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Corporate governance in transition

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In corporate governance, 2021 was characterized by continued use of virtual meetings, a rapid acceleration in the importance of environmental, social and governance (ESG) issues, an ongoing search for new tools and guidance for corporate governance, and a renewed focus on dual class share structures.

Virtual meetings are here to stay

In the second proxy season held during the COVID-19 pandemic, virtual shareholder meetings remained the preferred choice for the majority of Canadian issuers. Further detail is included in our Osler Update, The 2021 proxy season in review. Technical issues encountered during the initial rush to virtual shareholder meetings in 2020 were largely absent. Many issuers improved their disclosure regarding the mechanics of registering to access and vote at the meeting and to pose questions to be addressed at the meeting.

The provinces of Alberta, B.C. and Ontario modified their corporate statutes to permit the use of virtual meetings without any legislative impediment. However, the *Canada Business Corporations Act* and the corporate legislation in several other provincial jurisdictions still include the problematic requirement that attendees be able to communicate with each other, and not just with the chair of the meeting.

ESG on the agenda

ESG considerations became a strong focus of discussion among boards, management and investors in 2021.

Over the course of the year, several developments related to climate issues accelerated interest in the topic:

- proposed new requirements for disclosure in compliance with the Task Force on Climate-related Financial Disclosure in New Zealand and the U.K., as well as for those seeking to access the Large Enterprise Financing Facility in Canada
- adoption of “say on climate” shareholder votes at a number of companies internationally
- announcements about the proposed divestiture of carbon-intensive businesses by institutional investors
- proposed new disclosure requirements issued by the Canadian Securities Administrators in October 2020

The push for increased diversity on boards and senior leadership continued. As described in more detail in our seventh annual *Diversity Disclosure Report*, Canadian boards continued to add more women directors. Female directors now hold 23.4% of board seats among all TSX-listed companies and 31.5% of board seats among the S&P/TSX Composite Index companies, just slightly below comparable measures in the U.K. and Australia.

CBCA public companies improved compliance with requirements to provide disclosure regarding the representation of women, visible minorities, Aboriginal peoples and persons with a disability.

In the U.S., Nasdaq adopted bold new requirements to provide disclosure regarding the representation of women and other underrepresented groups. A breakdown must be provided of the number of directors who are African American or Black, Alaskan Native or Native American, Asian, Hispanic or Latinx, Native Hawaiian or Pacific Islander, White, two or more races or ethnicities, and LGBTQ+. In addition, most Nasdaq issuers, including Canadian issuers listed on Nasdaq, will be required to include at least two diverse directors, at least one of whom must be female, on their board or publicly disclose why they do not. Further detail is provided in our Osler Update, Nasdaq's new progressive board diversity listing requirement.

Investor interest in ESG matters has prompted increased fund flows into investments that have an ESG focus, encouraging more issuers to begin, or enhance the rigour of, their voluntary ESG reporting. Issuers also began including more detail regarding board oversight of ESG matters in their proxy materials.

Additional detail is included in our article, People, Planet and Performance: Embracing ESG.

Reports on corporate governance

Early in 2021, several reports advising on corporate governance matters were issued, reflecting a strong interest in enhancing governance practices in Canada:

- In November 2020, the Lambay Group issued the report *High Performance in the Boardroom*, authored by Tony Gaffney with Katie Taylor as lead advisor. The report reflects the results of a series of interviews with experienced Canadian directors conducted from late 2019 through 2020. It distills the sometimes-conflicting views of leading corporate directors on how boards can perform better in a time of accelerating change.
- As discussed in our article, Progressive changes in a historic year for capital markets activity, the final report of the Capital Markets Modernization Taskforce was issued in January 2021. The final report recommendations on corporate governance matters were substantially the same as proposed in the earlier consultation draft. The recommendations include proposals to require TSX-listed companies to set targets and provide disclosure of the representation of women and Black, Indigenous and people of colour (BIPOC) on boards and in executive officer positions. These recommendations include possible targets of 40% women and 20% BIPOC, and propose a 12-year maximum tenure limit for directors (15 for the board chair). Other recommendations in the final report include
    - with respect to proxy advisory firms, an opportunity for issuers to "rebut" conclusions made in the reports of such firms
    - a reduction of the threshold for early warning reports to 5% from 10%

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- mandatory annual “say on pay” votes for all issuers
- increased ESG reporting requirements
- a requirement for the use of a universal proxy
- the ability of the Ontario Securities Commission to provide its views with respect to issuers seeking to exclude shareholder proposals in proxy materials
- rules to prevent over-voting and to permit issuers to obtain the identities and shareholdings of beneficial owners who object to such disclosure

- In February 2021, Peter Dey and Sara Kaplan issued their report *360° Governance: Where are the Directors in a World in Crisis?* The authors sought input from a diverse advisory board of directors and governance advisors and academics. In summary, the report concludes that court decisions issued since 1994, when the seminal corporate governance report *Where Were the Directors?* was issued by TSX Committee on Corporate Governance chaired by Peter Dey (and supported by Osler, Hoskin & Harcourt LLP), have “underlined the legal shift from shareholder primacy to stakeholder primacy.” The report proposed 13 new guidelines to enhance corporate governance practices in addressing stakeholder impacts including recommendations relating to corporate purpose, the board’s consideration of stakeholder interests, director tenure, diversity at the board and senior leadership levels and in the workforce more generally, fostering by the corporation of relationships with Indigenous peoples and the disclosure and oversight of climate change-related matters.

Dual class share structures attract more attention

Dual class share structures have a long history in North American markets and have proven to be an enduring and popular feature of many recent initial public offerings. Dual class share structures enable significant shareholders to maintain control despite the disproportionate economic interest held by public shareholders. They also help insulate the public corporation against the vagaries of the market for control. Some issuers balance the structure by ensuring that the secondary class is entitled to elect a specified number of directors. In most cases, however, the significant shareholders retain the ability to replace the entire board through a separate class of voting shares or multiple voting shares.

The reality of dual class share structures became starkly apparent in 2021 when a boardroom dispute at Rogers Communications Inc. became a very public battle for control. Edward Rogers, as Chair of the Rogers Family Trust, which holds 97.5% of the company’s voting class A shares, signed a consent resolution to replace five directors on the board of directors. He was able to do so without convening a shareholder meeting or conducting a vote by shareholders.

The ability to effect a change of this nature by written resolution is a unique feature of the corporate statute in British Columbia. This was the first time in Canada that a consent resolution was used to remove and replace the directors of a publicly traded company. A B.C. Supreme Court judge ruled that the consent resolution was valid, effective and binding as of the date it was signed.

Since the decision, much attention has been given to the propriety of dual class share structures that permit controlled companies to access Canadian public markets when shareholders other than the controlling shareholder have no participation in the process by which directors are chosen.

Where do we go from here?

As Canadian business begins to return gradually to normal, we expect there to be continued focus on ESG considerations and increasing demands for greater regulation to address perceived deficiencies in standards of practice.