On Board WITH DIVERSITY

As companies are required to disclose the gender diversity of their boards, in-house counsel can play a leading role

BY BEV CLINE • ILLUSTRATION BY ANDRÉ DA LOBA

ON INTERNATIONAL WOMEN'S DAY THIS YEAR, once again marchers celebrated the strides women have made toward gender parity yet voiced their concerns for the barriers yet to be broken. Although there was much solidarity, the day also highlighted divergent global approaches toward advancing women's issues.

For example, in many countries there is a push to achieve gender parity on the boards of publicly traded companies. A 2015 survey for the Canadian Board Diversity Council reveals that although more women than ever are serving on boards, they presently hold only 19.5 per cent of FP500 board seats. But how to achieve this result is hotly debated and in some cases, controversial. Should this parity be achieved through a disclosure approach or through a legislated change that features a quota system?

The often highly vocal arguments for and against various approaches are no surprise to Osgoode Hall Law School Professor Aaron Dhir, author of *Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity,* published by Cambridge University Press in 2015. His book is published at a time, says Professor Dhir, when "policymakers around the world are wrestling with difficult questions that lie at the intersection of market activity and social identity politics."

Here in Canada, in September 2015, the OSC and regulators from a number of other provinces released the results of their staff review of more than 700 TSX-listed issuers' compliance with the amendments to National Instrument 58-101, *Disclosure of Corporate Governance Practices*, implemented on December 31, 2014. The amendments, says Professor Dhir, "require firms to publicly

report on a range of gender-related corporate governance practices on a comply-or-explain basis."

The results, he adds, "can be seen as quite disappointing, given, for example, that 65 per cent of issuers did not adopt a written policy on the representation of women on boards." However, he says, this is a kind of disclosure that "is new and still in its infancy; the information that it requires is of a type that corporate Canada is unaccustomed to having to produce and the rule is causing firms to develop a vocabulary of diversity — an important first step."

VETA RICHARDSON
> ASSOCIATION OF CORPORATE COUNSEL

> I know of many instances of general counsel, including a lot of minorities and women, who have been selected to be on corporate boards; they are being recognized as good corporate strategic executives and therefore have the skill set, the leadership ability, and the broad picture to be able to serve on another organization's corporate board.

But what National Instrument 58-101 does, and its greatest benefit, says Andrew MacDougall, a partner with Osler, Hoskin & Harcourt LLP in Toronto, is cause a conversation to happen at the board level that in the vast majority of companies, particularly smaller issuers, was just not happening. He likens it to the impact of the Dey Report proposals on corporate governance that introduced disclosure based on a comply-or-explain regime, which brought governance to the board for discussion.

"Prior to last year's proxy season, there wasn't a reason you could point to for bringing the diversity issue to the board. So it was very difficult for in-house counsel, even in-house counsel who had the issue of board diversity on their radar, to bring it forward to the board to get the discussion flowing," says MacDougall.

Post-proposal, MacDougall says the nature of his conversations with in-house counsel has changed dramatically; "it used to be 'we know we have to improve the diversity on our board,' so the discussion was about ways to introduce the topic. Now it's veered to 'here is the list of things the directors need to turn their minds to so that you can have a meaningful discussion and report to shareholders on the gender diversity of the board.'"

Yet the challenge, says Jennifer Longhurst, a Toronto-based partner with Davies Ward Phillips & Vineberg LLP, is to ensure the dialogue going on at the board level focuses on how diversity matters for that specific organization. "Initially, in part due to the short time frame for the first proxy year disclosure, there was a tendency for companies to say, and I did get this request, 'can you give me a boilerplate policy?'"

This approach, Longhurst says, is wrought with pitfalls. "You should really be asking 'what are the diversity criteria

ILLUSTRATION BY ANDRÉ DA LOBA

that really matter to us? Where does diversity add value for our organization?' Because for different organizations, in different industries, operating in different communities, with different stakeholders, the answer may be very different."

Now, given time since the first disclosure year, a lot of the companies Longhurst works with are having extensive dialogues and putting together and/or implementing actionable plans to make improvements in diversity at "all" levels of their organization. "They're asking, 'how are we recruiting? Where do we go to participate in women's organizations? How are we deciding who gets selected for our management program? And how can we provide greater transparency in our disclosures about the company's diversity efforts?'"

Stakeholders are watching

The UK experience could be seen to foreshadow how stakeholders will be watching and influencing the way companies in Canada consider the diversity of their boards and senior executives.

Chris Pearson, a partner with Norton Rose Fulbright LLP in London, UK, says businesses have embraced the voluntary, "soft" comply-or-explain approach taken by the government toward increasing the number of women on corporate boards and in senior positions. In fact, the number of women in these positions among FTSE 100 companies has steadily climbed since the initial review by Lord Davies in 2010, as seen in his subsequent annual progress reviews.

"There was a lot of thought by the government as to the approach, effectively the decision was taken to use the concept of peer pressure to try to encourage change to achieve what people generally accepted was a desired result, with the clear understanding that if there wasn't change, something would be done about it," says Pearson.

JENNIFER LONGHURST
> DAVIES WARD PHILLIPS & VINEBERG LLP

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He says a number of things happened simultaneously: there was a lot of peer pressure from very senior industry people who put their weight behind the initiative; mandated changes in disclosure rules in the Corporate Governance Code of 2012, which also brought the issue of board diversity on the radar; and the search firms agreed to a new search code and set of principles to help appoint more female directors at companies.

In addition, institutional investors, in their corporate governance guidelines have

embraced gender diversity, says Pearson. Some, such as the Pensions and Lifetime Savings Association (PLSA), formerly the National Association of Pension Funds (NAPF), "state that if a company does not have a diversity policy, or it is not successfully reaching its targets, or there is insufficient progress being made towards achieving a satisfactory level of board diversity, then institutional investors may vote against the re-election of the chairman or the chairman of the nomination committee if different at the AGM."

AARON DHIR
> OSGOODE HALL LAW SCHOOL

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Similarly, in the United States, which has taken the voluntary disclosure route, institutional investors are actively encouraging the Securities and Exchange Commission (SEC) to adopt new measures in disclosures that would provide more clarity as to board composition.

"One of the frustrations is that shareholders have to do a lot of research to figure out the composition of the board in terms of gender, race and ethnicity," says Lissa Broome, a law professor at UNC School of Law in Chapel Hill, North Carolina.

To redress this lack of information, says Broome, a group of high-profile institutional investors has petitioned the SEC to add language in the disclosure rules that would compel companies to provide this sort of information electronically in a chart or matrix form, a request the SEC said, in December 2015, that it will include in its review of disclosure rules.

"If shareholders were shown this information in a matrix, then, if diversity was important to me as a shareholder, I could vote on the recommendations of the nominating committee of the board based on that issue, and if it's not, then I could ignore it," says Professor Broome.

Still, Veta Richardson, President and Chief Executive Officer of the Washington-based Association of Corporate Counsel, says there's generally speaking some disappointment in terms of the pace of change. A former executive director of the Minority Corporate Counsel Association and former in-house counsel, Richardson suggests several reasons: boards of directors are generally small groups, in which positions don't turn over very frequently, so opportunities to look to appoint or nominate more diverse people are few and, secondly, boards are still in the process of expanding the networks of contacts so that as positions open there are people who have been pre-vetted, or even pre-thought about, as potential candidates for the board.

The role of in-house counsel

Richardson says one pool of good candidates is general counsel. "I know of many instances of general counsel, including a lot of minorities and women, who have been selected to be on corporate boards; they are being recognized as good corporate strategic executives and therefore have the skill set, the leadership ability, and the broad picture to be able to serve on another organization's corporate board."

Proximity to board decisions, moreover, gives GCs the opportunity to drive change from within. Catherine Wade, a partner with Dentons Canada LLP in Vancouver, says in-house counsel will be advising the board of the implications of the disclosure requirements as well as the expectations of the regulator, shareholders and other interested constituencies, for example, proxy advisory firms. So it's important to understand "what's said in the disclosure is deeper than just the words."

She says general counsel are going to have to determine who these interested parties are, how they're looking at the issue, what their expectations are and then advise the board as to the best practice for the particular company. "Do we establish a policy today? Or do we take a wait-and-see look? If we establish a policy, what is it going to say? Do we establish targets today, if regulators don't come back immediately to show leadership in the area? The general counsel is going to have a lot of issues to think about prior to the next proxy season and how to best position the company for a successful shareholders' meeting."

As to progress, it appears in-house counsel are going to take a much more active role in the disclosure requirements. Reflecting on the role of in-house counsel in the first proxy year, Wade says her experience was that some in-house counsel let their external counsel take the lead on the new rule.

Currently, she is seeing a marked shift. "I think in this second year, general counsel have the information to judge the market from last year's proxy season and, moreover, they have seen the reaction from regulators. Consequently, I think general counsel are going to take more ownership" on this issue.

Targets are not quotas

Unlike Canada, the US, Australia and the UK, which have opted for a disclosure regime, countries such as Norway, Italy, France and, as recently as January 1, 2016, Germany, have taken the quota route.

Based on his research and ongoing discussions in both Canada and the US, Professor Dhir finds "some people in both Canada and the US tend to conflate a target with a quota. That's clearly incorrect; companies can certainly set aspirational goals for themselves that they are working

to meet, and that's consistent with the idea that what gets measured gets done."

Many regulators have been quite surprised as to how few companies have set aspirational targets for increasing gender diversity on the board, Longhurst says. "Regulators and some others are saying, 'companies have preset targets for every other important business objective, so why can't we set targets for board diversity that aren't quota targets?'"

The whole theory is that we measure what we treasure, says Wade. "Any company will tell you if it's important to the company we measure it, people are compensated on it, bonuses are put in place because of it, but to date the issue of gender diversity on the board does not seem to have been truly treasured."

As to whether a quota system, as opposed to a disclosure regime, is best suited for a particular jurisdiction, Professor Dhir suggests a lot depends on the socio-political culture of the country as well as the corporate governance culture. "In Norway, the idea of a quota is not foreign to the society, given there's a long-standing history of voluntary political party quotas."

However, Canadian companies and their in-house counsel need to pay attention to voluntary ways to increase board diversity, says Dhir, "in contemplation of the fact that if care is not taken, more aggressive regulation could follow. That is certainly reflective of the Norwegian experience where they tried other measures before they actually got to this austere quota."

In the UK, says Stephen Parish, Chairman of Norton Rose Fulbright LLP in London, the idea of quotas is very much rejected by women because they want to feel they've achieved the position, "not because we have to have three women on our board of 10." He says this attitude is prevalent among law firms, both domestic as well as major international firms, and in the broader corporate market.

Speaking from his London office, Parish says although comply-or-explain in the UK is voluntary, particularly as regards the corporate governance code, "no company wants to be explaining when it can comply, so compliance is treated pretty much as mandatory, save where there's a very good reason to the otherwise."

But quotas for Canada? MacDougall says a quota system would be hard for Canadian securities administrators to impose because their mandate is principally focused on addressing disclosure. For a quota system, there would need to be a legislative change, which is how it's been introduced in the European jurisdictions where mandatory quotas have been implemented.

In Canada, says MacDougall, "a quota system for women directors has only been legislated in Québec, where it applies only to Crown corporations. The impetus for the current disclosure requirements for public company boards was a direction from the Premier of Ontario to the Ontario Securities Commission to do an analysis of the diversity of publicly traded companies — it was not a legislative initiative." In the short term, he says, Canadian in-house counsel should be thinking about how they and their companies should be addressing the disclosure obligations in order to demonstrate improvement.

Because even if Canadian companies are not forced to improve diversity on their boards, their shareholders will now have a clearer picture if the company has made improvements or not.

IN HOUSE INSIGHT

DIVERSITY DISCLOSURE

In-house counsel should keep these principles in mind when working on board diversity at their company

Expect real change: Andrew MacDougall at Osler, Hoskin & Harcourt thinks the push to have more women on boards has greater potential to improve the governance of Canadian boards than any other governance initiative that's being pursued today. "Companies struggled with the comply-or-explain requirements in the first proxy season as there wasn't much time to prepare for the disclosure requirement, but, on the other hand, last year's disclosure provided a very good picture of where Canada was at that time."

Define diversity broadly: "Companies shouldn't just talk about gender diversity; as well, there is ethnic diversity and social mobility, which are just as important to a business," says Stephen Parish, Chairman of Norton Rose. If you look at diversity on the board from a wide-angled diversity lens, he says, and "keep going in the right direction, although the steps might be quite small from time to time, you end up with quite a significant change over a period of time."

Be proactive: In-house counsel should engage early with their board; don't wait until the proxies are being sent out in draft form to the board, says Catherine Wade, at Dentons. "Start your discussion now for next year's disclosure."

Avoid boilerplate: Jennifer Longhurst, a partner with Davies Ward Phillips & Vineberg, says in-house counsel "should take the lead in crafting disclosures that go beyond boilerplate statements by clearly describing … concrete examples of how gender diversity initiatives tie into director and executive identification, selection and advancement — instead of stating that the representation of women is considered, describe how it's considered."

Consider the context: "It's important to be aware that the amendments to National Instrument 58-101 are not run-of-the-mill disclosure requirements; rather, they are reflective of shifting, evolving, cultural and social norms," says Professor Aaron Dhir of Osgoode Hall Law School. Counsel, both external and in-house, should expect that regulators, civil society groups, academics and the media are going to be watching these particular disclosures with enhanced scrutiny.

Reputational v. legal advice: Diversity on boards is not so much a legal issue but a reputational issue, except in those countries where there is a legal requirement, such as a quota, says Chris Pearson, a partner with Norton Rose. In the UK, he says, "peer pressure and stakeholder engagement on the issue have significantly moved the needle on gender diversity on boards."