

ADVISORY COUNCIL RECOMMENDS THAT ONTARIO GOVERNMENT MODERNIZE THE ONTARIO *BUSINESS CORPORATIONS ACT* (OBCA)

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The Ontario government recently established an advisory body called the Business Law Modernization and Burden Reduction Council (the Council) to make recommendations to the government on how to modernize Ontario's corporate and commercial laws.

The Council has made several recommendations to the Ministry of Government and Consumer Services, including that the government make three important amendments to the OBCA:

1. Remove the current requirement under the OBCA that, generally, at least 25% of a business corporation's directors be Canadian residents.
2. Amend the OBCA to lower the approval threshold for a written shareholder resolution in lieu of a meeting for privately-held corporations (by lowering written shareholder approval to a majority of the voting shares (or special majority for certain decisions)), instead of the current requirement for a unanimous written resolution.
3. Amend the OBCA to allow corporations to relieve or limit the liability of fiduciaries (e.g. directors and officers) arising from the corporate opportunity doctrine by allowing fiduciaries to pursue certain business opportunities without fear of liability arising from their duties in certain circumstances.

The proposals would be welcome improvements. Removing the director residency requirement would align Ontario's business corporation statute with the laws of British Columbia, New Brunswick, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Quebec, and the Yukon, none of which have a requirement for resident Canadian directors. The current requirement in the OBCA (and its Federal counterpart, the *Canada Business Corporations Act*) creates a compliance burden for non-Canadian investors and, in our experience, does nothing to enhance the accountability or transparency of private corporations or their governance. The compliance burdens often result in investors incorporating in other provinces.

With appropriate protections for minority shareholders, allowing majority shareholders to approve matters based on their written resolution (without requiring that the minority also sign the resolution) would improve

corporate efficiency and avoid the formality of calling an in-person meeting to have a vote which the majority predictably will win in any event. Likewise, with appropriate protections for the corporation (such as allowing it to provide an informed prior consent to a transaction), corporations should be allowed to renounce certain business opportunities or consent to its directors/officers to pursue specific business opportunities and thereby remove the risk of liability to the interested directors/officers.

The Ministry is welcoming public feedback on the proposals until November 26, 2019. The full report is available and comments on the proposals can be provided online [here](#).

We anticipate that the recommendations will likely result in a proposed bill being tabled early in 2020, and that the changes will become effective sometime during the spring or summer of 2020. We will keep you posted as to the specific amendments that are ultimately adopted.

by Michael Whitcombe, John Clifford and Rupin Sawhney

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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