Changes to the Canada Business Corporations Act

July 24, 2019

On June 21, 2019, Bill C-97, an act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures (C-97), received Royal Assent and became law. The act includes several amendments to the *Canada Business Corporations Act* (the CBCA) that introduce important new obligations on CBCA companies. We will summarize some of the most important amendments below.

The Best Interests of the Corporation

The CBCA has long required the directors and officers of a corporation to act with a view to the best interests of that corporation. Historically, the best interests of a corporation were understood to mean the best interests of its shareholders. This changed in *BCE Inc. v. 1976 Debentureholders* (BCE) where the Supreme Court held that, in evaluating the best interests of a corporation, directors could look beyond the interests of shareholders and consider the interests of a broader array of stakeholders, including employees, creditors, consumers and others.

C-97 provides a statutory basis for this expanded array of interests directors and officers may consider. It states that, when acting with a view to the best interests of the corporation, directors and officers may consider, but are not limited to, factors such as:

- the interests of shareholders, employees, retirees and pensioners, creditors, consumers, and governments,
- the environment, and
- the long-term interests of the corporation.

The changes set out in this section of C-97 are in force with immediate effect.

New Disclosure Requirements

The amendments in C-97 add a number of new disclosure obligations on CBCA organized companies.

- **Say-On-Pay**. So-called ‘say-on-pay’ votes currently exist in Canada on a voluntary basis for public companies but, until C-97, had not yet crept into corporate law. C-97 will require “prescribed corporations”, meaning those types of corporations identified in pending regulations — a group that we expect to include only public companies — to develop an approach to the remuneration of directors and “members of senior management”, to mail the information on that approach to shareholders before each annual meeting, to allow a non-binding vote on the approach by shareholders at such meeting and to then disclose the results of this vote to shareholders.
- **Diversity**. The directors of prescribed corporations will be required by C-97 to put before shareholders at each annual meeting information with respect to the diversity of the directors and members of senior management of the corporation. Although this requirement will be outlined in greater detail in the regulations, we suspect that the focus will be similar to that set out in the regulations accompanying Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act* and *the Competition Act*, where disclosure was required for the representation of “designated groups”, including women, Indigenous peoples, persons with disabilities and members of visible minorities.
- **Clawback**. C-97 will require the directors of prescribed corporations to put to shareholders at each annual meeting information relating to the “recovery of incentive benefits or other benefits” previously paid to directors or members of senior management, often referred to as a ‘clawback’, as further described in regulations.
- **Well-Being**. Lastly, the directors of prescribed corporations will be required to put before shareholders at each annual meeting information concerning the well-being of employees, retirees and pensioners.

The changes set out above will come into force on a date to be fixed by the federal cabinet, which will not occur until the accompanying regulations have been finalized. It is not clear when the regulations will be finalized.

Requirement to Provide Share Registers to Investigative Bodies

C-97 supplements and clarifies the requirements first introduced in Bill C-86, *Budget Implementation Act, 2018, No. 2* (C-86), which came into force on June 13, 2019, concerning individuals with “significant control” over private CBCA corporations. C-86 requires private CBCA corporations to develop and maintain a register of individuals with significant control over the corporation. A more detailed overview of C-86 can be read here.

The changes set out in C-97 clarify who will have access to the share register of individuals with significant control mandated by C-86. When in force, C-97 will compel private CBCA companies to disclose details concerning individuals with significant control to certain “investigative bodies”, a category which includes police forces, the Canada Revenue Agency and other prescribed bodies.

Companies in receipt of such a request would be compelled to provide the investigative body with a copy of the corporation's share register of individuals with significant control, or to disclose any information available in the register.

An investigative body would only be allowed to make an information request if:

1. they had reasonable grounds to suspect that the information so requested would be relevant to investigating one of a broad range of enumerated offences, and
2. they had reasonable grounds to suspect that the corporation that is the subject of the request committed the offence or was used to commit the offence, facilitated the commission of the offence or protected from detection or punishment a person who has committed the offence.

The changes regarding share registers are in force with immediate effect.

Recommendations for CBCA Companies

The amendments set out in C-97 will have a number of practical implications for management of CBCA companies.

The changes with respect to the factors that directors and officers may consider when determining the best interests of the corporation cement the view, first established at common law with BCE, that corporate law at the federal level has moved beyond a shareholder-centric model. Directors and officers may now feel emboldened, particularly in the context of an acquisition transaction, to look past the interest of shareholders and towards a wider community of interests. Corporate development teams will be wise to keep this in mind when pitching potential transactions to target boards.

The new access rights given to investigative bodies with respect to a corporation's share register of individuals with significant control should serve as a reminder to management that they need to ensure this register is available and kept up to date. It is far better that management devote time to this effort now than wait until a request from an investigative body is received.

The disclosure requirements introduced by C-97 will require corporations to be more transparent around executive pay, corporate diversity and employee well-being. Nonetheless, until the accompanying regulations are finalized, it is difficult to determine which corporations will be covered by the rules and the exact content of this new disclosure.

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