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TSX Adopts and Proposes New Director Election Requirements



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The Toronto Stock Exchange ("TSX") has adopted amendments (the "Amendments") to its Company Manual that, effective December 31, 2012, will require TSX-listed issuers to

- provide for the election of directors individually and not by way of a slate;
- hold annual elections for all directors;
- make specified disclosures concerning majority voting for the election of directors; and
- promptly release detailed disclosure of director election voting results.

The TSX has also published for comment further proposed changes to its Company Manual that would require TSX-listed issuers to have majority voting for director elections at uncontested shareholders meetings (the "Majority Voting Proposal").

Objectives of the Amendments

The TSX's stated purpose of initially proposing the Amendments was to improve corporate governance standards and disclosure for all listed issuers and uphold the integrity and reputation of the Canadian capital markets, as well as security holder interests.

Mason Capital Succeeds: Appeal Court Confirms CDS’s Ability to Requisition Meeting By “Empty Voter”



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In *TELUS Corp. v. CDS Clearing and Depository Services Inc.*,¹ the British Columbia Court of Appeal considered the validity of a shareholder’s requisition for a general meeting of shareholders. The court clarified that a requisition made under s. 167 of the *Business Corporations Act*² need not identify the beneficial owner of the shares used to call the meeting in order to be valid. In addition, the court held that it had no authority under the Act to restrain a shareholder from requisitioning a meeting on the basis of its “net investment” or of the fact that its interests are not aligned with the economic well-being of the company.

Background

The requisition concerned the capital structure of the respondent, TELUS Corporation (“TELUS”). TELUS has two classes of shares: common shares and non-voting shares. TELUS originally adopted this capital structure in order to comply with foreign ownership restrictions on its voting shares.

When foreign investment in TELUS decreased and the rationale for having non-voting shares disappeared, TELUS’s board of directors explored the possibility of consolidating the company’s share structure by exchanging the non-voting shares for voting shares.

TELUS ultimately announced plans to see the non-voting shares converted on a one-for-one basis to common shares. This announcement resulted in a narrowing of the price differential between the two

classes of shares. Historically, the non-voting shares traded at a discount relative to the trading price of the common shares.

In response, the appellant, Mason Capital Management LLC, began acquiring common shares and hedging its position by short selling both common and non-voting shares. As a result, Mason’s interests lay in widening the gap between the prices of non-voting and common shares.

Mason later requisitioned a general meeting pursuant to s. 167 of the Act, proposing that four resolutions be put before shareholders. The first was to amend TELUS’s articles to prohibit the company from exchanging non-voting shares for common shares at a ratio of less than 1.08 non-voting shares per common share with limited exceptions. The second resolution was identical to the first except that it specified a lower rate of exchange. The third resolution, which was to be considered only if the first two resolutions were not approved, was a non-binding recommendation to the directors that they not proceed with any exchange of shares at a ratio of less than 1.08 non-voting shares per common share. The fourth resolution mirrored the third resolution but specified a lower rate of exchange.

Although Mason was behind the requisition, the requisition was formally made by CDS & Co., the nominee of CDS Clearing and Depository Services Inc. As the national securities depository, CDS was the registered shareholder of most of the common shares, which CDS held on behalf of numerous intermediaries, including on behalf of Mason. The requisition stated that CDS was the registered holder of a number of shares sufficient to requisition the meeting and that CDS was operating under direction from a beneficial owner of the shares. The requisition did not identify Mason as the beneficial owner behind the requisition. However, on the day immediately following CDS’s requisition, Mason issued a press release announcing that it had requisitioned the meeting.

TELUS responded to the requisition by seeking and obtaining court orders preventing Mason from calling or holding the meeting. At trial, the chambers

judge held, among other things, that the requisition was improperly made because it did not fully identify the beneficial owner of the shares that were used to call the meeting and, alternatively, that the proposed resolutions were contrary to TELUS's articles and the Act. Mason appealed.

Decision

The key issues on appeal were whether the requisition was improperly made because it did not identify the beneficial owner of the shares used to call the meeting, whether the resolutions were contrary to the TELUS's articles and the Act, and whether Mason should be permitted to requisition a meeting despite having a very limited net financial interest in the company due to its hedged position.

Mr. Justice Groberman, writing for the court, concluded that CDS was capable of "requisitioning a meeting on behalf of the beneficial owner of shares that are deposited with it" and that there was no "requirement that the beneficial owners of shares be identified in a requisition." The basis of this conclusion was s. 167(3)(b) of the Act, which provides that in order for a requisition to be validly made, it must be signed by and include the names and mailing addresses of all of the requisitioning shareholders. "Shareholder" is defined in s. 1(1) of the Act to mean "[any] person whose name is entered in a securities register of a company as a registered owner of a share of the company." The court observed that because the definition of "shareholder" includes registered owners, "the plain words of the statute dictate that CDS is entitled to requisition a meeting."

The court further concluded that s. 167(7)(d)(ii) also does not require the identity of the beneficial shareholder be revealed, on the basis that such provision of the Act does not require the directors to detect whether a requisition is inappropriate, but merely gives them the discretion to refuse to call a meeting where the primary purpose is to enforce a personal claim or redress a personal grievance. While there may be rare cases where the identity of the beneficial holder may be critical to weed out

an inappropriate requisition, the court noted, s. 167(7)(d)(ii) did not permit the court to expand the requirements for a requisition beyond what is set out in the Act.

The court then considered whether the proposed resolutions were inconsistent with certain provisions in the articles. In particular, one of the provisions set out certain rights, privileges, restrictions, and conditions attached to the common shares and non-voting shares but did not contemplate an exchange of one class of shares for the other (the "Rights Provision"). TELUS argued that the proposed resolutions were inconsistent with another provision in the articles, which provided that the Rights Provision could only be "deleted, amended, modified or varied" by a special resolution of each share class. However, the court held that because the Rights Provision did not purport to be the exclusive provision in the articles setting out the rights, privileges, restrictions, and conditions that attach to the shares, it could not be said that the proposed resolutions deleted, amended, modified, or varied the Rights Provision.

TELUS also argued that the proposed resolutions breached a provision in the articles that provided that each common share and non-voting share "shall have the same rights and attributes and be the same in all respects." However, the court observed that, under the articles, there was "no existing right to exchange or convert non-voting shares to common shares, nor [would] the resolutions, if passed, create such a right." The matter was also not left in the discretion of the board of directors. Accordingly, the proposed resolutions did not affect any right or attribute of the non-voting shares.

In addition, the court observed that the third and fourth resolutions, despite being purely advisory, were not precluded by the Act from constituting the subject of a requisitioned meeting. Section 167(1) of the Act provides that a shareholder may requisition a general meeting for the "purpose of transacting any business that may be transacted at a general meeting." In the court's view, the phrase "transacting any business that may be transacted at a general

meeting” has a wide ambit that includes advisory resolutions.

The court then turned to the issue of whether Mason should be permitted to requisition a meeting despite the fact that its hedged position meant that it had a limited net financial interest in the company. Although the court recognized that this was a “cause for concern,” it observed that it was sufficient that a requisitioning shareholder hold the required number of shares to requisition a meeting pursuant to s. 167(2) of the Act. The Act did not provide the court with the power to “look behind shareholdings to determine whether the shareholding represents a ‘material interest in the company.’” The court concluded by remarking that, to the extent that cases of “empty voting” are subverting the goals of shareholder democracy, “the remedy must lie in legislative and regulatory change.” TELUS also attacked Mason’s empty voting position on the basis that s. 186 of the Act gives a court broad discretion to enjoin a meeting. While acknowledging it gives a court fairly broad authority to control the calling and conduct of a meeting, the court found it does not allow a court to disenfranchise a shareholder on the basis that it is suspected of empty voting.

In the result, the court allowed the appeal and set aside the orders of the chambers judge.

Analysis

While it remains to be seen whether Telus will appeal the British Columbia Court of Appeal’s decision, the decision has important implications. First, the court’s conclusion that it is not entitled to “look behind” a shareholder’s shareholdings should help to avoid the prospect of unwarranted court challenges based on shareholder motive. Subsequent to the decision of the chambers judge, it may have been open to interpret that a shareholder’s rights could be restricted where its interests were perceived as being inconsistent with the best interests of the company.

The court has also helpfully clarified the power to requisition a meeting for the purposes of consider-

ing advisory resolutions. By broadly interpreting s. 167(1) of the Act, the court may have foreclosed future arguments that the meaning of the phrase “transacting any business that may be transacted at a general meeting” should be narrowly construed.

Clear rules are required to ensure a level playing field for management and dissidents. The court’s decision provides well-needed clarity with respect to the law and procedure that governs requisitions of shareholder meetings and implicitly emphasizes that the provisions of the Act should generally be read in their ordinary sense where their language is clear and ambiguous.

¹ [2012] B.C.J. No. 2083 (B.C.C.A.).

² SBC 2002, c. 57.

Gender Diversity on Boards— Breaking the Impasse



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Amid all of today’s talk about the desirability of bringing more women onto corporate boards, two indisputable facts stand out: One, the business case for board diversity of all kinds, including gender diversity, has been well established and widely accepted. Two, over the past decade, progress has been negligible. Here is what boards, top management, female candidates, and executive search firms can do about it.

Despite the widespread acceptance of the business case for diversity, the percentage of women on Fortune 500 company boards has remained stuck for the past seven years at around 15 per cent. In both 2010 and 2011, about one-tenth of companies

had no female directors at all. The future could be even darker, as recent research by our firm suggests: Over the past five years, the number of women reaching senior executive roles has decreased by 12 per cent, shrinking the talent pool from which most female directors are likely to be drawn. Despite some recent high-profile appointments, only 3 per cent of Fortune 500 CEOs are women, and—as any board search professional can attest—boards still almost reflexively seek sitting or retired CEOs to fill board seats.



Over the past 5 years, the number of women reaching senior executive roles has decreased by 12%

Source: EEOC Labor Statistics 2000 & 2010

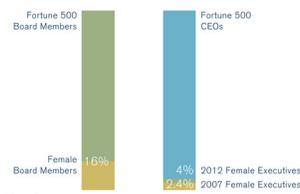


Figure 1
Fortune 500 Female Representation
Source: Fortune 500 Board statistics from Catalyst Quick Takes 2012
Fortune 500 CEO statistics from CNN Money

Great Expectations: The P&L Perspective

It’s no surprise that boards see CEOs (and COOs) as most qualified to oversee multi-billion dollar corporations and to fulfill the chief responsibilities of directors—to hire and fire the chief executive, set compensation for top management, validate strategy in terms of shareholder value, and ensure corporate integrity and sound risk management. For many boards in search of a new director, the bottom line is literally the bottom line: they want someone who has been responsible for a significant P&L, and the title “CEO” is used as a proxy, sometimes incorrectly. When boards fully realize the difficulty of finding a Fortune 500 female CEO to join them, they often try to come as close as they can to the CEO profile.

Any approach to increasing gender diversity on boards will have to address this overwhelming preference on two fronts simultaneously: by broadening the perspective on what constitutes valuable experience and by making sure that women get the experiences that help them qualify for board service. All of the interested parties—boards, top

management, aspiring female directors, and board search professionals—have a distinctive role to play. By taking some highly specific actions, we can not only increase board diversity but, more importantly, realize the promise of the business case.

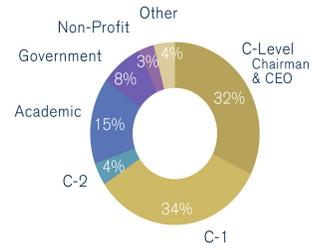
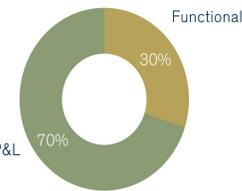


Figure 2
Profiles of Current Female Directors of Fortune 100
Source: 2011 Egon Zehnder analysis



The real purpose of increasing gender diversity is not simply to increase the number of women on the board but to find exceptional directors who can help take the organization to the highest level of performance.

What Boards Can Do: Adopt New Perspectives and Processes

In some countries, the issue of gender diversity on boards has simply been addressed through government-mandated quotas, but quotas remain controversial in many other regions. For most Fortune 500 boards, there is no simple solution that will change deeply ingrained practices overnight. For most, achieving gender diversity will require a concerted effort to adopt some new perspectives and some new processes, including

- *Thinking holistically about the board’s needs.* When the Nominating Committee is developing a profile of the desired candidate for a board opening, they should avoid the tendency to establish qualifications that could only be fulfilled by a CEO or COO

and think more flexibly about the competencies the board needs. Because boards often view the head of a function as presiding over a narrow silo that does not qualify that individual to take the enterprise-wide strategic view, they overlook this rich source of potential directors. However the issue should not be whether they have had staff rather than line experience, but whether they have, for example, demonstrable and exceptional competence in an area where the board is lacking.

- *Requiring that the shortlist of candidates for a board opening include at least one woman.* One of the most effective steps a board can take in the short term is simply to adopt such a policy as part of its internal governance process. Neither a quota nor a regulatory rule, this voluntary practice, as one of our colleagues has forcefully argued, exposes the board to highly qualified female candidates they might otherwise not see, compels all candidates, male and female, to genuinely compete for the position, and provides even unsuccessful female candidates with valuable experience of the process. The number of female board members will inevitably rise. Once exposed to top-flight, highly qualified diversity candidates are likely to make the best business decision for the organization.¹
- *Integrating gender diversity with board succession planning.* Forward-looking boards should plan board succession far in advance of vacancies. They may even address multiple anticipated successions together in order to make sure that the board will remain balanced and equipped with the competencies needed, as the company's strategy and business environment continue to evolve.² Once they've developed profiles of the kinds of directors they will need, they can begin to

make contact with potential appointees, including women who, during a purely paper-based process, might not have been considered due to time pressure. As the demand increases for female board members, boards that have already established relationships with qualified women will be better positioned to compete for them.

- *Ensuring critical mass.* Being the sole woman on a board can sometimes be a frustrating role. She may be regarded as a “diverse” checkmark or someone other board members turn to about gender-oriented business issues, not as a member of the board who is listened to on a wide variety of issues that come before the board. By recruiting more than one woman, boards can maximize the impact of their contributions and facilitate their integration.
- *Evaluating based on competencies, in addition to experience and cultural fit.* Often, board members will privately express their reservations about taking a chance on candidates who do not fit the usual profile. The reality today is that boards do not have to take chances. Director assessment has become increasingly sophisticated, scientific, and accurate—partly because long-established organizations devoted to executive search and assessment have been able to analyze, codify, and apply the enormous amount of experience and data they have amassed over decades.

Most of the many CEOs who currently sit on Fortune 500 boards lead or have led companies that have affirmed the value of diversity of all kinds and have made progress on it in many instances. Taking these steps, not one of which is particularly onerous or difficult, enables these leaders to reaffirm the value of gender diversity and extend it to the outside boards on which they serve.

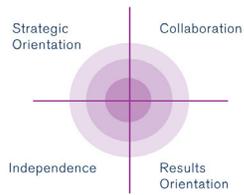


Figure 3
The Four Core EZI Proprietary Board Competencies

Predicting a Prospective Board Member's Performance
EZI has identified four core competencies that boards and directors should have: Strategic Orientation, Collaboration, Independence, and Results Orientation. Through a combination of skilled interviewing and scaled assessment it is possible to determine the degree to which a board candidate possesses each of these competencies and predict the kinds of behaviors that can be expected from the prospective director – even if the candidate has never served on a board, as is often the case with diversity candidates.

Here, for example, are the expected behaviors of candidates who fall into the low (L), medium (M), and high (H) ranges of competency in Results Orientation:

FULL DESCRIPTION	
L	Wants company to perform well <ul style="list-style-type: none"> Is interested in the company doing well, but will not identify what drivers will have greatest impact on short-term and long-term performance. Will not articulate the key operational objectives of the company and how they would generate results.
M	Focuses on Measurable, Shorter-Term Results <ul style="list-style-type: none"> Expresses dissatisfaction with poor performance and is keen to see that management is held fully accountable for clear operational objectives and targets. Questions monthly performance figures and takes an interest in a variety of relevant measures, both financial and qualitative.
H	Expresses Desire to Improve Long-Term Shareholder Value <ul style="list-style-type: none"> Challenges CEO or board member thinking on current strategy or practice for potential longer-term results. Draws on real-life examples from experience in a way that illustrates possible directions or alternatively, will recommend external professionals who could advise the CEO on next steps. Will be focused on ensuring that the company performs to the highest levels of shareholder expectation.

What Management Can Do: Create a “Board Track”

Top management can help female executives acquire the desirable characteristics of a director by creating, in effect, an informal “board track” designed to increase the pool of talented women. Critical elements include the following:

- *Identifying female executive talent early.* Companies should establish a high-potential program that has the identification of talented female executives as early as possible as one of its explicit goals. Here again, advances in assessment can be extremely helpful. For example, our firm has recently developed a first-of-its-kind model for executive potential (Figure 4) specifically designed to identify possible CEOs early in their careers. By identifying these extremely high-potential executives and involving them in carefully tailored high-potential programs, the organization can accelerate their development and keep their careers on track toward the kind of experience boards value and for which, as the assessment indicates, they are supremely fitted.
- *Providing appropriate development opportunities.* While a broad range of experiences

is desirable, the most difficult to acquire are roles that would prepare someone to help oversee a multi-billion dollar corporation. Often, women fail to get these opportunities because their bosses make assumptions that may not necessarily be true. For example, sometimes it is assumed that a woman would not take on an international assignment or work in a high-risk locale—precisely the kind of line experience boards like in potential directors.

- *Supporting board service.* Talented women should be encouraged to express interest in board service. To support them, CEOs should open their networks and actively refer and promote “board-ready” women in their organizations. They should provide exposure to the company’s board, broadening their networks and multiplying referral opportunities. CEOs and board members should search firms and other board level executives, as well as facilitate introductions to influencers for added exposure.

What Female Executives Can Do: Proactively Prepare

Given the stagnant numbers of female directors, it is clear that women who aspire to a board seat face formidable obstacles. To overcome them, they should consciously do everything they can to put themselves in the position to handle such a role and, just as important, do everything they can to secure one, including

- *Seeking the right experiences.* Board aspirants should be diligent in seeking assignments that provide the breadth of view and responsibility that would prepare them to deal with macro-strategy and other issues of broad oversight at the board level. Such experiences might include international postings, general management roles, and exposure to governance issues, or it might

mean gaining great depth in areas that are critical to boards in particular industries such as risk management in financial services or digital marketing in consumer products.

- *Gaining sponsorship and networking.* Highly qualified women should be on guard against simply assuming that hard work and high performance will suffice. They should therefore be especially proactive in seeking sponsors in the company and networking with relevant individuals and organizations. Even if a female executive has a sponsor, she should reach out to mentors, directors, and search firms to gain valuable exposure—getting her name in circulation as a possible director and obtaining valuable advice from people who know first-hand what it takes.
- *Aiming appropriately.* Board aspirants should be aware of setting themselves up for disappointment by assuming, for example, that experience with a relatively modest P&L qualifies them to serve on the board of a multi-billion dollar company or by being unwilling to accept anything less. There are more than 12,000 public companies, offering a multitude of opportunities for board service. However, that should not mean jumping at the first chance that comes along, unless it is the right chance. The key is to aim for board service that aligns with the individual’s career path and offers opportunities to learn and grow, preparing the way for service on boards of larger enterprises in the future.

In addition to breadth of experience required by any board, particular depth in emerging areas that are critical to boards such as digital for consumer companies or risk for financial institutions allow women to make a greater impact.

However, once in the running for an appointment, potential female directors should avoid getting pigeonholed by gender. As candidates, they should be clear and specific about the special skills and perspectives they bring beyond gender and how those skills can complement those of other directors. Once on the board, female directors should resist simply becoming relegated to the role of “representing” all women.

What Search Firms Can Do: Educate, Challenge, and Nurture

Search firms that are well aware of the business case for diversity know that they are doing no greater service for their clients than when championing and facilitating diversity. Because they influence which candidates get serious consideration, they have an opportunity and an obligation to help boards understand and achieve the full benefits of diversity. Critical elements include

- *Challenging and broadening the criteria for directors.* Instead of letting nominating committees fixate on the issue of experience and the CEO/P&L paradigm, search consultants should guide committee members to a deeper understanding of what they really need a prospective director to do in relation to the current board, its composition, and company strategy.
- *Nurturing candidates at each point along the journey.* Working with management on their high potential program, search consultants with powerful assessment tools and extensive coaching experience can help high-potential women identify their level of readiness and help them close any gaps they have. For “ready-now” candidates, the search firm can help build networks and begin to expose those candidates to relevant opportunities. For first-time candidates, the firm can provide guidance and advice, as they make their way through the maze of

assessment, interviews, and formal and informal contacts with board members.

- *Facilitating the on-boarding process.*
Because it is hard for anyone to join a new group and can be especially hard for a woman joining a previously all-male board, it is critical to design a careful onboarding process to set her up for success. The process should begin by exposing her to board members who can explain honestly what can be expected in terms of decision making, openness, and collegiality. On boards appointing a woman for the first time, the other directors may also need some “onboarding” with an experienced search consultant facilitating a head-on discussion of biases, especially since many are unconscious.

If the firm does these things right, diverse slates will become routine. More importantly, boards will greatly increase their chances of finding someone who not only brings the business value of diversity to the boardroom but is also extraordinary—as a leader, a colleague, and a wise counsellor to management. The real purpose of increasing gender diversity is not simply to increase the number of women on the board but to find exceptional directors who can help take the organization to the highest level of performance.

Time to Make Good on the Promise of Diversity

We began with two indisputable facts: the acceptance of the business case for diversity and the stagnant numbers in achieving it on boards. We conclude with a third: There should no longer be any excuse for a lack of gender diversity in the

boardroom. Boards need only to widen their perspective about what constitutes board-worthiness and put in place processes to make sure it is realized—including the short listing of women candidates, the integration of diversity with succession planning, and the objective evaluation of candidate competencies. Management can support that vision by creating a “board track” that gets highly talented women into the historically closed network of potential directors, and women can do their part by seizing opportunities and experiences that will prepare them for board service. Search firms also have an important role to play—challenging clients to embrace diversity and nurturing worthy candidates at each step of the journey. By taking these steps, boards, top management, potential candidates, and search firms can translate the promise of diversity into practice, raising the number of female directors and—most importantly—changing the landscape of corporate governance.

[*Editor’s note:* This article has been reprinted courtesy of Egon Zehnder International. © 2012.]

- ¹ Kim Van Der Zon, “Bring The NFL ‘Rooney Rule’ Into Corporate Boardrooms,” *Forbes.com* (May 9, 2012), <<http://www.forbes.com/sites/forbeswomanfiles/2012/05/09/bring-the-nfl-rooney-rule-into-corporate-boardrooms/>>.
- ² George L. Davis Jr., “Succession Planning for the Boardroom: Chart a Winning Course through Supply and Demand,” Egon Zehnder International (October 2008), <<http://www.egonzehnder.com/global/thoughtleadership/publications/articleindex/publication/id/11900537/article/id/11900539>>.
- ³ Michel Deschappelles, “What CEOs Need to Know to Make Diversity and Inclusion Really Work,” Egon Zehnder International (September 2011), <<http://www.egonzehnder.com/global/thoughtleadership/publications/articleindex/publication/id/17500518>>.