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Board Games 2020: Canadian companies fall short on board diversity

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When it came time last winter to prepare their 2020 disclosures, Canadian companies largely chose not to share information about racial and ethnic diversity on their boards of directors, despite new federal rules that required many of them to do so. The problem may have been that they didn't have much to talk about.

This marked the first year that federally incorporated companies were required to disclose in shareholder circulars whether they had directors who were visible minorities, of Indigenous heritage or persons with disabilities. The rules didn't apply to the half or more of companies with provincial incorporations, and governance experts surveyed by The Globe and Mail said companies that didn't have to abide by the rules would wait and see how others responded.

Underwhelmingly, it turns out. An annual diversity-disclosure study by law firm Osler Hoskins & Harcourt LLP found "there was significant non-compliance with the requirement." Osler identified 343 companies it believed were subject to the federal Canada Business Corporations Act, or CBCA, rules and had filed proxies by the time of its study. Of those, 270 companies provided some sort of disclosure, and just 213 disclosed how many diverse directors they had.

For companies that did disclose numbers, 5.5 per cent of all directors were visible minorities, while Indigenous and directors with disabilities made up 0.5 per cent and 0.4 per cent, respectively.

The numbers were also poor for a new diversity question The Globe added to its annual Board Games survey, which measures Canadian companies in the S&P/TSX Composite Index on their board composition and governance processes.

Just four of the 211 marked companies in Board Games this year got the full two points in the question, which set a higher bar than the federal rules. There were 170 companies that received zero points, because they did not disclose any directors who were members of the groups identified in the federal law, and they did not reveal anything about their policies to promote board diversity. The zeroes included a number of major corporations that often jockey to get a near-perfect Board Games score. (The table will allow you to see which companies did, and did not, receive the points.)

Canadian companies who chose not to use the CBCA disclosure may have had visible minorities, Indigenous or people with disabilities on their boards, but those diverse directors were not captured by either Osler or Board Games.

Catherine McCall, executive director of the Canadian Coalition for Good Governance, said the institutional investors who make up her group want to know that companies are thinking about diversity, “that they’re taking it seriously, and they’re going to report on it.”

“Maybe not that they’re there yet … but if you’re silent about it, it’s going be interpreted as a red flag, like this is not something that you’re focused on, and it doesn’t matter to you,” she said.

A lot has changed since most companies prepared their proxy disclosures this year. The COVID-19 pandemic and the wave of social unrest in which the Black Lives Matter movement ascended have pushed issues of equality and diversity to the forefront.

Advocates hope that Canadian companies are seeing the light on the business case for diversity. And if not, a number of proponents, from major investors to regulators and political leaders, say that if the companies can’t get moving, they may need more of a push to make it happen.

“Now it is front and centre in [Canada’s] discussion,” said Raymond Chan, a Telus Corp. director who said he is speaking for himself, not the company. “Twelve months ago, there was hardly anyone talking about it other than the [federal government] CBCA folks. The amount of attention this topic is now getting is extremely encouraging.”

For years, Canadian board diversity centred on gender. Women were woefully underrepresented on corporate boards and in the executive suite. Faced with years of pressure from advocacy groups such as Catalyst Canada, provincial securities regulators, led by the Ontario Securities Commission, adopted rules making gender diversity disclosures mandatory for public companies, starting in 2015.

Margaret Franklin, the Canadian-born chief executive officer of the CFA Institute, the global advocacy and certification group for financial analysts, said that when she worked on her organization’s diversity efforts five years ago, it still had to spend time on making the case for the value of gender diversity.

“All we did was take a playbook from a basic tenet of investment management, which is diversification actually adds to returns and mitigates risk,” she said. “Where very poor decisions get made that either miss real opportunities or create accidental risk, a lot of times that really comes from teams that have the same types of people and create collective blind spots.”

The progress on board and executive gender diversity in Canada has been slow, however, and has arguably stalled. Osler found women now hold about 21.5 per cent of board seats among Toronto Stock Exchange-listed companies that make such disclosures. While that's up three percentage points over the prior year, the rate at which women are being appointed to fill newly created or vacated board seats declined to 35 per cent, compared with 36.4 per cent the year before.

The numbers are better among larger companies. Osler found women hold 31.4 per cent of board positions among the S&P/TSX 60 Index companies and 28.3 per cent of board positions among the 221 companies in the S&P/TSX Composite Index.

Yet, Osler says 18.5 per cent of all TSX-listed companies still have all-male boards. Advisory firm Kingsdale Shareholder Services noted in 2019 that the S&P/TSX Composite finally had, for the first time, no all-male boards, allowing Kingsdale CEO Amy Freedman to say to The Globe, sardonically, "Congratulations, but really?"

Osler's Andrew MacDougall said that after six years of preparing the report, he's seeing "a very gradual, slow increase" in the proportion of women on boards.

"And then when you look at executive officer level, there's no change at all. So I absolutely can understand why people would believe that the existing regime doesn't work," he said.

That regime is what's called "comply or explain," and it's used at the provincial level for gender and in the new CBCA changes for other diverse groups at the board and executive level. Canada does not set specific quotas or targets for women or other diverse groups on boards. It does not even require that a company set any internal target at all. Instead, if a company does not have a policy to identify and add directors who are part of the targeted groups, it needs to explain why.

The Conference Board of Canada, in a recent global comparison, noted Canada's "comply or explain" approach to disclosure, and not targets, is unique among the developed countries it studied. Canada trails nearly every country that uses either "hard quotas" or "soft quotas" in the proportion of women on boards, it says.

In the Ontario Securities Commission's 2019 review of gender disclosures, just 22 per cent of companies in their sample had adopted board gender targets.

"Comply and explain – to me, it's a cop-out," says Wes Hall, the founder of Kingsdale who created The BlackNorth Initiative this summer in the wake of the Black Lives Matter protests in the United States and Canada.

"People who don't want to comply with it will always find an excuse as to why they are not going to do it. If you actually just say to the companies, you know what? This is something good for your business, this is the direction we're going, this is a timeline in which you need to make the changes by' – everybody will do it."

That has been BlackNorth Initiative's modus operandi. It created a seven-goal pledge for companies that includes a minimum 3.5 per cent of Canadian executive and board roles held by Black leaders by 2025. (The figure is based on Black citizens making up 3.5 per cent of Canada's population.) To date, nearly 400 companies have signed the pledge.

While BlackNorth's target is explicitly pegged to Black people, its pledge notes companies need to "increase equity for all, including, but not limited to, Black, Asian and other racialized communities in Canada, Indigenous peoples, members of the LGBTQ+ community, persons with disabilities, and women."

And in practice, Mr. Hall said, companies are realizing they need to commit to increase more than just Black representation. "Some companies say to me, 'Wes, we can't deal with just Blacks. We have to deal with everybody else.' I said, 'Right now you're dealing with no one.' "

One of the least-represented groups among those that provide diversity beyond gender, Osler found, were Indigenous directors. Osler found just seven federally incorporated companies that reported Indigenous directors under the CBCA requirements, including agricultural giant Nutrien Inc.

"It's just going to take some time and effort for everybody to fix," said Keith Martell, a Nutrien director who is CEO of Saskatoon's First Nations Bank and a chartered professional accountant. Mr. Martell said there needs to be more Indigenous people in accounting, corporate law, management finance and investment banking to create a pipeline of director talent.

At the same time, Mr. Martell, said, "too often, I think boards recruit from their contacts: people they know, people they've worked with, people who belong to their club. And that ends up being a very homogeneous group, and you exclude diverse people and especially Indigenous people."

Jean Paul Gladu, the former CEO of the Canadian Council for Aboriginal Business who joined Suncor Energy Inc.'s board this month, said "when it comes to the pool, there are 50,000-plus Indigenous businesses, and some of them are quite large. ... So I think we've just got to get outside our comfort zone. I just don't think Canadians and corporations understand enough about the Indigenous portfolio of of talent."

BlackNorth's Mr. Hall said he chose the direct route – calling on companies to make a public pledge – as a faster way of getting to the diversity goal than lobbying government to make legal changes, which can take years, even once government agrees to act. "If you try to push the government first, we know that they move slowly. ... If the company decides to do this, they can make a change right away."

Governments and regulators may not sit on the sidelines, however. Sophy Lambert-Racine, a spokeswoman for Innovation, Science and Economic Development Canada, said that since some companies are still holding their 2020 annual meetings, the department does not yet have the data to evaluate compliance with the new CBCA changes. Non-compliance with the new diversity disclosure rules "can result in enforcement measures against the corporation or its principals," she said in an e-mailed statement.

Senator Howard Wetston, a former chair of the OSC, said this month that he's begun to speak to his colleagues about the possibility of requiring companies to actually set diversity targets. Mr. Wetston said he initially resisted target requirements in the name of harmonization with less-stringent provincial rules, but now feels that not enough progress has been made.

And the Ontario Capital Markets Taskforce, a group formed to review the province's regulation of capital markets, has a tentative proposal to amend securities legislation to require TSX-listed companies to set targets for the representation of women and Black, Indigenous and other people of colour on boards and in executive officer positions. The task force's final report is expected in the coming weeks.

Rahul Bhardwaj, CEO of the Institute of Corporate Directors, said Canada's approach has been voluntary compliance because the less regulation, the better. But "there are other jurisdictions that have looked at this and said, look, we tried all that. The only way that works is if you put quotas out there. So, you know, just get on with it."

Mr. Bhardwaj said his organization, which provides director education and maintains a membership database of 15,000 director candidates, many diverse, held a webinar with a Norwegian corporate governance expert who described her country's use of quotas. Before the session, Mr. Bhardwaj said, ICD polled the Canadian participants and found them opposed to quotas by a 70 to 30 margin. "Then we have the full conversation about their experience in Europe, and we polled everybody again. That 70-30 against became 60-40 in favour."

As Canadian governments mull action, institutional investors, and the groups who represent and guide them, say they will continue to apply pressure. Many major pension funds have adopted proxy-voting rules that called for the funds to withhold votes from the chairs of the boards' nominating committees if the boards didn't have women on their boards, and have gradually ratcheted up the requirements from one woman to, for example, two, or 25 per cent.

The plans generally have not yet adopted voting policies for diversity beyond gender. Jennifer Coulson, vice-president of environmental, social and governance in public markets for British Columbia Investment Management Corp., said it's difficult to do so when some Canadian companies are subject to the federal rules, and some are not.

"In order to adopt a guideline, we have to be able to implement it across the board," she said. "With a lack of data, that becomes very challenging. So even though we very publicly have said that this is important, and we're paying attention to it … if we don't have the data, we can't translate it into a voting guideline. So we've been pushing for the disclosure that will allow us to get there, but we don't feel like the data is there yet."

Institutional Shareholder Services Inc., the major U.S. proxy advisory firm, which helps institutional investors vote their shares, says it will begin in 2022 to recommend the withholding of votes from nominating-committee chairs of U.S. companies where the board "has no apparent racially or ethnically diverse members." They haven't announced a similar policy for Canada – yet.

"I think that, given the interconnectedness of the Canadian and U. S. markets and the institutional investor community, frankly, it's just a matter of time that some of those guidelines that we're seeing in the States creep up to Canada," said Rima Ramchandani of Torys LLP.

Ms. McCall, at the Canadian Coalition for Good Governance, said her group had been developing early in the year a new policy for diversity beyond gender, and the Black Lives Matter movement has caused the group to revisit it. "In the last seven months, the conversation has exploded, and we realized that there's a lot more thinking to do."

Jennifer Longhurst, of law firm Davies Ward Phillips & Vineberg LLP, said part of the explanation for companies' lack of disclosure in 2020 may come from the issues posed by the framework of the CBCA, which uses the limited number of groups, and the outdated terms that describe them, named in the "rather old" Employment Equity Act.

"I think a lot of them are grappling with how to provide meaningful disclosure to their investors, recognizing that many of them do want to know more than just about gender representation," she said. "Corporate statutes are kind of ill-suited for promoting major change in these areas. They only get amended very infrequently and when they are, they often tend to be quite backward looking."

Other companies struggle with the difficulty of building boards that align neatly with Canada's demographics. Gender advocates have noted that women make up roughly 50 per cent of Canada's population, but the 30% Club set as its minimum board goal the lower number from which it took its name. BlackNorth uses the 3.5 per cent for the Black population.

"Do you really want a corporate board to be structured exactly where 16 per cent to 17 per cent will be Asian, and 3.5 per cent Black, [5 per cent] Indigenous, and so on?" asked Mr. Chan, who serves on a joint committee set up by TMX Group and the Institute of Corporate Directors to work on updating the guidance on corporate governance for Canada.

"If you set those kinds of targets it may be a bit too complicated, too difficult to execute. So you have to look at equity, diversity and inclusion as sort of a more holistic concept."

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