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Shareholders "Got the Power"? Proposed Amendments to Enhance Shareholder Voting Rights

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Recent proposed amendments may result in significant changes for public companies incorporated under the CBCA. In particular, the amendments would abolish the plurality shareholder voting system and ensure that each shareholder vote counts, and is counted, in electing a company's board of directors.

Key Takeaways

- **Proposed amendments will abolish the "vote for" or "withhold" voting system in board elections.** The amendments require that shareholders either vote "for" or "against" a proposed board member, thereby permitting the election of a director only where she secures the majority of the votes *cast*.
- **Even if enacted, these changes may not come into force for a number of years.** If the amendments are passed, the government will need to allow time for companion regulations to be updated and to educate investors about the change.

Summary and Background

The federal government is proposing to enact Bill C-25 – *An Act to Amend the Canada Business Corporations Act*. The proposed amendments relate to a variety of corporate governance issues for CBCA incorporated companies, a key aspect of which relates to shareholder voting.

Currently, Canada has a "plurality" voting system whereby shareholders have two options: vote "for" or "withhold." This system essentially ignores withheld votes by treating them as absentee ballots. Accordingly, a director can be elected with only one vote "for," regardless of the number of votes withheld – even if that single vote is cast by the director herself. Bill C-25 would require that shareholders either vote "for" or "against," thereby permitting the election of a director only where that director secures the majority of the votes cast. Such a system would give practical significance to *all* shareholder votes. Further to that end, Bill C-25 would also require that individual votes be taken in respect of each director nominee (thereby prohibiting slate voting).

Following in these footsteps, Bill 101, *Enhancing Shareholders Rights Act, 2017*, a private member's bill, had been working its way through the Ontario Legislature and, if passed, would have resulted in similar amendments for uncontested elections in respect of OBCA incorporated companies. Although Bill 101 died on the order paper when the Legislature was recently prorogued, it may still be reintroduced in the new legislative session, or following the upcoming provincial election.

The Good, The Bad

Canada's plurality voting system is a global outlier and the proposed amendments to the OBCA and CBCA would inject meaning into one of the principal tenants of corporate law: that shareholders elect directors. These amendments, however, are not Canada's first venture into codifying majority voting. For more than a decade, the TSX Company Manual has mandated majority voting, annual elections, and individual voting on director nominees. However, there are more than 1,600 companies listed for trading on the TSX Venture Exchange to which these rules do not apply.

For some, these amendments may signal the descent of corporate governance into chaos. One view is that legislating majority voting will create unnecessary governance distractions and uncertainty. In particular, there may be cause for concern about the possibility of "sudden death" elections. Under the regime adopted by the TSX, boards have 90 days to accept a director's resignation following a shareholder vote, permitting time to identify someone new to serve on the board. When the board determines that such a defeat has created an "extraordinary circumstance," it may decide not to accept the resignation. However, under the proposed amendments, neither of these fail-safe mechanisms will exist. If a director does not receive the majority of the votes cast, she immediately ceases to be a director. This may pose a challenge where the board is not able to conduct a thoughtful search for a new candidate; it may also be used to wrestle control away from the incumbent board in the absence of a proxy contest.

The chances of “sudden death” elections may be less likely for federally incorporated companies given the Senate’s recent amendments to Bill C-25, which provide that a director candidate who receives the support of less than a majority of votes cast may continue in office until the earlier of (i) the 90th day after the date of the election, and (ii) the day on which their successor is appointed or elected. Bill 101 did not have this same failsafe mechanism, although it could be added if Bill 101 is reintroduced.

For others, these amendments have been a long time coming. Even in the current system, only rarely do director nominees fail to receive majority support and there is no indication that this will change if the proposed amendments are introduced. These amendments may result in greater board accountability, transparency, and confidence in the directors who are elected, without much downside. They may also increase shareholder participation, which will then increase board legitimacy and the legitimacy of the voting process.

The Ugly

Even if these amendments are enacted in short order, it will likely be many months, or even years, before they come into force. Time will be needed for companion regulations to be updated and to educate investors about the changes. Moreover, the above-noted proposed amendments in Bill C-25 are part of a larger package of changes which include notice and access requirements for communications with shareholders as well as diversity-related disclosure requirements. These too may take time to implement, even if enacted soon.

We will continue to monitor the progress of these proposed amendments. In the meantime, no matter where we end up at the federal and provincial levels, discussions about shareholder democracy can only serve to foster the integrity, efficiency, and proper functioning of the capital markets and the players within them.

If you have any questions concerning these proposed amendments, corporate governance, or securities litigation, please contact Lara Jackson, John M. Picone, Stephanie Voudouris or any other member of the Cassels Securities Litigation Team.
