

Governance Trends

How Amendments to the
Canada Business Corporations Act
will Impact Investor Relations

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IR Magazine Forum – Canada
April 3, 2019



Latest Governance Trends & Proxy Adviser Guidance



High Profile Prosecution of Corruption in Foreign Markets

- SNC-Lavalin: highlights the increasing attention being paid by governments and prosecutors to corrupt practices by companies operating in foreign jurisdictions.
- Heightened awareness among directors and investors of the risks of doing business in jurisdictions with known corrupt practices.



Shareholder Engagement

- ISS projects record number of climate related shareholder proposals for 2019.
- Note: ISS found steady upward trend of climate related proposals from 2013 to 2019.
- Investors have been responsive – ISS noted trend of increasing support from 9% in 2011 to 31% in 2018.



Employees on Boards

- Interesting recent move: seeking addition of employees to boards.
- CtW Investment Group filed shareholder proposal for Alphabet's annual meeting seeking nomination of a non-executive employee to the board.
- Issue has become political: democratic presidential candidates Elizabeth Warren and Bernie Sanders have both advanced initiatives to have employees included on corporate boards.



Registration of Individuals with Significant Control

- Newest amendments to the *Canada Business Corporations Act* in December require private companies to maintain register of individuals with significant control; not in force until June 13, 2019.
- Consistent with other initiatives to increase corporate transparency – money laundering, tax evasion among policy goals.
- Individuals with significant control defined as:
 - (i) any individuals who jointly or individually own or control **more than 25%** of the corporation's **voting shares**;
 - (ii) any individuals who own or control **more than 25%** of the **fair market value** of the corporation's outstanding shares; or
 - (iii) individuals who have "**direct or indirect influence that, if exercised, would result in control in fact of the corporation**".



Annual Proxy Voting Guidelines – ISS & Glass Lewis

- Negative voting recommendations for Chairs and nominating committee members where lack of gender diversity (both).
- Negative voting recommendations for directors who serve on too many boards (benchmark is more than five public boards) (ISS).
- Negative voting recommendations for directors responsible for improper management or mitigation of environmental or social risks (Glass Lewis).

The background of the slide is a photograph of the Canadian Parliament Hill in Ottawa. The image shows the iconic Gothic Revival architecture of the Parliament Buildings, including the Peace Tower with its green copper roof and the Canadian flag flying from the top. The buildings are situated on a hill, with a well-manicured green lawn in the foreground. The sky is a clear, pale blue. Overlaid on the center of the image is the title text in a dark green, serif font.

Canada Business Corporations Act: Amendments to Introduce Majority Voting

CBCA Majority Voting Amendments

13 (1) Subsection 106(3) of [the CBCA] is replaced by the following:

Election of directors

(3) Subject to subsection (3.1) and paragraph 107(b), shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term ending not later than the close of the **third annual meeting** of shareholders following the election.

Election of directors — distributing corporations

(3.1) Subject to paragraph 107(b), shareholders of a distributing corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term ending not later than the close of the **next annual meeting** of shareholders following the election.

Exceptions — certain distributing corporations

(3.2) Despite subsection (3.1), in the case of any prescribed class of distributing corporations or in any prescribed circumstances respecting distributing corporations or classes of distributing corporations, the directors are to be elected in accordance with subsection (3).

CBCA Majority Voting Amendments con't.

Separate vote for each candidate

(3.3) If the election of directors is for a prescribed corporation, a separate vote of shareholders shall be taken with respect to each candidate nominated for director.

Majority voting

(3.4) If, at a meeting of shareholders of a **distributing corporation** — other than in the case of a prescribed class of distributing corporations — at which an election of directors is required, there is only one candidate nominated for each position available on the board, **each candidate is elected only if the number of votes cast in their favour represents a majority of the votes cast for and against them** by the shareholders who are present in person or represented by proxy, unless the articles require a greater number of votes.

CBCA Majority Voting Amendments con't.

(2) Subsections 106(6) to (8) of [the CBCA] are replaced by the following:

Incumbent directors

(6) Despite subsections (2), (3) to (3.2) and (5) and subject to subsection (6.1), if directors are not elected at a meeting of shareholders, the incumbent directors continue in office until their successors are elected.

Incumbent director not elected

(6.1) If an incumbent director who was a candidate in an election held in accordance with subsection (3.4) was not elected during the election, **the director may continue in office until the earlier of**

- a) **the 90th day after the day of the election;** and
- b) **the day on which their successor is appointed or elected.**

Vacancy

(7) If, for either of the following reasons, a meeting of shareholders fails to elect the number or the minimum number of directors required by the articles, the directors elected at that meeting may exercise all the powers of the directors if the number of directors so elected constitutes a quorum:

- a) a lack of consent, disqualification under subsection 105(1) or the death of any candidates; or
- b) a lack of a majority referred to in subsection (3.4).

Appointment of directors

(8) The directors may, unless the articles otherwise provide, appoint one or more additional directors, who shall hold office for a term ending not later than the close of the next annual meeting of shareholders, but the total number of directors so appointed shall not exceed one third of the number of directors elected at the previous annual meeting of shareholders.

Exception

(8.1) If an individual who was a candidate in an election held in accordance with subsection (3.4) was **not elected during that election, the individual is not to be appointed**, except in prescribed circumstances, as a director under subsection (8) or 111(1) before the next meeting of shareholders at which an election of directors is required.

Scope and Impact of Amendments

- Not yet in force.
- CBCA Federal corporate statute.
 - Companies can incorporate Federally in Canada or in one of the Provinces or Territories, each of which have their own corporate statutes.
- New provisions will apply **only** to public companies incorporated under CBCA, but will apply to **all** public CBCA companies including those listed on the TSX, TSXV and alternative exchanges.
 - Approximately 40% of TSX-listed companies incorporated under the CBCA.
 - TSX already has majority voting requirement, but statute will take precedence; TSXV has no policy in place.

Risks of Statutory Majority Voting

- Canada has not historically had a significant problem with directors remaining on boards; impact of new legislation to be seen.
- Risk that activists could take advantage of majority voting in smaller companies with more concentrated ownership: “vote against” campaigns could keep only sympathetic directors in control – without proxy contest.
- Statutory requirement means no flexibility to address evolving circumstances and/or abuse.
- Heightened concern for TSXV-listed companies over bigger and more established TSX-listed companies.

Risks of Statutory Majority Voting con't.

- Authority to appoint limited number of new directors; may not result in full board.
- Risk of compromised board effectiveness if too few elected, insufficient breadth of skill and experience.
- Risk of non-compliance with regulatory requirements, *e.g.* audit committee.
- Potential trigger of change in control provisions; employment agreements, credit agreements, others.
- Inconsistent approaches for TSX-listed companies may create confusion.

Considerations for Investor Relations Professionals

- Ensure that directors are aware of the risks introduced by statutory majority voting and understand whether statutory majority voting applies to their company.
- Enhance disclosure about the nomination and election process.
- Get out the vote.
- Work with directors to ensure robust evergreen lists, with candidates available to serve if needed on short notice.
- Crisis management plan in place, including plan for replacing directors and communications including to investors and other stakeholders.

What Does it Mean for Investor Relations?

- It will be easier to replace directors, in context of already increasing activism.
- Most important action for investor relations professionals is to know your investors better – and earlier.
- No good starting point: should be continuous discussion with your investors.
- Ensure year-round outreach:
 - starting quarter following AGM to talk about year ahead;
 - following quarter to talk about progress;
 - following quarter to anticipate next AGM and address any issues;
 - final quarter to work in partnership with investors heading into the AGM.

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