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Significant Amendments to CBCA Proposed in 2019 Federal Budget

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The 2019 federal budget, announced on March 19, 2019, includes significant proposed changes to the *Canada Business Corporations Act* (CBCA). The proposed amendments include:

- codification of key elements of the 2008 decision of the Supreme Court of Canada (SCC) in *BCE Inc. v 1976 Debentureholders (BCE)*¹ regarding directors' and officers' duties to act in the best interests of the corporation;
- a requirement that certain CBCA corporations disclose to shareholders their approach to remuneration and hold an annual non-binding shareholder "say-on-pay" vote;
- new disclosure requirements applicable to certain CBCA corporations regarding the well-being of the corporation's employees, retirees and pensioners and the clawback of compensation paid to directors and officers; and
- the addition of enhanced investigative powers and enforcement provisions in relation to the requirement – soon to be in force – that private CBCA corporations maintain a register of individuals with significant control.

Codification of *BCE*

The CBCA imposes a duty on directors and officers to act honestly and in good faith with a view to the best interests of the corporation. In *BCE*, the SCC considered this duty in the context of a leveraged buyout transaction where the interests of shareholders conflicted with the interests of certain bondholders of Bell Canada. The SCC rejected a "Revlon" duty to maximize shareholder value in connection with a change of control of the corporation. The SCC reaffirmed its decision in *Peoples Department Stores (Trustee of) v Wise* that "although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders," including among others "the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment."

Bill C-97 codifies this aspect of the decision in *BCE* by amending the CBCA to provide that in satisfying their duty to act in the best interests of the corporation, directors and officers may consider, but are not limited to considering,

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

This amendment will come into force upon royal assent of Bill C-97, currently expected in June 2019. It is not clear why the amendment was considered necessary, or whether it will result in any change in the behaviour of the boards of CBCA corporations, since the principles stated in *BCE* are well-known and frequently applied by Canadian courts.

Compensation and Say-on-Pay

While the holding of say-on-pay votes by Canadian public corporations has been on the rise in recent years, until now there has been no legal requirement in Canada for a corporation to conduct such a vote. According to [Davies Governance Insights 2018](#), 78% of companies on the TSX 60, and 48% of TSX listed issuers overall, held say-on-pay votes in 2018.

The proposed amendments in Bill C-97 will require “prescribed corporations” to develop and disclose to shareholders on an annual basis an approach to the remuneration of “members of senior management,” to put this approach to an annual, non-binding shareholder say-on-pay vote and to publicly disclose the results of the vote. The scope of “prescribed corporations” and the “members of senior management” to which these proposed amendments will apply will be set out in regulations to be published. The federal government will undertake public consultations in connection with the proposed amendments before adopting the more detailed regulations, a process which could take months if not years. It remains to be seen if the federal government will expand the requirements beyond current market practices.

New Disclosure Requirements

Previously announced amendments to the CBCA, not yet in force, require CBCA corporations which are reporting issuers to annually disclose to their shareholders prescribed information regarding diversity among the corporation’s directors and senior management. Bill C-97 expands these disclosure requirements by requiring certain CBCA corporations to also disclose to shareholders prescribed information regarding (a) the well-being of the corporation’s employees, retirees, and pensioners and (b) the clawback of incentive benefits or other benefits paid to directors and senior management of the corporation. The federal government will undertake public consultation in connection with the preparation of the regulations containing these detailed disclosure obligations, so the scope of the required disclosure may not be known for some time. We expect that these new disclosure requirements will apply only to public companies.

Enforcement of Share Register Requirements

Previously introduced amendments to the CBCA, taking effect on June 13, 2019, require that private CBCA corporations maintain a detailed share register of individuals having “significant control” over the corporation. An individual with “significant control” is any individual who holds (a) shares that carry 25% or more of the voting rights attached to the corporation’s shares or (b) 25% or more of the corporation’s shares measured by fair market value. The register may have to be disclosed to the Director of Corporations Canada on request and must be available for inspection by shareholders and creditors. These changes reflect international efforts to provide additional tools to regulators to address tax evasion, money laundering and terrorist financing. Further details can be found in our earlier bulletin, [Private Federal Corporations Must Track Controlling Shareholders Beginning in June 2019](#).

Bill C-97 proposes the addition of enforcement provisions to the new share register requirements. Corporations will be required to disclose their significant shareholder registers to investigative bodies (including police forces and the Canada Revenue Agency) when the investigative body has reasonable grounds to suspect that the share register would be relevant in investigating an offence committed by or involving the corporation or an individual with significant control. Any director or officer of a corporation who knowingly authorizes, permits or acquiesces in the contravention of the new shareholder register requirements may be liable to a fine of up to \$200,000, six months’ imprisonment or both, whether or not the corporation is prosecuted for a related offence.

Key Takeaways

The amendments to the CBCA proposed in Bill C-97 signal that the current federal government envisions a more robust role for itself as a proponent of corporate governance best practices in Canada. This is perhaps most noticeable in the new disclosure requirements relating to the well-being of employees, retirees and pensioners and the clawback of incentives for directors and officers, where the federal government is proposing, without any real detail at this time, to create from whole cloth new corporate governance requirements which may impose a material burden on public companies. In proposing to enshrine into statute diversity disclosure and say-on-pay obligations, the federal government is wading into areas that have largely been in the regulatory sphere of provincial securities regulators or that have developed organically through efforts of corporate governance influencers in Canada. Many will view the overlap between these new requirements and existing securities laws and corporate governance practices as unnecessary, problematic and

burdensome. As many of the details have yet to be worked out, however, it remains to be seen if and to what extent these fears will be justified.

¹ Davies acted as lead counsel for BCE throughout this litigation.

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