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Corporate opportunity waivers make their way to Canada: Implications for private equity and venture capital investments

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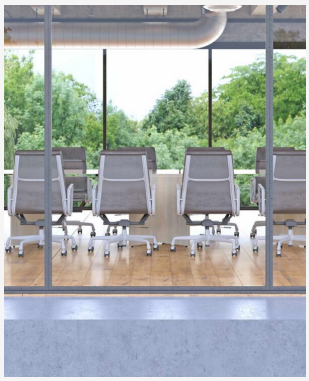

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Amendments to Alberta's *Business Corporations Act* (ABCA), which came into force on May 31, 2022 (the ABCA Amendments), introduced a new ability for an Alberta corporation to include a corporate opportunity waiver in its articles or unanimous shareholder agreement, making Alberta the first jurisdiction in Canada to permit such waivers. The introduction of a corporate opportunity waiver is expected to, among other things, minimize litigation risk and improve deal-making speed for private equity and venture capital investors that are active in Alberta.

The ABCA Amendments were summarized in the Osler Update titled "A bid to attract business: amendments to Alberta's Business Corporations Act (osler.com), published on June 16, 2022. This Osler Update expands on the corporate opportunity waiver with a focus on how this amendment could affect private equity and venture capital investors in Alberta and also how private equity and venture capital funds may think about corporate opportunity waivers in other Canadian jurisdictions.

The corporate opportunity doctrine is a manifestation of the duty of loyalty, which has long been recognized by common law and enshrined in most corporate acts in Canada. The corporate opportunity doctrine precludes directors and officers from personally benefitting from, or usurping to another person or corporation, opportunities that belong to the corporation. The clearest way for a director or officer to avoid liability for appropriating a corporate opportunity is to provide the corporation with first rights to the opportunity in question, and to allow the corporation to formally renounce such opportunity. In effect, the corporate opportunity doctrine provides the corporation with an implied right of first refusal with respect to any opportunities sourced by or attributed to its fiduciaries.

This can be particularly problematic for representatives of private equity or venture capital investors who are appointed to serve on boards of such investor's portfolio companies. A private equity sponsor or venture capital investor that receives board nomination rights in return for investing in a particular portfolio company may be active in the same space or vertical as such company. This makes it increasingly likely that its board representatives may be approached for additional investment opportunities, or such fund's opportunities may be imputed to its representatives by virtue of their employment relationship and role with the fund itself. Under this scenario, in order to discharge the duty of loyalty, the fund's board representative would be required to first present each opportunity to the board of directors of such portfolio company for consideration and, if presented, for the board to formally

renounce each such opportunity before it can be pursued by the fund without personal risk to the fund's board representative. This not only delays or prohibits the ability of the fund to pursue this opportunity, but it also poses a unique risk to its board representative, who must choose between pursuing the opportunity in question or risk breaching their fiduciary duty to the portfolio company. The speed of execution, one of the many attractive attributes of private equity or venture capital investment, does not lend itself to constant review by company boards.

The Delaware General Corporation Law (DGCL) addressed this concern by expressly granting Delaware corporations the power to include a corporate opportunity waiver in the certificate of incorporation or by action of the corporation's board of directors. In response, it has become common practice for U.S. private equity or venture capital funds to include such waiver in a portfolio company's (or aggregator entity's) constating documents, often as a condition of their investment, including in the constating documents of Canadian corporations, inside and outside Alberta, even prior to the ABCA Amendments.

Under a corporate opportunity waiver, a corporation expressly waives any interest or expectancy of the corporation in or to an opportunity to participate in a specified business opportunity that is offered to the corporation's officers, directors or shareholders. A typical corporate opportunity waiver in the private equity and venture capital context acknowledges a fund's (including its affiliates and representatives) involvement in a particular industry or business and that such investor is not precluded from making investments or appointing representatives to serve on other company boards in such industry. More importantly, it will also include a full waiver and blanket renunciation from the company and its shareholders for any claim the company may have with respect to certain business opportunities of such fund (including its affiliates and representatives).

The ABCA Amendments are very similar to their legislative counterparts in the DGCL in that both corporate acts require that the corporate opportunity waiver apply to a specified business opportunity or specified classes or categories of business opportunities. While it remains to be seen how and to what extent Alberta corporations will test the boundaries of the corporate opportunity waiver, in our view Alberta courts will likely follow Delaware jurisprudence in interpreting the permissible scope of a corporation's waiver. For instance, there is Delaware case law suggesting that broad waivers may call into question the validity of the company's renunciation of corporate opportunity. The ABCA Amendments suggest restrictions on the use of corporate opportunity waivers may be included in future regulations under the ABCA, but no regulations relating to corporate opportunity waivers have been proclaimed to date.

We fully expect the law in Alberta to evolve as more companies introduce this waiver into their constating documents. Furthermore, as it is more and more commonplace to see corporate opportunity waivers and, in some cases, waivers of fiduciary obligations to shareholders other than the fund and its affiliates, we expect that other Canadian provinces will begin considering a corporate opportunity waiver in its corporate statute. For a non-Alberta corporation asked to consider a corporate opportunity waiver in its constating documents, such corporation and its shareholders should be mindful that even if such waiver is not permitted by law, its inclusion in constating documents almost certainly provides evidence of the shareholder dynamic and relationship, and potentially background to a court in a future shareholder dispute (i.e. how did the shareholders view their commercial relationship at the time of drafting the constating documents).

The corporate opportunity waiver provides increased certainty to directors and officers serving as representatives of fund investors that their actions will not violate the duties they would otherwise owe to the corporation at common law, and it also serves to increase execution speed and reduce litigation risk for fund-appointed board and management representatives. This should make Alberta a more desirable jurisdiction for private equity and

venture capital investment. It remains to be seen if other Canadian corporate acts will follow suit, but even in jurisdictions where corporate opportunity waivers are not yet permitted by law, a corporate opportunity waiver may still be a useful tool to frame the shareholder relationship.