, 2004, page 1-12.

28. While there is some commonality among them, the entities pursue a wide variety of approaches. Some entities use a number of accountability mechanisms, others use fewer. In some cases the results are easily measurable. In other cases they are not.

29. Some of the entities hold annual public meetings. The Committee believes such meetings are a vital part of the accountability process and can help ensure public confidence in the manner in which the entities are being governed. The Committee commends those entities that hold annual public meetings and would encourage the others to use this accountability mechanism as well.

30. The fact that entities have different reporting and accountability mechanisms is not, in and of itself, problematic. Given the different natures of the entities, there may be very good reasons for this variety.

31. However, one question raised – regardless of the type of mechanism used – is the degree to which these measurements genuinely reflect the entity's performance. Of particular concern is how these entities can know, with reasonable certainty, that they are fulfilling their mandate.

32. Part of the problem is with articulating measurable outcomes, and measuring them. For example, Section 4(2) of the *Housing Corporation Act* establishes six objectives for the Corporation. During the public hearings the President of the Corporation was asked if the Corporation was able to accomplish these objectives. He replied that, "It's always rather difficult to say to what extent one fully meets the objectives when they are not articulated in such a way that they are clearly measurable."⁶

33. Similarly, the Chair of the Yukon Development Corporation informed the Committee that the Corporation has objectives. However he does not "think they're really good performance measurements. They're not as broad or detailed as they should be."⁷

34. The Committee views this as problematic. While it may be that certain outcomes are difficult to evaluate using quantitative data, it should not be the case that criteria are, as a rule, not clearly measurable.

35. All entities should have clear performance measurements regarding objectives and identification of key performance indicators to measure how effectively and efficiently each objective is met. The goal should be to establish clear performance measurement tools that can be used to demonstrate the accomplishment of the organization's objectives.

⁶ Transcript of Public Accounts Committee public hearings, February 3, 2004, page 1-2.

⁷ Transcript of Public Accounts Committee public hearings, February 4, 2004, page 2-7.

Recommendation #5: That the planning and accountability documents employed by the entities examined in this report contain performance measures and expectations and that the plans be tabled in the Legislative Assembly annually.

36. The Committee notes that Part X of the Government of Canada's *Financial Administration Act* addresses Crown corporations in terms of requiring that these entities table corporate plans and establish audit committees. There is nothing analogous in Yukon's *Financial Administration Act* regarding the operations of the entities examined in this report.

Recommendation #6: That the Cabinet review the *Financial Administration Act* and consider amending it to incorporate requirements similar to those applicable to Crown corporations found in the federal *Financial Administration Act*.

The evolution of the mandate (mandate 'creep')

37. Each entity has a mandate. This is enumerated in the enabling legislation for the entity as the 'object' of the entity. These objects tend to be worded rather broadly. The legislation establishing these entities also gives them certain powers so that the mandate can be realized. Pursuant to the legislated objects and powers, entities can also develop mission or vision statements that articulate their mandate more specifically.

38. An example of a broad mandate is that of Yukon College. Section 3 of the *Yukon College Act* says, "The objects of the College are to provide educational programs, services and activities to meet the needs of people in the Yukon." Given that the educational needs of Yukoners are constantly changing, such a broad mandate is an asset but also, potentially, a liability.

39. A broad mandate is an asset where it allows an entity to adapt to changing circumstances. A mandate becomes a liability to an entity where it is so broadly worded that it excludes little. In such cases, an entity may find itself being pulled in various directions by interested parties who can visualize any project complying with the entity's mandate. This can also become a problem for the minister responsible and the Legislative Assembly because it becomes difficult to provide direction where almost nothing is outside an entity's mandate.

40. During the public hearings, the chair of the Yukon Development Corporation told the committee that he was "concerned about the fact that (the Corporation) "may have too many things going on on too many fronts with not enough focused effort."⁸ It may be that a more focused mandate could help the entity focus its efforts.

⁸ Transcript of Public Accounts Committee public hearings, February 4, 2004, page 2-4.

41. This raises the issue the ability of entities to re-focus their mandate. The president of the Yukon Housing Corporation told the Committee that, “The benchmarking that (Yukon Housing Corporation does) is not so much used to establish whether or not the program is still required; (it)...is more used to determine if we are operating or running the programs in an efficient and effective way.”⁹ Ensuring efficiency and effectiveness is essential. However this comment raises the question of how the Yukon Housing Corporation, or other entities, determines whether certain programs or activities are still necessary or should be eliminated.

42. Of interest, therefore, are the decisions taken by entities with regard to how they fulfil their mandate and the extent to which government is, or should be, involved in this evolution. For example, during the public hearings the President of the Yukon Housing Corporation indicated that social housing was one of the Corporation’s core programs. At the same time, he indicated that this is the Corporation’s “most expensive program.” As a result, the Corporation has initiated other programs – such as a focus on affordable housing - “intended to reduce the need for social housing and to keep (its) focus on less expensive options.”¹⁰

43. The decision to concentrate on reducing the need for social housing, as opposed to meeting the need as it exists, is a significant one given the importance of social housing to the Corporation’s mandate. It does not appear that this way of implementing the mandate regarding social housing is the result of ministerial direction. Given the broad mandate of the Corporation, it is not clear that ministerial direction is required for the Corporation to make such decisions.

44. This raises the question whether, or to what extent, significant shifts in the way a mandate is fulfilled require ministerial direction and to what extent these decisions should be left to the board of directors or the president or chief executive officer of the entity.

45. Generally, then, the Committee’s concern is the degree to which mandates can, over time, grow past those originally envisioned when the entities were established. This tendency is sometimes referred to as ‘mandate creep.’ This growth may occur in response to legitimate demands. Nonetheless, it is worth asking whether entities are operating as efficiently as they could because they are being asked to do more than they were originally intended to do. If so, it may be appropriate for the minister responsible to work with boards of directors or operational heads to help entities curtail or re-focus their activities.

46. The Committee observed, through written submissions and the public hearings, that it is not unusual for their operations to expand within the context of

⁹ Transcript of Public Accounts Committee public hearings, February 3, 2004, page 1-3.

¹⁰ Transcript of Public Accounts Committee public hearings, February 3, 2004, page 1-3.

a rather generalized legislated mandate. However, the Committee has a different concern about the Yukon Lottery Commission. Specifically, the Committee is concerned that the Lottery Commission is operating beyond the legislation that establishes its mandate.

47. This concern emanates from the written submission of the Yukon Liquor Corporation. Among other things, this submission lists the objectives for the Liquor Corporation and the Lottery Commission that augment the legislated mandate.

48. In discussing the evolution of the Yukon Lottery Commission, the submission states that this has occurred “in accordance with changes in public lottery regimes and practices across the country. Its presence in the territory has expanded, especially as a fund source for community groups. As such **the Public Lotteries Act does not fully encompass current operations.**”¹¹ (emphasis added)

49. The meaning of this statement is not clear from the text. Subsequent to the public hearings the Committee received a clarification on this matter. The Committee was assured that the Lottery Commission is operating within the scope of the Act. Nonetheless, it was acknowledged that the Act does not appear to contemplate the Commission controlling the distribution of lottery tickets and managing the payment of large volumes of expenditure from the revenues generated. The requirements to administer expanded lottery business operations and to manage the use and distribution of the funds effectively has changed the role and associated resource needs of the Commission. The Committee is further assured that the Commission has recognized this ambiguity between the legislated and operating frameworks.

50. This recognition notwithstanding, the current situation appears inappropriate. It appears necessary to harmonize the legislated mandate and the current operating framework. Assuming the Cabinet is satisfied with the current operations of the Lottery Commission, this may require a change to the legislation or regulations that establish the Commission’s mandate.

Recommendation #7: That the Cabinet, the Yukon Legislative Assembly and the heads of the entities examined in this report establish a process to evaluate mandates and consult with the Yukon public in doing so.

Relationship with the Legislative Assembly

51. All the entities covered by this report are accountable to the Legislative Assembly. The Committee has concerns about the nature and quality of this accountability. At the same time, the Committee recognizes that changing the

¹¹ Yukon Liquor Corporation, Written Submission to the Standing Committee on Public Accounts, January 23, 2004, page 3.

nature and improving the quality of accountability is, to a great extent, up to the Legislative Assembly itself.

Indirect accountability

52. In most cases, entity accountability to the Legislative Assembly is done through the minister responsible for the entity and the tabling of its annual report. This is what is meant by indirect accountability.

53. As mentioned, all the entities covered by this report are responsible to a minister of the Yukon Government. These ministers exercise their responsibility to the Legislative Assembly by answering questions regarding the entity's activities and presenting and defending the departmental or corporate estimates during budget debate.

54. Ministers have some power to direct the operations of some entities. Section 4(1) of the *Corporate Governance Act* gives the Cabinet the power to "issue directives to (the Yukon Housing Corporation, the Yukon Liquor Corporation and the Yukon Development Corporation) with respect to the exercise of the powers and functions of the corporation." Section 4(2) says, "the Minister and the government corporation shall negotiate annually a protocol about performance expectations for the corporation to meet and roles of the Minister, board, and president, respectively, in the work of the corporation; the protocol becomes effective when agreed to by the Minister and the corporation."

55. During the public hearings, the Committee learned that some of these entities are still without protocols. Given the potential importance of the protocols and the legislative requirement the Committee makes the following recommendation:

Recommendation #8: That the ministers responsible for the Yukon Housing Corporation, the Yukon Liquor Corporation and the Yukon Development Corporation ensure that protocols are negotiated annually, as per Section 4(2) of the *Corporate Governance Act*.

56. Each entity issues one or more annual reports that are tabled in the Legislative Assembly by the minister responsible for the entity. In many cases, the entity's enabling legislation requires this tabling.

57. The Committee is concerned that, in some cases, the annual reports are not as effective an accountability mechanism as they could be. The Committee would like to see more substantive evaluations of entity performance. This relates to previous observations (see Recommendation #4) about performance measures. These must be developed, measured and reported upon in the annual report.

Direct accountability

58. Direct accountability occurs when board members and/or the operational heads of the entities appear before the Legislative Assembly or one of its committees. The Public Accounts Committee process is one example of direct accountability. The appearance of witnesses in Committee of the Whole is another. Direct accountability occurs less frequently than indirect accountability. However, the Legislative Assembly and its committees have a direct hand in increasing this frequency.

59. Whereas indirect accountability is legislated to a degree - specifically as regards the tabling of annual reports - direct accountability rarely is. Section 109 of the *Workers' Compensation Act* requires that "The chair of the board and the president appear annually before the Legislative Assembly." However, this power is exercised at the discretion of the Legislative Assembly. The Assembly and its committees control who appears before them and how often witnesses appear. Should Members of the Legislative Assembly desire more direct accountability, they have the authority to make this happen.

60. One gap in direct accountability has been the inactivity of the Public Accounts Committee since the early 1990s. If the mandates of these entities have not been reviewed in a long time, this may be partially due to the fact that the Public Accounts Committee has not examined their operations since the 1980s.

61. The Committee's intention is that the public hearings and the subsequent report will re-establish the Public Accounts Committee as a permanent part of the accountability landscape.

62. While acknowledging its own role regarding these entities the Committee would also state that the Legislative Assembly needs to do more to ensure accountability. The mandate of the Public Accounts Committee is broader than these entities – it includes government departments.

63. During the public hearings, the Chair of the Yukon Development Corporation mentioned that the Legislative Assembly of British Columbia has a Standing Committee on Crown Corporations.¹² If the Yukon Legislative Assembly were to establish such a committee, it could provide on-going scrutiny to a degree the Public Accounts Committee cannot. This would be an advantage to the Legislative Assembly, the entities and the public. The Committee believes the Legislative Assembly should give consideration, through the Standing Committee on Rules, Elections and Privileges, to establishing a standing committee devoted specifically to the operations of these entities and any similar entities that may be established in the future.

¹² Transcript of Public Accounts Committee public hearings, February 4, 2004, page 2-2.

64. Another option would be for the Assembly to set aside time during its Spring and Fall Sittings so that board chairs and operational heads of entities could appear in Committee of the Whole on a more regular basis than is now the case. Other procedural options could also be developed.

Recommendation #9: That the Legislative Assembly find an acceptable method to ensure a higher level of accountability for the entities examined in this report takes place on a more regular basis.

Do these entities need to exist as they are currently set up?

65. The mandate of the Public Accounts Committee is accountability. It extends to all matters of government operations mentioned in the Yukon's Public Accounts.

66. The consideration of the above issues leads to the question of whether these entities need to exist as they are currently set up, or whether some other form, mandate, accountability mechanism or relationship to the Legislative Assembly is preferable. The Assembly created many of these entities some years ago. It is worth re-visiting the rationale for establishing the entities in the current climate, as opposed to the one that existed when they were established.

67. One of the difficulties in the current make up of the entities covered by this report has to do with their very nature. These entities were established in the way they were so as to operate at arm's length from government. Nonetheless, a government minister is responsible to the Legislative Assembly, and Yukoners generally, to account for the activities of that entity.

68. In certain circumstances, however, ministers are held to account for decisions they did not make and, given the independence of governing boards, should not be attempting to influence. This raises serious questions as to how elected Cabinet ministers can be fully accountable to the Legislative Assembly and to Yukoners for these entities.

69. It would be presumptuous of the Public Accounts Committee to make detailed and sweeping recommendations regarding the operations of these entities based only on the written submissions received and the few hours of public hearings. It is for that reason that the Committee's recommendations are more suggestive than prescriptive. Nonetheless, the Committee believes it has identified issues that should be of concern to the entities, the Cabinet, the Legislative Assembly and the Yukon public. These are issues that should be thought about, discussed and acted upon where necessary.