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OBCA Changes Could Be Used to Restrict Shareholder Rights

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The Ontario government introduced an omnibus bill (Bill 91) on April 3, 2023 that proposes both welcome and concerning amendments to the Ontario *Business Corporations Act*'s (OBCA) regulation of shareholder meetings. The inclusion of a provision that authorizes corporations to limit the manner by which meetings of shareholders may be held should give stakeholders pause for its open-endedness and susceptibility to abuse, particularly in contested meetings such as proxy contests or activist-initiated meetings.

Hybrid Shareholder Meetings Under the OBCA

Among the welcome changes is Bill 91's proposal to more expressly facilitate hybrid shareholder meetings under the OBCA. Specifically, the legislation proposes a new Subsection 94(2), which provides that, unless a corporation's articles or by-laws specify otherwise, shareholder meetings "may be held entirely by one or more telephonic or electronic means or by any combination of in-person attendance and by one or more telephonic or electronic means." Absent a prohibition in a corporation's constating documents, then, a corporation may hold a shareholder meeting entirely in-person, entirely virtually or by way of some combination of the two.

Corporate Rights to Restrict Manner of Holding Meeting Should Be Revisited

Bill 91's proposed addition of Subsection 94(3), on the other hand, is less welcome. Subsection 94(3) provides that a corporation may, by way of its articles or by-laws: (a) "limit the manner or manners by which a meeting of shareholders may be held" in accordance with Subsection 94(2); and (b) "specify requirements that apply with respect to the holding of a meeting of shareholders" in a manner described in Subsection 94(2) or in such manner as described by the articles or by-laws made under clause (a).

Without the benefit of debate or consultation in respect of Subsection 94(3), the purpose of the amendment is not apparent. We presume that Subclause 94(3)(b) is intended to allow the corporation to prescribe certain minimum communication standards for the holding of virtual and hybrid meetings. As well, Subsection 94(3)(a) might be intended to permit a corporation to restrict itself from holding meetings in certain formats (e.g., to prohibit exclusively virtual meetings unless required to do so in emergency circumstances). If that is the case, Subsection 94(2) and Subclause 94(3)(a) appear to overlap, as each ostensibly authorizes the corporation to delineate the preconditions for holding a particular meeting format.

Most concerning, however, is the apparent open-endedness of Subsection 94(3). Read plainly, the subsection gives corporations wide scope for creating rules on the holding of shareholder meetings. For example, the wording appears to allow companies to set different rules for meetings requisitioned by shareholders or other types of contested meetings in an attempt to make it more difficult for shareholders to exercise their fundamental corporate franchise, including the right to nominate and vote for directors. While any such effort by a corporation to prescribe discriminatory meeting requirements in its constating documents may not survive a court challenge, the costs of litigation (not to mention the challenges of obtaining a timely court date) would put that option out of reach for most shareholders who, unlike the corporation, must bear that burden personally.

Bill 91 has proposed the addition of Subsection 94(4), which requires that all persons entitled to attend a shareholder meeting, no matter the format of the meeting, must be able to "reasonably participate." While this is certainly an important requirement, it would not address the concerns outlined above because it speaks only to equal participation rights within a given meeting, but does not address equal rights among management and shareholders to access a given format of meeting.

Rather than leave the proper scope of Subsection 94(3) to be set by the courts (and/or by proxy advisers who may step into the vacuum of legislative guidance to set their own standards on what is permissible for a public company to include in its constating documents), the "limits" and "requirements" authorized by Subsection 94(3) should be prescribed in the legislation to minimize the risk of abuse and ensure even and fair-handed governance standards for the holding of shareholder meetings. This might include, for example:

- providing in Subsection 94(3)(a) an illustrative list of the "manners" by which a shareholder meeting may be held, or providing that the permitted "manners" will be prescribed by regulation; and/or
- clarifying that "meeting of shareholders" means all meetings of shareholders and that the rules set by corporations regarding the manner in which shareholder meeting are held must apply equally to all meetings of shareholders, whether or not contested.

If left unaddressed, the OBCA amendments proposed in Bill 91 could become an unnecessary and avoidable battleground in the proxy contest arena.

Bill 91, whose short title is the *Less Red Tape, Stronger Economy Act, 2023*, is currently in its second reading and is before the Standing Committee on Justice Policy. If approved, the amendments will come into force on October 1, 2023.

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