

# Private Sector Opinion

## Does More Power for Shareholders Undermine Board Stewardship?

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**Peter Dey**

The level of shareholders' expertise and experience needs to be questioned as they wield greater clout and become more deeply involved in strategic issues that should be the board's purview. This misdirected involvement distracts shareholders from their principal and most important role: electing and overseeing boards. To play that role, shareholders must have the basic tools—from soliciting proxies of holders of voting securities to having the ability to seek court relief for a company's oppressive conduct.

### Foreword

One of the important principles of good governance is the empowerment of shareholders. Unless they are able and willing to hold boards to account, then there is little hope, short of tough and intrusive regulation, of ensuring that company management acts in anything other than their own narrow self-interest.

But the question is: how far should shareholders go? Peter Dey's paper brings an important perspective of someone who is both committed to good governance and experienced as a corporate director. He is right to ask whether the balance between intrusion and entrepreneurial freedom is being struck correctly, even though his relatively cautious stand on "Say on Pay" will be seen as controversial in some quarters.

It is an oft-repeated mantra that shareholders are not in the business of micromanagement. Dey's concern is that "Say on Pay" may lead us in this direction, followed, for example, by "say on the environment and health" and then other issues. Eventually, shareholders may become surrogate regulators.



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The Forum is a multi-donor trust fund facility located within IFC, co-founded in 1999 by the World Bank and the Organisation for Economic Co-operation and Development (OECD).

There is a risk here, which must be recognized, that the pressure for shareholders to adopt an intrusive approach often comes from people who are not actually shareholders but seek to advance their own public policy agendas. They want institutional investors to micromanage according to preset criteria—for example, CO2 emissions or the size of bonuses—and believe those same institutions should be held to account by the public for fulfilling this role rather than just by their ultimate beneficiaries.

Financial regulators, too, are looking to shareholders to reinforce their efforts by becoming more involved in challenging boards, especially in the area of risk management.

Here, too, is a potentially short slide down a slippery slope before shareholders are obliged to assume some direct responsibility for risk management, which ought to be a task for management overseen by the board. Shareholders can do many things to ensure that boards are well-equipped to understand and manage risk, but they cannot fulfill this task themselves, because they lack the intimate knowledge of what is going on inside the company.

Dey's concern is to identify what really matters to shareholders and how they can prioritize their governance efforts. Sometimes, this will involve challenging a company's strategic direction and the degree to which it is equipped to manage the risks it has taken on. This will require a good understanding of the board's strengths and weaknesses and the business model the directors are trying to pursue, all of which goes beyond a mere ability to crunch the financial numbers.

Shareholders investing for the long term must be up to such intervention when it is necessary, but mostly they need to focus on securing and properly exercising those rights that are critical. Dey identifies, for example: the right for shareholders not to be diluted against their will through the issue of new capital; and, the right to appoint and dismiss directors.

The latter right in particular is critical. If boards know they can be dismissed, they will tend to behave better, and it is easier for shareholders to make sure the boards are equipped to perform the core tasks of making robust strategic decisions and managing risk. Having a strong, well-functioning board in place offers a much greater chance of long-term success than shareholders trying to run the company at an ignorant distance.

So, where does this leave “Say on Pay?” I share some of Dey’s reservations. It will never succeed if its purpose is to operate a pay policy aimed at ratcheting down amounts to publicly acceptable levels. But, remuneration is an important indicator of how well boards are coping with the natural tension between the self-interest of executives and the broader interest of the entire company.

A good policy can help by properly aligning remuneration to the delivery of key strategic objectives, but a poor remuneration policy generally means a poorly functioning board. It can thus be a critical warning sign, as indeed it was for several banks.

A focus on remuneration thus remains worthwhile. Where they see persistently poor policy, however, shareholders may need to do more than just vote against a “Say on Pay” resolution. They need to look through that to the ultimate reasons why the policy is flawed and ask themselves whether more radical action is needed. The critical right thus remains to appoint and dismiss directors.

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<sup>1</sup> The findings, interpretations and conclusions expressed in this foreword are the author’s own, and they should not be attributed in any manner to the organizations he is associated with.

# Does More Power for Shareholders Undermine Board Stewardship?<sup>2</sup>

By Peter Dey  
Chairman, Paradigm Capital, Inc.  
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Since the financial crisis erupted, we have seen many discussions among directors, shareholders, regulators, policymakers, researchers, stakeholders, and others about the most important factors determining board effectiveness. We have also seen a shift in the balance of power between boards and shareholders, one that presents problems as it undermines board stewardship.<sup>3</sup>

## Background

My direct involvement in governance reform began in the early '90s, when I chaired the Toronto Stock Exchange (TSX) committee that published the December 1994 report, *Where Were the Directors?*<sup>4</sup> This report heralded a new era of increased attention to the responsibilities of Canadian boards as stewards of shareholder value. Internationally, I have been associated with the International Corporate Governance Network (ICGN) for the last 10 years and have been an active participant in the Global Corporate Governance Forum, serving as PSAG's chairman.

*Where Were the Directors?* was a controversial title at the time of publication, but it effectively focused the thinking of those involved in governance systems on those systems' principal weaknesses. The TSX adopted the committee's 14 recommendations as best practice guidelines for listed companies. Recognizing that there is no "one size fits all" solution, the TSX does not require compliance with the guidelines—but, every year, companies have to disclose and explain any differences between their corporate governance practices and the guidelines.

Good governance requires a large dose of common sense. In the course of the TSX exercise, we proposed standard guidelines, ones that reflect the practices in any good governance system. These include: a majority of independent directors (since extended to a majority of independent-minded directors); a chair who is not the CEO; the appropriate board committees; objective board evaluations; and *in camera*<sup>5</sup> meetings.

<sup>2</sup> This article is based on Peter Dey's speech following his acceptance in June 2010 of the Lifetime Achiever Award from the London-based International Corporate Governance Network (ICGN). Dey was recognized for his role in creating governance guidelines in 1994 for companies on the Toronto Stock Exchange, helping the Organisation for Economic Co-operation and Development (OECD) develop global governance guidelines, and chairing the Forum's Private Sector Advisory Group (PSAG).

<sup>3</sup> See, for example: Jennifer G. Hill, "The Rising Tension between Shareholder and Director Power in the Common Law World." March 30, 2010. Corporate Governance: An International Review, Forthcoming; Sydney Law School Research Paper No. 10/34; Vanderbilt Law and Economics Research Paper No. 10-11; ECGI - Law Working Paper No. 152/2010. Available at <http://ssrn.com/abstract=1582258>.

<sup>4</sup> *Where Were The Directors? Guidelines for Improved Corporate Governance in Canada (The Toronto Report)*. December 1994. Available at: <http://www.ecgi.org/codes/documents/dey.pdf>. See also: *Five Years to the Day: Report on Corporate Governance*, 1999. Available at: <http://www.ecgi.org/codes/documents/5years.pdf>

<sup>5</sup> Latin phrase, meaning "in the chamber" or "in private."

The Canadian corporate community's response was positive. They recognized that the markets would reward companies with enhanced governance systems. As with all good public policy reforms, the private sector led the reform of corporate governance standards as the report advised.

Since that publication, I have simplified my thinking about how to advance the quality of governance. This is a result of my having sat on several boards of companies listed in Canada, the United States, and the United Kingdom, and also as a result of my participation in shareholder-led initiatives to challenge boards. My observations are also based on my work with emerging-market and developing countries as PSAG's chair.

My experience is that boards are generally composed of responsible, hard-working individuals. There is a tendency to lose sight of that premise, particularly when a crisis hits and anger is feverish, and, as a result, to demand greater changes than a more prudent vantage point would advise.

### Director-Shareholder Balance

Some time after the publication of the TSX report, I thought there should be a sequel: *Where Were the Shareholders?*

From one perspective, the answer to this question is clear. The shareholder community has become more organized and answers this question on an ongoing basis. Indeed, since the ICGN was formed, it has been very effective in addressing shareholders' roles and responsibilities in governance systems globally.

In Canada, the Coalition for Good Governance was formed—one of the most important developments in governance for my country. The business community in Canada, on the other hand, does not have a counterpart to this coalition. As a result, the business community has been rather passive in the dialogue prescribing the balance between boards and shareholders.

*My experience is that boards are generally composed of responsible, hard-working individuals. There is a tendency to lose sight of that premise.*

Finding the right balance is an ongoing challenge. I am concerned that, in the course of the dialogue to do so, shareholders have become distracted from their principal role. That role is to elect and oversee effective boards—by far, the most meaningful avenue for influencing corporate decision making. I make this comment having participated in the governance process as a shareholder advocate and a corporate director.

*It is an ongoing challenge to find the right balance between the role of directors and that of shareholders within a corporation. I am concerned that shareholders become distracted from their principal role. That role is to elect and oversee effective boards—by far, the most meaningful avenue for influencing corporate decision making.*

There is a trend for shareholders to try to involve themselves in issues that, under our corporate model, should be within the board's purview. I expect most of this involvement is to test directors, but nevertheless, there is a trend. Please understand that I have no allegiance to one particular constituent or another in governance systems; my interest is in ensuring that the corporation continues to function effectively.

An example is "Say on Pay" (or, as we say in Canada, "Say on Pay, Eh"). Is "Say on Pay" the beginning of a trend? Will shareholders want to vote on a company's environmental policy? On its health and safety policy? And so on?

In asking this question, I do not intend to be critical of the "Say on Pay" initiative. In some markets, there was a huge disconnect between corporate performance and compensation. And, we have witnessed the impact that the vote has had on such major corporations as Glaxo Smith Kline in the United Kingdom and both Motorola and Occidental Petroleum in the United States. What would concern me is an organization, such as ICGN, leading initiatives that give shareholders increasing powers at the board's expense.

There are other examples. Indeed, the issue of the shareholder's role in governance first became graphically apparent to me several years ago as a director of Goldcorp (the world's second-largest gold company by market capitalization).

The company proposed making an acquisition that would be funded by a significant issuance of shares, equal to about 60 percent of the float. There was a robust debate within the board as to whether shareholders should be offered an advisory vote. The law did not require such a vote. One board faction expressed concern about dilution and advocated a shareholder advisory vote. The other faction advocated "deal certainty" and opposed such a vote. The issue was litigated, and, ultimately, no vote was required.

Of the many decisions that directors make, which can have a material impact on the corporation, issuing equity is one that has been singled out for shareholder approval by several major stock exchanges, including the TSX.

As an aside, I note that if the governance process results in value creation, as was the case with Goldcorp, the process is assumed to have been correct.

“Say on Pay” has not been mandated by any regulator in Canada. Those corporations that have accepted “Say on Pay” have offered the right to shareholders voluntarily. In Canada, the banks have been the leaders in offering “Say on Pay.” They have provided leadership in other areas of governance reform, too, notably the separation of the chair and CEO. It is too early to know whether “Say on Pay” will become as common as the separation of the chair and CEO.

Why am I concerned about this trend? I have a few reasons. First, the board is better positioned than the shareholders to understand the strategy of the corporation and to take action to develop the strategy, such as providing the proper incentives in the compensation system.

Second, I am concerned about diluting the shareholders’ ability to hold boards accountable, if shareholders increase their involvement in decisions that the board should make.<sup>6</sup>

Finally, it is not realistic for investors whose portfolios include hundreds of companies to take the time to critically assess compensation systems. Outsourcing this responsibility is not a satisfactory answer.

*Boards are better positioned than shareholders to understand a corporation’s strategy. Shareholders’ ability to hold boards accountable may be diluted if they become more involved in decisions the board should make. Investors whose portfolios include hundreds of companies cannot realistically devote the time to critically assess compensation systems.*

## **Evolving Role of the Institutional Investors**

Granted, the role of investors, particularly institutional investors, has become increasingly complex as the internationalization of cross-border portfolios and the fallout from the financial crisis has led institutional investors to look more carefully at the corporate governance of companies. They are exerting their monitoring power through securities class-action lawsuits that seek financial recovery and improvements in the corporate governance of defendant firms.<sup>7</sup>

<sup>6</sup> See, for example: William W. Bratton and Michael L. Wachter, “The Case Against Shareholder Empowerment.” *University of Pennsylvania Institute for Law and Economics Research Paper No. 09-35*; *University of Pennsylvania Law Review*, Vol. 158, p. 653, 2010; *University of Pennsylvania Institute for Law and Economics Research Paper No. 09-35*; and *Georgetown Law and Economics Research Paper No. 1480290*. Available at: <http://ssrn.com/abstract=1480290>. “The prevailing legal model of the corporation strikes a better balance between the powers of directors and shareholders than does the shareholder-centered alternative. Shareholder proponents see management agency costs as a constant in history and shareholder empowerment as the only tool available to reduce them. This article counters this picture, making reference to agency theory and recent history to describe a dynamic process of agency cost reduction. It goes on to show that shareholder empowerment would occasion significant agency costs on its own by forcing management to a market price set in most cases under asymmetric information and set in some cases in speculative markets in which heterogeneous expectations obscure the price’s informational content.”

<sup>7</sup> C. S. A. Cheng, H. H. Huang, Y. Li, and G. Lobo, “Institutional Monitoring through Shareholder Litigation,” *Journal of Financial Economics* (201), 95:356–383.

And, true, there are persuasive academic studies showing how intensive involvement from institutional investors enhances a company's corporate governance. For example, researchers Reena Aggarwal (Georgetown University McDonough School of Business), Isil Erel (Ohio State University Department of Finance), Miguel A. Ferreira (Universidade Nova de Lisboa; European Corporate Governance Institute), and Pedro P. Matos (USC Marshall School of Business) looked at this issue for companies from 23 countries during the period 2003–2008. They found: “Institutional investors affect not only which corporate governance mechanisms are in place, but also outcomes. . . . Our results suggest that international portfolio investment by institutional investors promote good corporate governance practices around the world.”<sup>8</sup>

Another study, focused on developing countries, finds that “in countries where the institutional investors actively participate in the corporate governance, their presence possibly reduces the cost of capital for firms and also positively influences the stock market capitalization.”<sup>9</sup> In South Africa, investors escalated their engagement with the company Nampak to install a new chairman and CEO and to restructure the board. Shareholder value improved after those changes were implemented.<sup>10</sup>

But, investor interest is partly a function of the incentives in place, as the discussions during the Latin American Roundtable on Corporate Governance in October 2007 made clear. “Whether a fund manager takes an active interest in the good performance of individual investee companies depends on the set of incentives the fund manager faces, including the regulatory framework and the character and efficiency of the funds' own governance.”<sup>11</sup> Without such frameworks in place, institutional investors' roles are limited, a point that is particularly relevant for emerging-market and developing countries where awareness of corporate governance and the attendant regulatory structures tends to be in the early stages of development.

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<sup>8</sup> Reena Aggarwal, Isil Erel, Miguel A. Ferreira, and Pedro P. Matos, “Does Governance Travel around the World? Evidence from Institutional Investors.” May 29, 2010. *Fisher College of Business Working Paper No. 2009-008*; ECGI - Finance Working Paper No. 267/2010; CELS 2009 4th Annual Conference on Empirical Legal Studies Paper; Fourth Singapore International Conference on Finance 2010 Paper; AFA 2010 Atlanta Meetings Paper. Available at: <http://ssrn.com/abstract=1361143>.

<sup>9</sup> Aneta Hryckiewicz, “Pension Reform, Institutional Investors' Growth and Stock Market Development in the Developing Countries: Does It Function?” 2009. *National Bank of Poland Working Paper Number 67*. Available at: [http://www.nbp.pl/publikacje/materialy\\_i\\_studia/67\\_en.pdf](http://www.nbp.pl/publikacje/materialy_i_studia/67_en.pdf). For an overview of shareholder activism, see: Huimin Chung and Till Talaulicar, “Introduction: Forms and Effects of Shareholder Activism.” July 2010. *Corporate Governance: An International Review* 18:4, 253–257. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8683.2010.00806.x/full>.

<sup>10</sup> David Couldridge, investment analyst, Elementim ([www.elementim.co.za](http://www.elementim.co.za)).

<sup>11</sup> OECD, World Bank, and IFC, “The 2007 Meeting of the Latin American Corporate Governance Roundtable, October 10–11, 2007.” Available at: <http://www.oecd.org/dataoecd/17/4/39963408.pdf>.

Studies of experiences in individual countries are also instructive in understanding the limits of investor activism. In Malaysia, for example, institutional investors may not be in the best position to uphold corporate governance standards, given the conflicts of interest they inevitably have because the pool of major investors is a narrow one, largely composed of government agencies or family-owned corporations.<sup>12</sup>

*The experiences demonstrating the benefits of increased shareholder power do not lessen my concern about the trend of shareholders to become more deeply involved in decisions that should be properly made by the board.*

By and large, though, shareholder activism in emerging-market and developing countries is smaller in scale, less developed, and infrequent. The controlling shareholders in many companies tend to be family members or related parties. There are fewer institutional investors, and retail investment has yet to take hold. Remuneration levels are lower, and therefore less a lightning rod than those in the United States, for example. Governance of companies according to best practices is advancing, but it is not as widespread or institutionalized as in developed countries.

The experiences demonstrating the benefits of increased shareholder power and more aggressive intervention, though, do not lessen my concern about this trend of shareholders to become more deeply involved in decisions that should be properly made by the board. The shareholders' role—with the tools and legal authority they have—should focus on electing competent boards.

## Shareholders' Power and Tools

What powers do shareholders need to ensure that boards are constituted with effective directors? In Canada, we have provisions in our business corporation laws that give shareholders this power. The basic tools offered to Canadian shareholders to enable them to elect and constitute effective boards and to hold the board accountable are as follows:

First, shareholders have the ability to solicit proxies from holders of voting securities—a common provision in all modern corporation laws.

Second, shareholders have the right to make any proposal, including a proposal to nominate a person to be a director of the corporation, and request that the proposal be included in the Management Information Circular.

Third, shareholders holding more than 50 percent of the votes can remove and replace a director or an entire board. Shareholders can then elect a new board; but, until we adopt majority voting, this can only be achieved by putting up an alternate slate, which attracts more votes.

<sup>12</sup> Elsa Satkunasingam and Bala Shanmugam, "The Consequences of Culture on Shareholder Activism in Malaysia." 2006. Available at: <http://www.cmawebline.org/documents/JAMAR-v4-1-Consequences%20of%20Culture.pdf>.

*The Global Corporate Governance Forum has worked with more than 70 countries to support corporate governance reform efforts, including introduction of codes.*

Fourth, shareholders holding not less than 5 percent of the issued shares of the corporation have the right to requisition a corporation to hold a shareholder meeting, and the corporation, upon receiving the requisition, has to publish and circulate the Information Circular (at the corporation's cost). This is the most lethal tool.

Fifth, shareholders have the ability to seek relief from the court for oppressive conduct by the corporation.

Shareholders have other rights, such as bringing a derivative action and seeking a court order directing an investigation of the corporation's books. There are also other tools to make boards more effective. (See the box: "How Boards Can Be More Effective.")

In emerging-markets and developing countries, we are seeing the adoption of similar best practices in corporate governance. With those efforts must come the establishment of the necessary political and economic institutions tailored to a country's specific needs, institutions that give corporate governance some teeth.

These five tools are the most important and basic ones that should be made available to shareholders in every market. It is my view that the investor community should give the creation and provision of these tools the highest priority in efforts to influence public policy, rather than trying to insert themselves into the director decision-making process.

My experience is that boards are willing to be engaged on issues of concern to serious shareholders. If shareholder confidence in the board has dropped to such a degree that the shareholders are prepared to have a public confrontation with the board, there are more effective ways of addressing this lack of confidence before provoking a public confrontation.

The coalition's approach to companies is instructive. The coalition identifies companies in which its members have large holdings or sectors in which members have significant holdings. It typically contacts the board's chair and other director(s), depending on the issue.

*Shareholders can exert influence by avoiding public confrontation (and keeping some heavy artillery in the closet!). Engage the board. Assess the response. In the extreme, requisition a shareholder meeting to change the board.*

The coalition's phone calls are always answered. Shareholder concerns are almost always addressed in private without a public expression in a shareholder vote, and the corporate action fully remains the responsibility of the board. This strategy is more effective, less costly to the company, and, importantly, avoids having the shareholders dilute the responsibility for the corporation's action on the issues in question.

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## *How Boards Can Be More Effective*

Here are a few factors that improve a board's effectiveness:

**Physical location of directors in the boardroom:** Boards must share a certain intimacy in their meetings. Directors should be oriented in the boardroom to achieve that intimacy, rather than being spread among management and advisers.

**Directors must be at their meetings:** Boards must ensure that board meetings are *their* meetings—and not management's. The chair of one of our banks recently told me he divides meetings into three two-hour periods: the first with only the CEO, with an emphasis on strategy; the second on execution; and the third on committee reports. This is a board with strong leadership.

**Strong, effective chairman:** I think the board's chair is the most underappreciated position in governance systems. Strong leadership fosters openness and candor among directors, thereby ensuring that all issues, particularly the difficult ones, are deliberated.

**Acoustics:** I had one CEO tell me that he favored mandatory retirement for directors, because he realized that many of his older directors could not hear him or other directors. Good acoustics for board meetings is critical. If directors cannot hear what others say, they have an obligation to interrupt the meeting and ensure they know what is going on.

**Directors' comfort zones:** Scramble membership on board committees. Keep testing directors' comfort zones.

**Industry knowledge:** Boards need to include directors with direct experience in, and knowledge of, the industry.

**Director courage:** The greatest challenge for every director occurs when a director sees something, usually in a management presentation, that raises a concern in the director's mind. The director must absolutely raise the concern. Sometimes, the director's intervention will interrupt the meeting's flow and may create awkwardness. This requires courage, and that's what investors expect.

These initiatives are not profound in the broader scheme of governance reform, but they can have a material impact on the effectiveness of board meetings and can help directors be more effective in creating shareholder value.

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I would encourage the ICGN, in its efforts to improve governance, to develop a definitive template of legal rights that shareholders must have to set the stage for engaging boards. The Canadian model is a good starting point (although being Canadian I am not allowed to brag!). I think the ICGN could apply its considerable energy and resources to this project.

The corporation is the principal vehicle for commerce in our markets. We all have an obligation as participants in the markets to make sure that the corporation continues to be effective in addressing the needs of commerce and those of society. The ICGN has a critical role to play in ensuring that the legal framework within which the corporation functions responds to society's needs. At present, the markets have confronted us all with significant investment challenges. Nevertheless, it is critical to the efficient functioning of our capital markets that we continue to give time and attention to governance issues.

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**Peter J. Dey** is chairman of Paradigm Capital Inc. and a past partner of Osler, Hoskin & Harcourt LLP, specializing in corporate board issues and mergers and acquisitions. Earlier, as chairman of Morgan Stanley Canada Limited, he was involved in developing both the Canadian investment banking business and the overall strategic direction of Morgan Stanley in Canada. From 1993 to 1995, he chaired the Toronto Stock Exchange Committee on Corporate Governance in Canada, which in December 1994 released the report, *Where Were the Directors?* (also known as the “Dey Report”), that established corporate governance standards for Canadian corporations. Dey chairs PSAG, which brings together international leaders of the private sector whose shared goal is to help developing countries improve their corporate governance. Through PSAG, the Forum brings the practical experience of the international private sector to bear upon the issues and challenges facing corporate governance in developing countries and emerging markets.

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