ONTARIO MODERNIZING ITS *BUSINESS CORPORATIONS ACT*

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The Government of Ontario has proposed important changes to the Ontario *Business Corporations Act* (the "**OBCA**") that will make Ontario a more welcoming jurisdiction for non-Canadian businesses to incorporate their Canadian subsidiaries and ease rules for OBCA-incorporated private corporations to pass written shareholder resolutions. Bill 213, the *Better for People, Smarter for Business Act, 2020* ("**Bill 213**"), an omnibus bill that was introduced into the Ontario Legislature on October 6, 2020, includes provisions to eliminate the OBCA's Canadian residency requirements for corporate directors and permit private corporations to pass certain written shareholder resolutions in lieu of meetings with only a majority of shareholders signing the resolutions. As of the time of writing the Bill is still under debate in its second reading, however, given the government majority, it is expected that the Bill will ultimately be passed, and it may be passed quickly.

Removing Canadian Residency Requirements

Under Section 118(3) of the OBCA, at least 25% of the directors of an OBCA corporation must be residents of Canada or, if the corporation has less than four directors, at least one must be a resident of Canada. For the purposes of the Act, a "resident Canadian" includes a citizen or permanent resident ordinarily residing in Canada, as well as certain other prescribed Canadian Citizens. Bill 213 will remove this requirement entirely.

This change will simplify the corporate governance requirements of Ontario corporations and thus make Ontario a more favourable jurisdiction for foreign businesses to establish their Canadian operations because they will be permitted to form and operate OBCA corporations with entirely non-resident boards of directors. In doing so, the move will make Ontario a more competitive jurisdiction for incorporation, bringing it in-line with a growing number of other provinces – such as British Columbia, Nova Scotia, Quebec, and recently Alberta – that do not have director residency requirements in their respective corporate legislation.

New Rules for Written Shareholder Resolutions

Under Section 104(1) of the OBCA, shareholders may adopt resolutions in writing rather than holding a meeting of shareholders provided that all of the shareholders entitled to vote on the resolution sign the written resolution. Bill 213 will add a new, alternate approach for approval of some resolutions in writing for corporations that are not offering corporations. Under those new rules for private companies, it will be

sufficient for “ordinary resolutions” approved in writing to be signed by shareholders representing a majority of shares entitled to vote; the requirement that all shareholders sign in all instances will be eliminated. However, and importantly, the existing rules applicable to “special resolutions” will remain unchanged. That is, matters that require approval under the OBCA by special resolution must still be approved by two-thirds of the shareholders at a duly constituted meeting or by all shareholders in a written resolution.

It also important to note that these new rules will not supplant a corporation’s existing ability under Section 5(4) to set shareholder approval thresholds that are different from those in the OBCA. If a corporation’s articles or unanimous shareholder agreement require a greater number of votes to pass a shareholder resolution, that threshold would prevail over the majority required under Bill 213. The Bill will also enact certain other consequential amendments, including a requirement that if a written resolution is signed by at least a majority but not all shareholders, the corporation give written notice of the resolution to the shareholders entitled to vote on the resolution who did not sign it.

These changes will simplify the OBCA’s approach to shareholder resolutions by making the rules regarding written and in-person meeting resolutions more consistent. While private OBCA corporations already routinely use written shareholder resolutions as a more expedient alternative to traditional shareholder meetings, this would ease corporate decision-making as dissenting minority shareholders would no longer have the ability to force a private corporation to hold an in-person shareholder meeting to take certain actions. This is all the more important in the context of the current COVID-19 pandemic in which such meetings might not only be inconvenient, but also a danger to public health.

by John Clifford and Graham Bevans

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.