The Broad Sweep of Change

Think of the corporate governance landscape a quarter-century ago: Boards populated by personal friends of the CEO; no pre-reads ahead of board meetings; the roles of chair and CEO concentrated in the same person. Since then, there has been an evolution – perhaps revolution – in the role and work of the corporate director. No longer rubber stamps, directors are strategy influencers, talent developers and the governance heart of the corporation. To discuss the tectonic shifts, the law firm of Osler, Hoskin & Harcourt LLP assembled a group of Canada's most experienced directors at the ICD national conference in Montreal. The forum helped mark the 25th year of publication of *Directors' Responsibilities in Canada*, a seminal guide to corporate governance, produced in collaboration with Osler and the ICD (www.osler.com/directors). In the first of a two-part series, recorded and edited by **Gordon Pitts**, the directors discuss changes in the critical relationship between boards and management.

The PARTICIPANTS

Brian LEVITT (moderator) is vice-chair of Osler and chair of the Toronto-Dominion Bank. Based in Montreal, he has been a director of public companies for more than 25 years.

Nancy HOPKINS practices corporate law in Saskatoon. She is a director of Cameco Corp., as well as Growthworks Canadian Fund Inc. and Growthworks Opportunity Fund Inc.

Dallas HOWE is chair of Potash Corp. of Saskatchewan and owner of DSTC Ltd., a technology investment company. Based in Calgary, he has served as a director of Canadian companies for many years.

Raymond ROYER is a seasoned director and corporate executive based in Montreal, who served as president and CEO of Domtar Inc. and president and COO of Bombardier Inc.

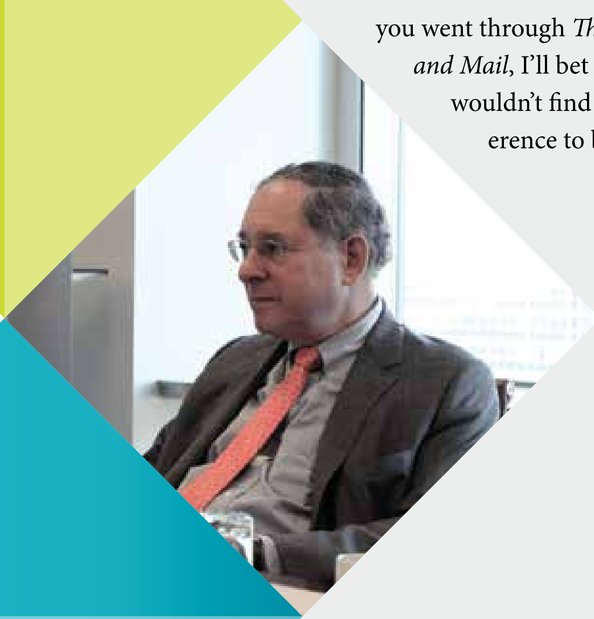
John THOMPSON became the first non-executive chair of the TD Bank in 2003. He served as executive vice-chair of IBM Corp., with responsibility for worldwide technology, manufacturing and strategy.

Andrew MACDOUGALL is a corporate law partner in Osler's Toronto office, playing a leadership role in the firm's corporate governance practice.

Nancy HOPKINS: Years ago, the thinking was that directors were rubber stamps. They had little role in the direction of the company, particularly in strategic planning. We have seen a big shift in the understanding of what directors should be doing in the strategic direction of the organization.

Dallas HOWE: Theoretically, the roles and responsibilities of the board haven't changed a lot but the behaviours have – in the preparation expected, in directors' knowledge, in the breadth of materials provided by management. Directors are more willing to take unpopular stands, to speak up on something and to pay more attention to risk and strategy. They worry much more about things. Years ago, they basically showed up and went through the process.

Brian LEVITT: The big thing that has changed is the degree of public scrutiny and the reputational risk directors face as individuals. Years ago, as you went through *The Globe and Mail*, I'll bet you wouldn't find any reference to boards.



Now there are all kinds of published surveys and scores by institutional investors. That scrutiny is a good thing, but for the wrong kind of director, it tends to make them too cautious and they act with a view to managing their image and not necessarily the business.

John THOMPSON: Today, the most important things we focus on as a board are strategy and talent – that is, looking at how you develop the right executive resources and other talent through the organization. That focus did not exist 25 years ago.

Raymond ROYER: The role of director is much more precise in terms of best practices and notions of business risk. It is also much broader. Now business risk includes cyber-security breaches and other things we were not thinking of before.

THOMPSON: Looking back 25 years, board meetings often started at 9:30 in morning and were over at 11:45, and then we retired to a very nice lunch. Time was spent hearing reports on the state of the business. But you weren't really asked anything about strategy. There were no in-camera meetings [of independent directors]. There was no pre-read of materials. Zero. The only time you saw the material was going through it during the meeting. What's different now is a lot of significant time spent in preparation. It is a serious assignment now; it was less serious back then. And in terms of training, in those days we did not have board committees focused on governance or risk. And human resources at the board level was just about compensation.

BOARD-MANAGEMENT RELATIONS

HOPKINS: At one time, there was a very rigid hierarchy in how communications went; there was the chair, who communicated with the CEO, who was usually the president, and then the communication went down from them. Even if you were chair of a committee, there was no interaction with the management person on the other side. It was very rigid and controlled.

THOMPSON: Board members were never encouraged to get to know management. We knew the CEO, the president, and a few other people but any further communication with management was frowned on.

HOPKINS: There was one thing that used to drive me nuts. Even when we were getting material ahead of time for meetings, management would still think it was okay to have a lot of walk-in information. There was something that came up at the last minute, or that management did not want to put out in writing in advance. So we would get all these pages, and we were expected to digest them in two minutes or less and make an informed decision. That just doesn't happen now.

LEVITT: Management's role is to get the board the information that directors need, and do it in a timely manner. The idea is: Do unto others as you would have them do unto to you. In the distant past, when management didn't think the board had much of a role in decision-making, it did not care about information. Now it is understood that no serious decisions can be made in one meeting. Directors get a chance to think about it, and at the next meeting they decide. It's just an end product of a different and much clearer understanding of the roles of the board and management.

SEPARATION OF CHAIR AND CEO

HOPKINS: The existence of an independent chair makes an enormous difference to corporate governance. Twenty years ago, I was on a board where there was concern about a series of changes in which the chair and CEO ended up as the same person. So we had a lead director, which was seen to be how you fix the problem. But the lead director is not a substitute for a separate chair. When you have the same person in both jobs, you don't get the sense the board is in charge. You get the sense management is in charge, and that the board is 'like parsley on fish,' to use a famous phrase.

THOMPSON: The separation of the roles started in the United Kingdom in the 1990s, but they didn't do it well. The old CEO typically became the chair and they brought up someone new to be CEO, but the relationships never changed. It prohibited the new CEO from running the business. The chairs knew they were not giving up real power.

Some years later, boards recognized these problems, and TD was the first major Canadian bank to go this way in 2002. To clarify the roles, we made up one sheet of paper that summarized what the chair would do and what CEO would do. You have to be very clear, as non-executive chair, that you will not interfere with running the business. I would not call on customers or employees unless the CEO wanted me to. I would run the board and the agenda would be mine. That reflected a concern in companies where CEOs set the board agenda – boards were afraid a CEO could hide issues.

HOPKINS: I have been on a couple of boards with independent chairs where we had to change the CEOs. I can't imagine how they do that with an executive chair.

HOWE: At Potash Corp. we just brought in a new CEO two months ago. It is hard to conceive how we could have done that with the CEO as chair. In our case, the CEO was involved but not in control of the process and not privy to the committee's work, which made it easier to function in a sensitive situation. And it was a three-year process. The biggest message is start early – we spent a year defining what the next CEO's attributes should be. After all, the business had changed and the world had changed. Doing all that was easier with an independent committee. The CEO could comment but he was not driving it.

LEVITT: And who picked the successors 25 years ago? The existing CEOs.

IN-CAMERA MEETINGS

LEVITT: The in-camera meetings of independent directors, without management, are the single biggest positive that came out of Sarbanes-Oxley legislation in the United States and has had huge impact on governance.

HOWE: I couldn't imagine functioning now without in-camera meetings. Some managements don't like it and it is natural for a CEO to want to be at the table when things are being discussed. But it works for us. I don't want to see a board meeting end, and have a director who didn't raise something because he or she was uncomfortable raising it in the presence of management. There is also the ability to close any kinds of gaps at the meeting. But we make sure we meet alone with the CEO before the in-camera. And in fairness to management, keep the in-camera meeting as short as possible.

HOPKINS: When we started doing in-cameras, management was very unhappy with the concept that the board would meet without them. The exception was regarding compensation. It took a lot of saying over and over: 'We have to do this – it is good governance'. It took time to get board colleagues to understand that if you have an in-camera session at every meeting, it ceases to be so unusual. Once it became the norm, the temperature went down considerably.

ROYER: It is a good tool to get to know management if, say, you are in charge of a committee. Through in-camera meetings with individual managers – without their superiors or support staff – you learn quickly about how management operates and you can help them in their job. Or you may have a situation where you learn this person should not be in that role and then you can act.

THOMPSON: At the board level, these meetings get the real issues on the table. You might get someone who has feelings about an issue but not so sure they want to make a big issue with everyone in the room. You get a smaller-group discussion, and if other people say 'yes, I had that feeling too,' you get it on the table with the management. You get better decision-making as a result.

It is also good feedback for the CEO. After an in-camera, the chair goes back to the CEO and gives some advice. A good CEO will want that constructive feedback but you have to be careful how you do it. And it improves the relationship among directors.

LEVITT: Occasionally management has made a presentation and it turns out not all the directors understood the same thing. You get that cleared up. And if one director is riding a hobbyhorse, it gives others a chance to hear about it. If they don't buy in, the individual knows that.

Andrew MacDOUGALL: Some of these themes we're discussing – separation of the roles of chair and CEO and in-camera meetings – were first proposed to make sure the board operated independently from management. We are hearing now that they are also useful tools for director self-improvement.

THOMPSON: The in-cameras make for a more candid discussion and it's a great learning experience. Things are said that raise the whole level of discussion.

The rising imperatives of director training and self-improvement are woven through these discussions by veteran directors – just as they lie at the core of the Osler-ICD publication, *Directors' Responsibilities in Canada*. In the second instalment of this discussion, to be published in the next issue, the board members explore the shifts in how they recruit, measure and improve themselves – and point to concerns for the future as they grapple with new roles and expanded authority.

Gordon Pitts is a business journalist and author of *Fire in the Belly, How Purdy Crawford rescued Canada and Changed the Way We Do Business*. He is writer-in-residence at the DeGroote School of Business, McMaster University.