

GOVERNANCE

The rules they are a-changin': Corporate governance developments in 2020

The unprecedented upheaval in the personal and work lives of Canadians and people worldwide resulting from the COVID-19 pandemic has not slowed down initiatives to reform corporate governance practices in Canada – in fact it may have sped them up. This year has witnessed significant reform of corporate laws in jurisdictions across Canada; the launch of a process in Ontario for securities law reform, including reform of corporate governance practices; new U.S. rules on proxy advisors; and a long-overdue industry-led initiative sponsored by the Institute of Corporate Directors and the TMX Group to update corporate governance best practices in the country.

Pandemic-induced changes to corporate law

The lockdown measures adopted in March to protect public health and safety in Canada were imposed shortly before most companies were to begin

holding their annual meetings. This led to the adoption of a wave of measures by federal and provincial governments to facilitate the use of technology to enable corporations to hold their meetings virtually. These measures were also intended to provide additional flexibility to delay the timing for holding issuers' annual meetings in 2020. Further detail on some of these changes may be found in our [Reducing the regulatory burden: Positive developments in corporate and securities law in 2020 article](#).

Virtual meetings

Prior to the declaration by the World Health Organization that COVID-19 was a pandemic, we summarized some of the key considerations to be taken into account when holding virtual meetings in our Osler Update entitled "[Let's meet – just not in person: Taking your annual shareholder meeting online \(in a coronavirus world\)](#)" on [osler.com](#). Jurisdictions with less flexible legislative provisions than Ontario responded with varying degrees of success. They implemented temporary orders or similar measures overriding impediments under their statutes or under corporations' constating documents that were preventing shareholder meetings from being conducted virtually. Although temporary relief in Ontario has been extended to the end of May 2021, relief measures adopted in other jurisdictions are currently scheduled to expire before then and prior to the time when corporations would normally be expected to hold their annual general meetings in 2021.

The pandemic led several (typically larger) issuers to seek court approval under their incorporating statutes to permit the holding of a shareholder meeting exclusively in virtual form. Among the first to obtain the approval was TELUS Corporation, who on March 11, 2020, obtained an order from the British Columbia Supreme Court permitting it to hold its 2020 annual general meeting of shareholders as a virtual-only shareholder meeting. The order was granted pursuant to the authority of a court under section 186 of the British Columbia *Business Corporations Act* (BCBCA) to call a shareholder meeting in the manner that the court directs. Similar provisions exist under the corporate statutes of all other Canadian jurisdictions, except the Nova Scotia *Companies Act*. Among other things, the order deemed shareholders who participate in the virtual-only meeting to be present at the meeting and deemed the meeting to be held at the location of TELUS' registered office. Further information is available in our Osler Update entitled "[TELUS Corporation obtains court order to hold virtual-only shareholder meeting](#)" on [osler.com](#).

Virtual meetings in 2020 were overwhelmingly conducted as audio-only meetings. And while there were some delays and hiccups in the execution of the process, those were minor and unsurprising given the sudden increase in the number of corporations meeting virtually compared to prior years. The necessity for conducting annual meetings virtually due to the pandemic caused institutional investors to suspend their criticism of the format for 2020, and many corporations expressed their hope to return to in-person meetings in 2021. Given continuing uncertainty on whether a return to "normal" will be possible in time for the proxy season in 2021, issuers should be planning for a return to the virtual meeting format next year.

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Delayed meeting requirements

Many jurisdictions also afforded corporations the opportunity to delay holding their 2020 annual meeting until later in the year, which helped to alleviate some of the pressure of the proxy season. We outlined some of the relevant considerations in our Osler Update entitled “[Room to move: delaying continuous disclosure obligations in 2020](#)” on [osler.com](#).

As Canada faces the prospect of continuing restrictions on public gatherings, whether legislative or practical, it remains to be seen if Canadian jurisdictions will permit similar delays this coming year. Alternatively, they may expect issuers to make arrangements to hold their meetings – virtually or otherwise in compliance with applicable public health guidance – within the normal time periods.

Other corporate law changes

CBCA

Changes to the *Canada Business Corporations Act* (CBCA) mandating diversity disclosure regarding designated groups consisting of women, visible minorities, Aboriginal peoples and persons with a disability came into effect on January 1, 2020. The CBCA was also amended to provide that directors may, in the exercise of their fiduciary duty, consider specified interests, including the interests of shareholders, employees, retirees and pensioners, creditors, consumers and governments, as well as the environment and the long-term interests of the corporation. However, several other amendments have yet to be proclaimed into force, including amendments regarding

- disclosure respecting the well-being of employees, retirees and pensioners
- disclosure respecting compensation clawback arrangements
- mandatory “say on pay” advisory vote requirements

BCBCA – New benefits companies

Effective June 30, 2020, amendments to the BCBCA came into effect permitting the incorporation of benefit companies. Under the BCBCA, a benefit company is a for-profit company that commits, by a “benefit statement” and “benefit provision,” to conduct its business in a responsible and sustainable way and promote one or more “public benefits” in accordance with the BCBCA.

In addition to the fiduciary duty to act honestly and in good faith with a view to the best interests of the company applicable to the directors and officers of all companies, directors and officers of benefit companies have two additional responsibilities. First, directors and officers of benefit companies have a duty to act honestly and in good faith with a view to conducting the business in a responsible and sustainable manner while promoting the public benefits specified in the company’s articles. Second, directors and officers of benefit companies have a duty to balance the above duty with the fiduciary duty.

These changes will provide another way for for-profit businesses that are committed to conducting business in a responsible and sustainable way to demonstrate their commitment. For more information refer to our Osler Update entitled “[B.C.’s new legislation on benefit companies](#)” on [osler.com](#).

Residency requirements

As described in our [Corporate and Securities overview](#), changes to the *Business Corporations Act* (Alberta) have been made, and changes to the *Business Corporations Act* (Ontario) have been proposed, to remove all Canadian residency requirements for corporate directors.

Diversity of boards and management in Canada

Mass protests following the May 25, 2020 killing of George Floyd in Minneapolis re-energized the Black Lives Matter movement and the fight to end anti-Black racism. In Canada, The Canadian Council of Business Leaders Against Anti-Black Systemic Racism was formed and it proposed the BlackNorth Initiative to combat anti-Black systemic racism. The BlackNorth Initiative's stated goal is to actively create opportunities for those in the Black, Indigenous and people of colour (BIPOC) community.

As part of the BlackNorth Initiative, senior Canadian business leaders have been asked to sign a pledge to commit their organization to specific actions and targets aimed at ending anti-Black systemic racism. The pledge includes a commitment to ensuring that members of the Black community represent at least 5% of student hires and 3.5% of board appointments and executive hires by 2025. The pledge also commits the organization to invest at least 3% of corporate donations and sponsorships in the promotion of investment and creation of economic opportunities in the Black community by 2025.

Our [annual review of diversity disclosure](#) practices by Canadian corporations this year examined disclosures respecting women in director and executive officer roles of TSX-listed issuers. In addition, and for the first time, we also examined disclosures by CBCA corporations regarding the representation on the board and in executive officer positions of visible minorities, Aboriginal peoples and persons with a disability.

Although we identified several leading organizations and the practices they disclosed, we also noted that much more work is needed. Overall, our results showed that continued, slow progress is being made by women on corporate boards, although not at executive officer levels. We also found that, based on the disclosure provided under the new CBCA diversity disclosure requirement, the representation of visible minorities at the board and executive officer levels is disproportionately small compared to the representation of these groups in the Canadian population generally. We also identified that the representation of Indigenous people and persons with a disability is almost non-existent.

Our report also provides an overview of recent regulatory and market developments in this area in both Canada and internationally. Since we published the report in October, Institutional Shareholder Services (ISS) has released its [policy updates for 2021](#). From a diversity disclosure perspective, ISS has indicated that from February 2022 it will recommend voting *against* the chair of the nominating committee for issuers included in the S&P/TSX Composite Index if those issuers either (a) do not have at least 30% women directors or (b) do not have a board diversity policy that includes a 30% target to be achieved in a reasonable timeframe. The policy for TSX-listed issuers that are not included in the S&P/TSX Composite index will remain substantially unchanged.

The BlackNorth pledge includes a commitment to ensuring that members of the Black community represent at least 5% of student hires and 3.5% of board appointments and executive hires by 2025.

Capital Markets Modernization Taskforce consultation report

As described in our [Corporate and Securities](#) overview, the Capital Markets Modernization Taskforce (Taskforce) has published their preliminary consultation report. In the consultation report, the Taskforce sought feedback on a number of proposals, including

- streamlining the timing of disclosure by permitting issuers to report financial results semi-annually instead of quarterly
- improving corporate board diversity, including proposals that would require TSX-listed companies to set targets and provide annual data in relation to the representation of women and BIPOC on boards and in executive officer positions, including possible targets of 40% women and 20% BIPOC, and whether to set a 10-year maximum tenure limit for directors, while permitting up to 10% of the board to exceed the 10-year maximum for up to two years
- introducing a regulatory framework for proxy advisory firms (PAFs), by providing issuers with a statutory right to “rebut” PAF reports at no cost and restricting PAFs from providing consulting services to issuers in respect of which PAFs also provide clients with voting recommendations
- empowering the Ontario Securities Commission to provide its views with respect to the exclusion by an issuer of shareholder proposals in proxy materials
- introducing rules to prevent over-voting
- eliminating the distinction between non-objecting beneficial owners and objecting beneficial owners and permitting issuers to contact all of the beneficial owners of their shares by removing the ability of beneficial owners to choose to keep their name and ownership details confidential

SEC final rules on proxy advisory firms

On July 22, 2020, the Securities and Exchange Commission (SEC) issued final amendments to its proxy rules to regulate certain activities of proxy voting advice businesses. The amendments codify the SEC’s view that the business of providing proxy voting advice constitutes a solicitation. Additional detail is provided in our [U.S. securities law developments in 2020](#) article.

The Committee to Chart the Future of Corporate Governance in Canada

On October 6, 2020, the TMX Group and the Institute of Corporate Directors announced a new initiative through the formation of [The Committee on the Future of Corporate Governance in Canada](#) (the Committee). Co-chaired by the ICD and the TMX, the Committee includes 11 leading directors. Its mandate is to conduct a review of corporate governance practices focused on

- the role of the corporation in society/societal expectations of corporations
- strategy, purpose and risk

- culture, equity, diversity and inclusion
- sustainable and resilient performance
- board and director effectiveness

This is the first industry-led initiative since the report of The TSX Committee on Corporate Governance (Dey Committee) in 1994 and the report of the Joint Committee on Corporate Governance (Saucier Committee) in 2001.

The Committee began its review with a consultation process with experts from groups and organizations with an interest in the governance of Canadian corporations from across the country, as well as internationally. The results of these stakeholder roundtables, as well as research into practices internationally and the experience of the leading directors who comprise the Committee, will form the basis for a report with guidance and recommendations on corporate governance for Canadian corporations. A draft of that report is expected to be issued sometime this winter for public comment. Following receipt of comments, the Committee is expected to release a final report in 2021. Osler is providing legal support to the TMX and the ICD on the Future of Corporate Governance project.

Governance in 2021

The role of public companies in Canada is under scrutiny on many fronts. There are high expectations for boards to provide leadership with respect to diversity and inclusion, the environment and human capital, as well as social issues, while delivering long-term financial returns to investors. Responding to these changes will be a challenge, especially in the current environment, and will demand leadership from Canada's director community.

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