CCGG Canadian Coalition for Good Governance
THE VOICE OF THE SHAREHOLDER

January 21, 2022

Ontario Ministry of Government and Consumer Services
Policy and Governance Branch
BusinessLawPolicy@ontario.ca

Dear Sir/Madam,

Re: Tracking Number 21-MGCS034: Draft Proposed Permanent Changes to Enable Digital and Virtual Processes under the Ministry of Government and Consumer Services' Business Law and Condominium Statutes

We thank you for the opportunity to provide additional feedback to the Ontario Ministry of Government and Consumer Services (the Ministry) on potential permanent changes to enable digital and virtual processes under the *Business Corporations Act* (the Consultation).

CCGG's members are Canadian institutional investors that together manage approximately $5 trillion in assets on behalf of pension fund contributors, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices, including the governance of environmental and social matters, at Canadian public companies and assists institutional investors in meeting their stewardship responsibilities. CCGG also works towards the improvement of the regulatory environment to best align the interests of boards and management with those of their investors and to increase the efficiency and effectiveness of the Canadian capital markets. A list of our members is attached to this submission.

General Comments

We were pleased to note that many of CCGG's recommendations in response to the Ministry's first consultation in early 2021 with respect to enabling virtual processes under the Ontario *Business Corporations Act* (OBCA) were addressed in the recent draft amendments published on the regulatory registry in support of the Consultation.

We have attached a copy of our February 5, 2021, submission for your reference and review. In CCGG's view, the goal of digital and virtual processes should be to achieve an experience for shareholders that is as much aligned with the experience of an in person meeting as possible.

We were particularly pleased to note the specific inclusion of language into the proposed Ss. 94(2) clearly enabling hybrid meetings with a combination of in-person, telephonic and electronic attendance.

We note, however, that our recommendation to integrate into the legislative regime, a requirement that "*all participants [be able] to communicate adequately with each other during the meeting*" has not been adopted.

Instead, the proposed draft incorporates language to the effect that a hybrid, electronic or telephonic meeting may only be held "provided that all persons attending the meeting are able to reasonably participate". We would reiterate the position we raised in our initial submission and recommend using the terminology of adequate communication because it is consistent with other Canadian corporate law statutes[1] and unambiguously addresses one of the key concerns of shareholders with respect to the structure and conduct of virtual shareholder meetings and hybrid meetings; the need for shareholders to be able to communicate with the board, management and each other, in real time, is essential. In our view, the proposed language is ambiguous and does not go far enough to clarify what is meant by "participation" and could be narrowly construed to mean simply accessing the meeting or its audio, or engaging in one way communication with the board or management only, and not being afforded the opportunity to communicate with others in attendance or engage in a two-way dialogue with management and the board.

We encourage MGCS to reconsider this language and err on the side of clarity and the facilitation of investor participation. As we observed in our initial submission, shareholder meetings are the vehicle by which shareholders exercise some of their core rights as investors, including voting to elect board directors and to approve or reject a myriad of corporate actions brought forward by management. Shareholders are also able to convene meetings and bring shareholder proposals of their own. These rights are exercised only by shareholders and not available to other stakeholders which creates a unique relationship of accountability between a company and its shareholders such that ensuring their capacity and ability to exercise these rights should be paramount in legislative amendments implementing digital processes.

Conclusion

We thank you again for the opportunity to provide you with our comments. Please feel free to contact the undersigned, at cmccall@ccgg.ca or our Director of Policy Development, Sarah Neville, at sneville@ccgg.ca if you would like to discuss the matters in this letter further or if we can be of any assistance.

Yours truly,

Catherine McCall
Executive Director, Canadian Coalition for Good Governance

[1] See for example, Section 132(5) of the *Canada Business Corporations Act*, and Section 126(4) of the *Corporations Act* (Manitoba).

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CCGG Canadian Coalition for Good Governance
THE VOICE OF THE SHAREHOLDER

February 5, 2021

Ontario Ministry of Government and Consumer Services
Policy and Governance Branch
BusinessLawPolicy@ontario.ca

Dear Sir/Madam,

Re: Potential Permanent Changes to Enable Digital and Virtual Processes under Business Corporations Act and the Personal Property Security Act, the Limited Partnerships Act, and the Partnerships Act

We thank you for the opportunity to provide feedback to the Ontario Ministry of Government and Consumer Services (the Ministry) on potential permanent changes to enable digital and virtual processes under the *Business Corporations Act*, the *Limited Partnerships Act*, and the *Partnerships Act* (the Consultation).

CCGG's members are Canadian institutional investors that together manage approximately $4.5 trillion in assets on behalf of pension fund contributors, mutual fund unit holders, and other institutional and individual investors. CCGG promotes good governance practices, including the governance of environmental and social matters, at Canadian public companies and assists institutional investors in meeting their stewardship responsibilities. CCGG also works towards the improvement of the regulatory environment to best align the interests of boards and management with those of their investors and to increase the efficiency and effectiveness of the Canadian capital markets. A list of our members is attached to this submission.

General Comments

Shareholder meetings are the vehicle by which shareholders exercise some of their core rights as investors, including voting to elect board directors and to approve or reject a myriad of corporate actions brought forward by management. Shareholders are also able to convene meetings and bring shareholder proposals of their own. These rights are exercised only by shareholders and not available to other stakeholders which creates a unique relationship between a company and its shareholders. CCGG's members, as institutional investors, have stewardship obligations to their beneficiaries and clients which include responsibilities to report on voting activities and seeking to

vote all the shares of the companies in their portfolios[1]. This set of obligations and responsibilities underscore the importance of effective and accessible shareholder meetings to CCGG's membership. Conducted effectively, investors recognize that virtual shareholder meetings (VSMs) or hybrid meetings can reduce costs for issuers, facilitate greater participation by shareholders and support dialogue and transparency.

Conducted ineffectively, VSMs can achieve the opposite effect. In CCGG's view, the goal of digital and virtual processes, whether in support of virtual or, preferably, hybrid shareholder meetings should be to achieve an experience for shareholders that is as much aligned with the experience of an in person meeting as possible. This includes important considerations such as accessible technology that is easy for shareholders to navigate and use, and the capacity for real time shareholder participation. Synchronous shareholder participation in an electronic or hybrid meeting must facilitate communication among shareholders as well as between shareholders and the company's board and management and provide the ability for shareholders to vote and to pose questions from the floor to management in real time, without prior gatekeeping or vetting by management. There is extensive research and analysis on this topic both pre- and post- pandemic which is useful in understanding how the legislative regime in the OBCA can draw from recent experience and be anchored in emerging best practices[2].

Below are our responses to those questions we considered most relevant to our mandate. CCGG has not answered all the questions posed by the Ministry.

Questions:

Section 1: Meetings

1. **Generally, the OBCA allows director and shareholder meetings to be held by electronic or telephonic means. However, should further amendments be considered to the OBCA to clarify that meetings may be conducted electronically or telephonically (e.g., to provisions related to quorum and voting requirements)?**

   CCGG recommends that S.94(2) be clarified to expressly permit hybrid meetings which, in our view, are preferable to virtual only shareholder meetings. Suggested wording is below:

   > Proposal: S. 94(2) Unless the articles or the by-laws provide otherwise, a meeting of the shareholders may be held ***[in person, or]*** by telephonic or electronic means, ***[or a combination***

[1] Canadian Coalition for Good Governance, *Stewardship Principles*, 2017 [online: https://ccgg.ca/policies/] see Principle 3 and related guidance.

[2] Rutgers Law School Center for Corporate Law and Governance, Council of Institutional Investors & Society for Corporate Governance, Report of the 2020 Multi-Stakeholder Group on Practices for Virtual Shareholder Meetings, 2020, Rutgers Center for Corporate Law and Governance.

International Corporate Governance Network, Viewpoint, The Future of Annual General Meetings, September 2020

thereof], and a shareholder who, through those means, votes at the meeting or establishes a communications link to the meeting shall be deemed for the purposes of this Act to be present at the meeting.

Furthermore, we would recommend integrating into the legislative regime, either through further amendment to S.94(2) or through a new definition for the term "communications link", a requirement that the communications link "permits all participants to communicate adequately with each other during the meeting". We would recommend using the terminology of adequate communication because it is consistent with other Canadian corporate law statutes[3] and addresses one of the key concerns of shareholders with respect to the structure and conduct of VSMs and hybrid meetings. The need for shareholders to be able to communicate with the board, management and each other is essential.

If implemented, such a change would also require a related amendment to S.93(2) which deems a telephonic or electronic only meeting to be held at the registered head office.

In our view, quorum does not need to be amended. The OBCA already deems attendees to be present at meeting if participate telephonically or electronically.

With respect to voting, S.103 Manner of Voting currently provides that voting is by show of hands unless by-laws provide otherwise or a ballot is requested. This should be clarified in context of telephonic only (voice), electronic (voting platform) or hybrid meetings.

2. **Prior to the temporary legislative amendments, the OBCA required the unanimous consent of directors that are present at or participating in the meetings to hold the meetings by telephone, electronic or other communication facilities. Should the temporary legislative amendments to the OBCA that removed the requirement to have unanimous consent of directors, present at or participating in the meeting, to hold meetings by telephone, electronic or other communication facilities be made permanent? Or should the unanimous consent be lowered (e.g. to majority consent)? Are there risks in doing so? Would this help to reduce the burden on corporations? If so, how?**

CCGG does not support lowering unanimity requirement for directors to hold electronic meetings. Boards of directors are not large and this requirement as it currently exists is not onerous. There is a risk to board dynamics if not all directors present or participating in a meeting are required to consent to the method by which the meeting is held.

[3] See for example, Section 132(5) of the *Canada Business Corporations Act*, Section 131 (3.1) of the *Business Corporations Act* (Alberta) and Section 126(4) of the *Corporations Act* (Manitoba).

3. **Some corporations may have by-laws in place that prohibit telephonic or electronic meetings. Should proposed legislative amendments be considered to the OBCA to make it easier for corporations to change these by-laws (e.g. by lowering the shareholder ratification threshold required to amend or revoke a by-law that prohibits electronic meetings)? Are there any risks in doing so? Would this help to reduce burden on corporations? If so, how?**

The OBCA should not make it easier to change by-laws prohibiting electronic or telephonic meetings. Shareholder ratification of amendments to by-laws is important, and recent amendments to the OBCA, once in force will already confirm the that the ratification is given effect by the shareholders through an ordinary resolution.

Where a corporation has put such a restriction on electronic or telephonic meetings in its articles requiring a special resolution to amend it, this should not be statutorily reduced. Maintaining the existing approval threshold is more likely to bring about well-developed and thoughtful proposals that will garner meaningful shareholder interest and support.

Section 4: General

8. **Should the Ministry consider seeking a further extension of the temporary suspension period for the application of the temporary legislative amendments related to electronic/telephonic meetings in the OBCA beyond May 31, 2021, rather than making permanent changes to the statute? If so, why and for how long?**

In the short term, yes. The pandemic has provided an opportunity for rapid evolutions and experiments in virtual and hybrid shareholder meetings and also with respect to the technology providers and service platforms available. Prior to amending the OBCA, there may be benefit to both issuers and shareholders in allowing some of the lessons learned and evolving practices to be implemented in subsequent shareholder meetings while the pandemic is still impacting business practices and travel.

9. **If you would like to see permanent changes implemented, should the Ministry also consider seeking a further extension of the temporary suspension period for the application of temporary legislative amendments related to electronic/telephonic meetings in the OBCA beyond May 31, 2021, to ensure the temporary provisions do not end before the permanent changes come into effect? If so, why and for how long?**

Yes, for the reasons set out above and because the course of the pandemic remains uncertain and may need accommodations beyond May 31, 2021. The temporary provisions should remain in place until decisions are made with respect to whether or not permanent changes are required, and if such amendments are deemed appropriate, then the temporary provisions should remain in place until such proposed amendments come into effect.

Conclusion

We thank you again for the opportunity to provide you with our comments. Please feel free to contact our Executive Director, Catherine McCall, at cmccall@ccgg.ca or our Director of Policy Development, Sarah Neville, at sneville@ccgg.ca if you would like to discuss the matters in this letter further or if we can be of any assistance.

Yours truly,

Marcia Moffat
Chair, Canadian Coalition for Good Governance

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