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CBCA Changes "Withhold Voting" to "Voting Against" Directors – its impact on Canada's 2023 Proxy Season

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Changes to the Canada Business Corporations Act ("CBCA") concerning director voting took effect on August 31, 2022. These amendments have changed corporate governance by replacing the traditional practice of "Withholding" votes to now a shareholder can vote "Against" directors. It should be noted that companies not incorporated under the CBCA will still adhere to Canadian securities laws, which require "For" or "Withhold" voting options for director nominees. This amendment has brought changes to the corporate voting process during the 2023 proxy season.

Previously, under the CBCA, shareholders could only express their dissatisfaction with a director by “Withholding” their votes which had no legal consequences for director appointment (unless the issuer subscribed to a majority voting policy). The amendment now enables shareholders to vote “Against” a director, clearly indicating their discontent and potentially affecting the director’s election or appointment.

This new voting standard has led shareholders to exercise their voting rights more actively, resulting in increased scrutiny of director nominees. As of today’s date, we have noticed a rise in the number of “Against” votes for directors of issuers governed by the CBCA. Shareholders are embracing their ability to vote “Against” as a means of expressing dissatisfaction with corporate performance, governance practices, or director qualifications. This has fueled shareholder activism with an increase in targeted “Against” vote campaigns, investors are more assertively exercising their rights to influence board compositions. This highlights a growing emphasis on accountability and corporate governance within CBCA public companies.

Key observations, to date, that have emerged during this season include:

- **Enhanced Engagement and Dialogue:** The amendment has encouraged issuers to engage in more meaningful shareholder dialogue, addressing concerns and demonstrating a commitment to effective governance practices.

- **Heightened Accountability:** Directors now face increased scrutiny, as the risk of being voted “Against” looms large, a higher standard for director accountability is required. This change has elevated transparency and oversight in the director election process, compelling directors to actively prove their value to shareholders.

- **Evolving Board Dynamics:** The new voting mechanism has prompted boards to reassess their composition, ensuring they possess the necessary skills, diversity, and expertise aligned with shareholder expectations. Issuers are prioritizing board refreshment and director nominations that reflect the evolving business landscape and stakeholder demands.

Anticipated changes for future proxy seasons include:

- **Enhanced Proxy Contest Activity:** The ability to vote "Against" directors is likely to result in more frequent proxy contests (or targeted "Against" voting, on specific directors). This is because it functions as a cost-friendly mechanism for dissident shareholders with less predictability and visibility from the issuers' standpoint. Dissident shareholders will leverage this new tool to challenge incumbent boards and demand greater accountability, utilizing campaigns advocating for change.

- **Strengthened Shareholder Democracy:** Voting "Against" reinforces shareholder democracy, empowering investors to actively shape the direction of the companies they own. It encourages a more engaged shareholder base, leading to better alignment between shareholders and boards.

- **Ambushes at the Annual General Meeting:** Small CBCA issuers with a concentrated shareholder base and traditionally low voter turnout may face more ambushes at Annual General Meetings (if they have a majority voting policy). Shareholders with large blocks may surprise management at the very last minute by casting their votes "Against" targeted directors. Hence, this expands the strategic possibilities and threats posed by certain shareholders and potentially can mute any advanced notice bylaws.

- **Improved Board Diversity:** Shareholder activism will exert pressure on boards to address diversity and inclusion concerns. Shareholders will use their voting power to advocate for more diverse boards, thus driving transformation via board refreshment diversity.

- **Evolving Governance Best Practices:** Companies will proactively adapt their governance practices to meet shareholder expectations and mitigate the risk of "Against" votes. Boards will increasingly focus on transparency, accountability, and effective shareholder engagement as integral components of their governance frameworks.

CBCA amendments have ushered in a new era of shareholder democracy and engagement. Based on what we have witnessed since its implementation, the 2023 proxy season is a very good indicator of what is to come. We have seen increased shareholder influence, heightened director accountability, and a stronger focus on board diversity and competence. It remains to be seen whether other jurisdictions in Canada will adopt a similar approach to director voting, following the CBCA's lead.

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