BENIGN ACTS

NEW LEGISLATION AIMS TO SOLIDIFY ONGOING TRENDS IN CANADIAN CORPORATE GOVERNANCE, WRITES FRANCESCA BATTAGLIA.

In March this year, the Canadian federal government announced several reforms to the Canada Business Corporations Act (CBCA), effective January 1, 2020. The amendments include a mandatory annual non-binding "say on pay" vote for shareholders and diversity-related changes for a group of public companies still to be defined.

The amendments codify key elements of the Supreme Court of Canada's seminal 2009 decision in BCE v 1976 Debentureholders regarding directors' and officers' duties to act in the best interests of the corporation, law firm Davies Ward Phillips & Vineberg wrote in a paper published on October 3.

> "IT STILL SURPRISES ME THAT THERE HAS BEEN LITTLE CHANGE IN CORPORATE CANADA IN TERMS OF ADDING MORE WOMEN TO TSX LISTED BOARDS."

Yet not everyone is fully convinced by the reforms. "It is unclear why these amendments were considered necessary or whether their implementation will result in any change in the behavior of boards of CBCA corporations," Davies stated in the paper. Patricia Olasker, a partner at the firm specializing in shareholder activism and M&A, argues that "the government wanted to put its stake on the ground to signal its commitment" to issues like diversity, rather than because legislation was necessary.

'SAY ON PAY'

Until the new law comes into effect, there is no legal requirement in Canada for a vote on remuneration policy, unlike in the U.S. or the U.K. Indeed, the boards of some companies, including Imperial Oil and Linamar, recommended their shareholders vote against regular "say on pay" votes at annual meetings this year. In response to a shareholder proposal, Linamar said "say on pay" was a form of communication "both administratively burdensome and not issue specific."

Yet despite the absence of any regulation, many Canadian public companies already hold such votes. Davies reported that in 2019, 83% of companies on the TSX 60 and 52% of all Composite Index and SmallCap Index issuers held "say on pay" votes. According to Davies, it is likely that Imperial Oil will have to implement such votes even though the proposal was rejected, while Linamar would not have to adopt it as it is an Ontario corporation and not a CBCA company.

Even so, for shareholders, a "say on pay" vote represents "a valuable way to communicate dissatisfaction with the performance without taking the directors down," and drives engagement, Olasker said. Kingsdale Advisors' Proxy Season Review noted that some companies that received low support in "say on pay" votes in 2018 have seen an increase in support levels this year because of "director-led engagement with shareholders…and active adoption of, and commitment to, executive compensation best practices."

DIVERSE, AND THEN SOME

The CBCA amendments also require public companies to disclose information regarding diversity among directors and management teams. This year, 92% of the TSX constituents had at least two women on their boards, Kingsdale reported. Yet the new law applies to all groups, including female, aboriginal, and disabled people, as well as other minorities. "I suspect this is unusual and that Canada may be on the forefront here," Olasker commented.

"It still surprises me that there has been little change in Corporate Canada in terms of adding more women to TSX listed boards," Deborah Rosati, CEO and founder of Women Get On Board, wrote on her blog approximately a month before the government announced the reforms. Board-diversity "requires business leaders to step up to recognize the positive impacts of and the necessity of developing a culture of diversity in the boardroom, which many have been slow to do," Rosati noted.

"People would like for this process to be accelerated, but there is no question that we are moving towards more gender diverse boards," Olasker said.