



## Proposed Ontario Legislation would Strengthen Shareholder Rights and Board Diversity

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Say-on-pay, board diversity and majority voting requirements are among the key proposals aimed at modernizing the *Business Corporations Act* (Ontario) (OBCA) in the recently introduced [Bill 101, Enhancing Shareholder Rights Act, 2017](#). Following the lead of [amendments to the Canada Business Corporations Act \(CBCA\) proposed in late 2016](#), Bill 101, a private member's bill, addresses some of the hot button issues facing corporations in Canada.

### Diversity: Keeping Shareholders Informed

Bill 101 proposes provisions that support diversity for certain OBCA corporations. Using the same language as the proposed amendments for the CBCA addressing diversity, Bill 101 would require prescribed OBCA corporations:

- to provide shareholders with prescribed information about diversity among directors and senior management on an annual basis; and
- to send this information to all shareholders, except for shareholders who have informed the corporation in writing that they do not want to receive such information.

It is not clear currently if such prescribed information would relate solely to gender diversity or, similar to the proposed amendments for regulations to the CBCA, extend to disclosure of diversity beyond gender. As [previously discussed](#), board diversity in all forms, and particularly gender diversity, has been at the forefront of corporate governance initiatives in the last few years, with the Canadian Securities Regulators adopting amendments to National Instrument 58-101 *Disclosure of Corporate Governance Practices* and Form 58-101F1 *Corporate Governance Disclosure* in 2014 and subsequently conducting annual reviews of the diversity disclosure made by TSX-listed issuers.

### Shareholder Nominations and Meeting Requisitions: Lower Thresholds

Bill 101 seeks to enhance shareholder engagement by lowering shareholding thresholds for:

- shareholders to nominate individuals for election as directors from 5% to 3%; and
- shareholders to requisition a meeting from 5% to 3%

The proposed amendments would not prevent director nominations from being made at a meeting of shareholders.

These proposed amendments differ from the CBCA which currently maintains a 5% shareholding threshold for both director nominations and meeting requisitions, with no current proposal for lowering the threshold. Interestingly, if adopted, Bill 101 would also amend the OBCA to provide that where a shareholder has nominated an individual for election as a director, the shareholders present at the relevant meeting of shareholders would select from among themselves a chair of the meeting. No similar CBCA provision is in effect or proposed.

## Majority Voting for all OBCA Corporations

Like the amendments proposed for the CBCA and existing [regulations of the TSX](#), Bill 101 seeks to legislate a majority voting standard for OBCA companies and to require that companies hold annual elections, with each director being elected separately to hold office for a term ending no later than the day of the company's next annual meeting. Notably, unlike the CBCA amendments, the Bill 101 amendments would apply to **all** OBCA companies and not just public companies. It remains to be seen whether such a requirement will have any real impact on private corporations which tend to be closely held and may not be subject to the same concerns raised by public company shareholders beyond introducing an additional degree of complexity in the director election process.

As [we have discussed in the past](#), the emergence of majority voting policies was a direct result of the fact that shareholders of Canadian public companies who vote by proxy have no automatic right under corporate law to vote "against" an individual director nominee. Instead, shareholders who vote by proxy only have the option to vote "for" a nominee or to effectively abstain from voting by withholding their vote. In practice, since most shareholders of Canadian public companies vote by proxy, directors are elected so long as any affirmative votes are received, regardless of the number of votes withheld. This has two implications: (i) a minority of shareholders voting "for" director nominees has the power to elect those directors; and (ii) even an overwhelming majority of votes withheld will not block the election. Existing majority voting policies and these proposed amendments are an attempt to address these two issues.

The proposed amendments would also impose a new mandatory voting requirement whereby all shareholders entitled to vote in a director election and who are present in person at a shareholder meeting where directors are being elected are required to vote in favour or against every candidate. Currently, no other corporate statute in Canada imposes such a requirement.

## More than Just a "Say": Shareholders to have "Last Word" on Pay

In addition to the proposals outlined above, Bill 101 would introduce a provision that explicitly allows shareholders to put forth proposals to adopt executive compensation policies with respect to the remuneration of directors and officers and would require directors of a corporation to fix director remuneration in accordance with any such adopted policy. This proposal goes a step further than traditional say-on-pay advisory votes where directors are not required to comply with shareholders' wishes. Currently, when shareholders reject a company's compensation structure in a say-on-pay vote, the company may still set compensation levels at its discretion (without regard to the say-on-pay advisory vote). However, such companies may face heightened scrutiny from proxy advisory firms like Institutional Shareholder Services or Glass Lewis and lack of board responsiveness to such votes will influence ISS or Glass Lewis when determining voting recommendations for director nominees.

## Other Provisions

Other topics addressed in Bill 101 include new requirements for forms of proxy, removing the requirement that dissident proxy circulars be sent to the company's auditors, and the filling of director vacancies.

## Status of the Proposed Legislation

Although Bill 101 is a private member's bill, it was introduced by a government MPP and reflects similar proposed legislation at the federal level. It may therefore be more likely than most private member's bills to gain enough support to be passed into law (although this is by no means a certainty).

For further information, please see [Bill 101, Enhancing Shareholder Rights Act, 2017](#) (March 7, 2017).

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