

Beyond the boilerplate

How activist shareholders and a complex regulatory regime are ramping up the demands on corporate counsel

By Bev Cline

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Shareholder democracy and shareholder engagement are the “new norm,” experts agree, meaning both new and veteran in-house counsel at Canada’s public companies have a vital role to play in guiding their organizations through increasingly complex corporate governance matters.

Disclosure, shareholder matters such as say on pay, advising the board and its committees on corporate governance: It’s the in-house counsel that knits them all together and who needs to develop and drive the processes, says Gordon Davies, chief legal officer and corporate secretary, Open Text Corporation.

As an example, “the complexity of the new disclosure rules and the requirements that come from that in the U.S. — and we are increasingly seeing this in Canada as well — have caused boards and committees to rethink their mandates to ensure that they are covering all of the things that need to be addressed as part of their oversight role,” says Davies.

And they are turning to in-house counsel to educate them on corporate governance issues.

“Given the increased visibility of corporate governance matters, and in particular, with respect to compensation and risk management, I think that boards of directors are increasingly looking to in-house counsel and corporate secretaries to educate them on the applicable legislation and emerging trends,” he says.

The influential Canadian Coalition for Good Governance (CCGG), which represents most of the country’s largest institutional investors, has been quite active in promoting its views on corporate governance matters to issuers, says Cornell Wright, a partner at Torys LLP who practises corporate and securities law with a focus on M&A and corporate finance.

“The CCGG is recommending that institutional investors engage directly with companies to talk about their compensation policies and practices.”

In fact, adds Leslie McCallum, a lawyer in Torys' capital markets practice, the CCGG is urging boards to be more *pro-active* in their relationship with shareholders.

Legal function integral

Generally the legal function in a company is right in the middle of most governance issues," agrees Stephen Griggs, executive director of CCGG, and a lawyer by training.

"Whether it is disclosure, regulatory disclosure, enhanced disclosure being requested by shareholders, engagement meetings between shareholders and boards, ensuring that no inappropriate disclosure is made — generally the legal function is integral in making [corporate] governance happen," he says.

As a result of the increased complexity, and a number of emerging corporate governance requirements, it is inevitable that there is more overlap in what boards and committees need to consider," says Davies, "in particular on the risk management side, we're seeing a bit of an overlap between committees."

"Both the audit committee and the compensation committee, as an example, may need to examine the same aspects of the business to ensure they are addressing the requirements of the new legislation in their respective area of governance.

"And from a disclosure perspective, under the new SEC rules, and the [Canadian Securities Administrators report, released in December] is going in the same direction, this process will need to be documented in the issuer's public filings," he explains.

"The point is compensation committees will need to look beyond the four corners of compensation-related matters to ensure they are not negatively impacting how risk is assessed in other aspects of the business," he says.

"In-house counsel has a very important role in making sure each of the committees is separately or collectively turning their minds as to what is required and that processes are in place to ensure that information gets transmitted to the board."

"Since in-house counsel are focused on risk management and compliance, a key component is making sure their public disclosure is accurate and reliable. Also, that the necessary internal systems to make sure information makes it way up to the board," agrees Wright, who advises companies, boards of directors and shareholders on corporate governance matters.

Hypersensitive role

According to Wright, in-house counsel should be independent thinkers. "There is a real — and growing — intolerance [among shareholders] for boilerplate disclosure or simply ticking the box," he says, by way of example.

"In-house counsel need to ensure that people in their company are thinking about corporate governance issues with a view to their company's own facts and circumstances.

"Be prepared to defend your decisions and make sure you draft your disclosure in a way that allows people to understand your thinking," says Wright.

"You don't want to be in a position, where, after the fact, you have to go out and put out supplemental disclosure because people have raised questions about it. So disclosure is a hypersensitive issue for in-house counsel," he says.

"In-house counsel has a very important role in terms of thinking about these issues, raising them with the board, consulting with external advisers, as appropriate, and making sure they are driving the process forward in a way that the company's practices and disclosure are defensible to the maximum extent," he says.

Global corporate governance

While the new CSA report [see sidebar] is very current here in Canada, not all of the themes are new," says Davies.

"Many of the same concerns came out of the U.S. Dodd Frank legislation and the new SEC [Securities and Exchange Commission] corporate governance disclosure rules that are applicable to U.S. issuers' proxy statements," he says.

"There are a number of companies like Open Text in Canada that are dual-listed, and therefore need to take into consideration legislation not only in Canada, but in the U.S. as well," he says.

"The reality is that board of directors depend on in-house counsel to be informed; not just what the rules are, but what the trends are, and what institutional investors are saying, and what's coming down the pipe," says Torys' McCallum.

"Certainly in Canada, you need to be aware of not just of what is happening here, but what's happening in the U.S. and other jurisdictions as well. We live in a globalized setting where peoples' practices and expectations are broader than

OSC and CSA updates

In January 2011, the Ontario Securities Commission released *OSC Staff Notice 54-701, Regulatory Developments Regarding Shareholder Democracy Issues*.

Seeking public comment on issues related to shareholder democracy, the notice provides an update from OSC staff on the current status of its work in the area of shareholder democracy issues.

The notice identified the following issues as requiring additional review at this time and, potentially, the development of regulatory proposals for reporting issuers:

- slate voting and majority voting for uncontested director elections;
- shareholder advisory votes on executive compensation;
- the effectiveness of the proxy voting system.

Looking forward, it said "we may identify additional issues as a result of our continued review and developments in the capital markets."

One month earlier, in December 2010, the Canadian Securities Administrators (CSA) released Staff Notice 58-306, 2010 Corporate Governance Disclosure Compliance Review.

According to the *Summary of results and future action*, "over half of the issuers reviewed were required to make prospective enhancements to their corporate disclosure.

"We view the level of non-compliance with the disclosure requirements of the Corporate Governance Instrument to be unacceptable. Although significant efforts have been made to comply with the corporate governance disclosure requirements, issuers need to further improve their disclosure." ■

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just what is happening in their own backyard,” she says.

The shareholder base of Canadian public companies is generally composed of more than just Canadian institutional investors, says the CCGG’s Griggs.

“The expectations of the British shareholders will be different

than the French or different than the Americans and so on. In-house counsel needs to understand these nuances and advise the board on those differing expectations,” he says. ■

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Au-delà de la divulgation habituelle

Des actionnaires activistes et un système réglementaire complexe augmentent les attentes par rapport au conseiller juridique d’entreprise.

Les nouvelles normes en matière de démocratie de l’actionariat et d’engagement des actionnaires et la complexité de la gouvernance d’entreprise renforcent le rôle essentiel du conseiller juridique d’entreprise au sein de sociétés ouvertes canadiennes.

Divulgation de données, conseils au CA et à ses comités sur la gouvernance d’entreprise sont autant de questions à gérer par le conseiller, selon le directeur des affaires juridiques chez Open Text Corporation, Gordon Davies. Compte tenu de la visibilité croissante de la gouvernance d’entreprise, notamment en matière de gestion du risque et de la rémunération, les conseillers sont appelés à informer les CA et comités sur les lois applicables et les tendances émergentes en vue d’une conformité aux nouvelles règles complexes relatives à la divulgation d’informations aux États-Unis et au Canada.

Le Canadian Coalition for Good Governance (CCGG), représentant la majorité des investisseurs institutionnels canadiens, recommande une discussion entre investisseurs et responsables d’entreprises, notamment sur les pratiques et politiques de rémunération. L’avocate Leslie McCallum chez Torys préconise également un rôle plus proactif du CA sur le plan de ses relations avec les actionnaires, pour faire suite à la recommandation du CCGG.

Un rôle vital

Selon Stephen Griggs, directeur exécutif de la CCGG, il faut s’assurer qu’aucune divulgation non appropriée n’est faite durant les réunions entre CA et actionnaires, qu’il s’agisse de divulgation d’information, de divulgation réglementaire ou d’une divulgation plus approfondie exigée par les actionnaires.

M^e Davies estime quant à lui que les comités d’audit et de rémunération doivent prendre en considération les exigences de la nouvelle législation dans leur sphère respective de gouvernance d’entreprise. Les nouvelles règles de la Securities and Exchange Commission (SEC) et le rapport des Autorités canadiennes en valeurs mobilières (ACVM) abondent dans le même sens en exigeant que ce processus soit explicité dans les rapports publics des émetteurs.

Le conseiller juridique d’entreprise joue un rôle vital en garantissant que chacun des comités garde à l’esprit les exigences en vigueur et que les processus soient en place pour assurer la transmission d’informations au CA ainsi qu’une divulgation publique fiable et exacte, selon M^e Wright, associé chez Torys.

Un rôle très délicat

Il fait remarquer, d’une part, que les actionnaires sont plutôt récalcitrants à l’égard de la divulgation typique et d’autre part, que le conseiller juridique d’entreprise doit

rester indépendant.

La divulgation étant une question très délicate, le conseiller doit s’assurer qu’elle soit bien comprise et approuvée. Cela implique de soulever les questions relatives à cette divulgation devant le CA, quitte à faire appel à un conseiller externe pour garantir que les pratiques de divulgation soient les plus justifiables possible.

Gouvernance globale

Le rapport de l’ACVM reste très d’actualité au Canada, même si les thèmes abordés ne sont pas tous nouveaux, indique M^e Davies. Des préoccupations similaires ont été énoncées dans la loi américaine Dodd Frank et les nouvelles règles de divulgation de la SEC.

Plusieurs entreprises à double cotation comme Open Text au Canada doivent prendre en considération à la fois les législations canadiennes et américaines. Les conseillers juridiques doivent informer les entreprises des nouvelles règles, tendances et perspectives des investisseurs, selon M^e McCallum. Elle somme les conseillers de rester au fait des événements canadiens, américains et à l’échelle internationale, au même titre que M^e Griggs, qui renchérit que le conseiller juridique doit cerner les attentes différentes d’un investisseur britannique, français et américain pour fournir des conseils adéquats. ■

~Yasmina El Jamaï