

Against votes for directors, new timing on shareholder proposals and other CBCA changes now in effect

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Authors: [John M. Valley](#), [Wesley Cohen](#)

On August 31, 2022, amendments to the *Canada Business Corporations Act* (the CBCA) and the *Canada Business Corporation Regulations, 2001* (the CBCA Regulations) came into force, impacting how directors of CBCA corporations with publicly traded securities and other distributing corporations are elected. The changes also alter timelines for submission of shareholder proposals, among other things.

Voting against directors

Shareholders of CBCA corporations which are distributing corporations now will be able to cast votes for or against the election of each nominee for director where the number of nominees equals the number of positions to be elected at the meeting (referred to as an uncontested director election). A director candidate is elected if the candidate receives more for than against votes at the meeting, unless the corporation's articles require a higher threshold of for votes.^[1]

This change will not apply where the election of directors of a CBCA distributing corporation is contested. In a contested election shareholders will continue to be provided only with the choice of voting for the election of a nominee or withholding from voting for that nominee. Non-distributing CBCA corporations and corporations incorporated under other corporate legislation in Canada will continue to provide shareholders only with the choice of voting for the nominee or withholding from voting, regardless of whether the election is contested.

Relationship to majority voting under TSX rules

Historically, directors of CBCA distributing corporations have been elected on a plurality basis – the directors with the most for votes are elected until all the available positions are filled. In an uncontested director election, a nominee would be considered elected so long as they receive at least one vote for their election, regardless of how many votes may have been withheld.

The Toronto Stock Exchange (TSX) requires all listed corporations to have a majority voting policy that provides that, in an uncontested director election, any director for whom more votes were withheld from voting than were voted for the director's election, must tender their resignation to the board of directors, which the board must accept absent exceptional circumstances.^[2] There have been past instances where the board did not accept a director's resignation despite the vote result and shareholders believed exceptional circumstances did not exist. As a result of the changes to the CBCA, it will no longer be necessary to require a

director who fails to receive sufficient for votes to resign as the director will not have been elected. The TSX previously indicated that the amendments to the CBCA would likely satisfy the TSX's majority voting requirements, and therefore CBCA corporations listed on the TSX would no longer be required to have a majority voting policy.^[3] Accordingly, TSX-listed CBCA corporations can now repeal their majority voting policies and remove them from their websites should they wish to do so.

Impact on form of proxy

As a result of amendments to the CBCA Regulations, the form of proxy for a distributing corporation now must provide shareholders the opportunity to vote for or against each director nominee in an uncontested director election. However, in a contested director election the CBCA Regulations require shareholders to be provided the opportunity to vote for or withhold from voting for each director nominee instead.^[4]

The CBCA Regulations create uncertainty that is yet to be resolved since a corporation, at the time it sends its proxy materials to shareholders, may not know whether or not the election of directors will be contested. As director elections at most annual meetings are not contested, the corporation normally will be required to provide a form of proxy providing a shareholder with a choice of voting for or against each nominee. However, after the management form of proxy has been sent a dissident could send out a dissident circular and form of proxy proposing additional director nominees, or a registered shareholder or proxyholder could propose additional director nominees at the annual meeting without conducting a solicitation.^[5]

If an election of directors that was uncontested at the time the corporation sent out its proxy materials for the meeting subsequently becomes a contested election:

- Is the management form of proxy no longer valid because shareholders are not provided the opportunity to withhold from director nominees instead of voting against them and does the corporation need to send a new form of proxy, and potentially restart the entire annual meeting process, in order to comply with the concurrent requirement to send a form of proxy in the prescribed form and give notice of a meeting of shareholders to each shareholder entitled to receive notice of the meeting?^[6]
- If the management form of proxy is still valid, then how should votes be counted at the meeting? Do the against votes received by a director nominee cancel the for votes so that the director nominated by management ends up with fewer for votes on a net basis than the aggregate number of for votes received by a dissident director nominee (for whom the options were to vote for or withhold from voting)?

Similar challenges also arise if a corporation sends a management form of proxy that assumes the election of directors at the meeting will be contested, but the dissident later decides not to nominate additional directors or subsequently reaches a settlement with the corporation. The management form of proxy sent to shareholders will have afforded only the "for" and "withhold" options, even though by the time of the meeting the election is uncontested and there are an equal number of nominees as there are positions to fill at the time of voting.

In the absence of guidance from Corporations Canada, CBCA distributing corporations may wish to consider modifying their management form of proxy to specify how proxy instructions will be interpreted if an uncontested director election becomes contested (or

vice versa) or to provide shareholders with both the against and withhold from voting options.

CBCA distributing corporations should also consider modifying their advance notice by-law provisions to increase the deadline for notice from 30 days to as much as 90 days prior to the meeting date, or adopting an advance notice by-law if they have not already done so. This time period will help mitigate the risk that an uncontested director election becomes contested after the management form of proxy has been sent.

Shareholder proposals

Previously, a corporation was not required to include a shareholder proposal in its proxy materials if the proposal was not submitted at least 90 days before the anniversary date of the date of the notice for the previous year's annual meeting and there was no limit on how early a shareholder proposal could be sent. As a result of the CBCA amendments, a CBCA distributing corporation is not required to include the shareholder proposal if it is not received during a 60 day period, beginning on the 150th day before the anniversary of the previous annual meeting of shareholders.^[7] Practically speaking, this allows shareholders to submit proposals later in the annual meeting cycle, affording corporations less time to engage with proponents or otherwise respond prior to sending out proxy materials.

The CBCA requires that a management proxy circular set out the final date for shareholders to submit shareholder proposals for the annual meeting of shareholders.^[8] Corporations in their 2022 management proxy circulars would have disclosed a final date that is earlier than the new shareholder proposal deadline. Notwithstanding the earlier deadline disclosed in their 2022 proxy management proxy circular, CBCA distributing corporations will need to comply with the new shareholder proposal timeline and would need to accept shareholder proposals received prior to the deadline as calculated under the CBCA amendments.

Other changes

Other changes to the CBCA and the CBCA Regulations now in force include:

- **Holdover directors:** If an incumbent director of a CBCA distributing corporation in an uncontested director election fails to receive more for votes than against votes, the unelected director nevertheless may continue in office until the earlier of the 90th day after the election and the day on which their successor is appointed or elected.^[9]
- **Subsequently appointing an unelected director:** A nominee for director candidate of a CBCA distributing corporation who fails to receive more for votes than against votes in an uncontested director election cannot be appointed by the board of directors to fill a vacancy before the next meeting of shareholders, unless the appointment would enable the corporation to comply with the requirement to have a minimum of three directors or to satisfy Canadian director residency requirements.^[10] This exception does not apply where a director is needed to satisfy independent requirements for audit committee service or stock exchange listing requirements – the nominee for director candidate who was not elected may not be appointed or allowed to remain on the board past the deadline for holdover directors to cease to hold office.

- **Annual individual director elections:** All CBCA distributing corporations are now required to elect directors annually on an individual basis (i.e., no slate elections or staggered elections).^[1] CBCA distributing corporations listed on the TSX were already subject to such requirements under TSX listing rules, but it now applies to all CBCA distributing corporations.
- **Miscellaneous housekeeping changes:** The amendments to the CBCA Regulations also change certain record keeping requirements, move retention timeframes from the CBCA to the CBCA Regulations, and address certain technical requirements regarding corporate names.

Conclusion

In light of the amendments to the CBCA and CBCA Regulations coming into force, CBCA distributing corporations should consider these changes well in advance of the start of their annual meeting process.

[1] *Canada Business Corporations Act*, RSC 1985, c C-44, s 106(3.4).

[2] *TSX Company Manual*, s 461.3.

[3] Toronto Stock Exchange, *Notice of Housekeeping Rule Amendment to the TSX Company Manual* (June 4, 2020).

[4] *Canada Business Corporations Regulations, 2001*, SOR/2001-512, ss 54.1(1) and 54.1(2).

[5] If a corporation has adopted an advance notice by-law provision, the dissident will need to comply with the notification requirements of that provision, but the standard advance notice provision in Canada requires that notice be given as little as 30 days prior to the meeting date, which is often after the date the corporation has sent out the management form of proxy and management information circular.

[6] *Canada Business Corporations Act*, RSC 1985, c C-44, s 149(1).

[7] *Canada Business Corporations Regulations, 2001*, SOR/2001-512, s 49.

[8] *Canada Business Corporations Regulations, 2001*, SOR/2001-512, s 55(2)(d).

[9] *Canada Business Corporations Act*, RSC 1985, c C-44, s 106(6.1).

[10] *Canada Business Corporations Regulations, 2001*, SOR/2001-512, s 45.2.

[11] *Canada Business Corporations Act*, RSC 1985, c C-44, s 106(3.3); *TSX Company Manual*, s 461.2.