



Recent changes to *CBCA* reinforce move towards transparency, governance and responsibility

Corporate Alert

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By: M. Sandra Appel

Bill C-97 of the federal government received Royal Assent on June 21, 2019 becoming Chapter 29 of the Statutes of Canada 2019, An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures. The short title is: the *Budget Implementation Act, 2019, No. 1*.

This new Act amends many federal statutes, including the *Canada Business Corporations Act* ("CBCA" or the "Act"). The amendments under the CBCA fall into two separate categories. The first of which provides the government with greater transparency relating to the shareholders of a corporation and follows on the amendments under Bill C-86 which were passed in December 2018 and proclaimed in force June 13, 2019. The second category sets out the factors that directors and officers will need to consider when acting in good faith and with a view to the best interests of the corporation.

Transparency and enforcement

Refresher on changes under Bill C-86

Under the legislation passed in December 2018, the CBCA was amended to add the definition of an "individual with significant control". Essentially that is an individual who is the registered holder of, beneficial owner of, or person

with direct or indirect control or direction of, a significant number of shares. Two or more individuals are deemed to be an individual with significant control if together they meet these same criteria. "A significant number" of shares is any number of shares that carry 25% or more of the voting rights or 25% or more of the outstanding shares by market value.

The Act was further amended to require that a corporation maintain a register of individuals with significant control, to be disclosed upon request of the Director. You may refer to our previous article here for more information.

Additional transparency under Bill C-97

Under the amendments to the Act set out in Subdivision A of Division 2 of Part 4 of Bill C-97, a corporation, on request by an investigative body (as described) will now have to provide that investigative body with the register information that it is now required to maintain by virtue of the changes under Bill C-86. For purposes of the CBCA and these additions to section 21 of the Act, an investigative body is any police force, Canada Revenue Agency ("CRA") and any prescribed body that has investigative powers in relation to (primarily) criminal offences usually prescribed in Canada's Criminal Code. An investigative body may only make the request if it has reasonable grounds to suspect that the copy of the register of individuals with significant control, or any information that the investigative body has requested in respect of information in the corporation's register, would be relevant to investigating a criminal offence, and the investigative body has reasonable grounds to suspect that:

- (i) the corporation that is the subject of the request committed the offence or was used to commit the offence, facilitate the offence or to protect from detection of punishment a person who has committed the offence, or
- (ii) an individual with significant control over the corporation that is the subject of the request is also an individual with significant control over a corporation that committed the offence or was used for the purposes set out in (i).

Similarly, the request may be made in respect of an individual with significant control over the corporation that is the subject of the request, if that individual also directly or indirectly influences the affairs of an entity, other than a corporation that committed the offence or was used to do anything set out in (i).

The request is made by serving the corporation at its registered office or by sending the same through registered mail to the registered office, with it deemed to have been received at the time it would be delivered in the ordinary course of mail, unless there are reasonable grounds to believe that the corporation did not receive the request at that time or at all.

A corporation that, without reasonable cause, contravenes this request for information, is guilty of an offence and liable on summary conviction to a fine not to exceed \$5000. Every director or officer who knowingly authorizes, permits or acquiesces in the contravention of these provisions relating to the request for information, commits an offence, whether or not the corporation has been prosecuted or convicted.

Bill C-97 also requires every investigative body that makes a request under these new provisions to keep a record of the following:

- (a) the name of the corporation that was the subject of the request;
- (b) the reasonable grounds on which the request was based;
- (c) information respecting what was requested;
- (d) the date the request was served or deemed to be served;
- (e) information respecting the service or the sending of the request;
- (f) all information received in response to the request; and
- (g) prescribed information.

In addition, every investigative body that makes a request is required, within 90 days after the end of the calendar

year in which the request was made, to provide the Director with the total number of requests made in that year, and in the case of the RCMP and CRA, the number of requests made in each province.

These additional provisions to the CBCA setting out requests that may be made by an investigative body were scheduled to be proclaimed in force the later of the date on which the Act dealing with the Bill C-86 additions was proclaimed (June 13, 2019) and the date on which Bill C-97 received royal assent (Jun 21, 2019). As a result, the CBCA has now been amended to include provisions addressing an individual with significant control and providing that investigative bodies may request information on these individuals. No regulations have yet been proclaimed and no investigate bodies prescribed.

Acting in the best interests of the corporation

Bill C-97 Additions to the CBCA

Prior to Bill C-97 and pursuant to section 122, the CBCA mandated that with respect to the duty of care of directors and officers, “every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

Previously, case decisions have interpreted what is “in the best interests of the corporation” and have not limited that interpretation to just referring to protecting the shareholders of the corporation. Bill C-97 has now expanded on this in section 122. Under the amendments to the Act set out in Division 5 of Part 4, a new subsection was added to section 122 and now describes the factors that the directors and officers may consider when acting with a view to the best interests of the corporation. These include:

- (a) the interests of (i) shareholders, (ii) employees, (iii) retirees and pensioners, (iv) creditors, (v) consumers, and governments;
- (b) the environment; and
- (c) the long-term interests of the corporation.

The addition of this new subsection to section 122 is provided for in section 141 of Bill C-97. Pursuant to section 152 of Bill C-97, Sections 133 to 140 and subsection 143 come into force on a day or days to be fixed by order of the Governor in Council. Since it is not specified when section 141 comes into force, it can be concluded that it was on June 21, 2019, when Bill C-97 received royal assent.

Additional disclosures

Further Proposed Additions to the CBCA from Bill C-97

Further proposed amendments to the CBCA address additional disclosure obligations to be imposed upon corporations. This information, which will need to be disclosed to shareholders, includes:

- a disclosure respecting diversity among the directors and senior management of the corporation, for “prescribed corporations”;
- information relating to remuneration of directors and members of senior management and the recovery of incentive benefits or other benefits which will be included in the remuneration of directors and members of senior management; and
- prescribed information respecting the well-being of employees, retirees and pensioners.

A prescribed corporation is to develop an approach with respect to the remuneration of its directors and members of senior management, and the shareholders, at each annual meeting, are to vote on the “approach”, which results are not binding on the corporation. To date, no regulations have been provided to enable a greater understanding of what will be “prescribed”, however it appears that corporations are now focussing on issues relating to transparency on boards, including diversity and compensation of board members as well as, perhaps, how slates of boards are presented and elected.

These further proposed additions will likely not be proclaimed into force until regulations are available to better set

out what these new disclosure obligations will actually mean for corporations and for which corporations.

Summary

Amendments to multiple statutes included within budgets can make it difficult to follow changes being made to Canadian laws and, in this instance, to keep abreast of the obligations imposed on corporations and individuals under the CBCA. However, it is noted that the changes made in these recent budget implementation acts have been enacted in order to keep up with the apparent desire for more transparency regarding who owns and who controls CBCA incorporated corporations and how these corporations are making decisions. It will be interesting to see whether the provinces and territories mimic these additional changes — BC has already added provisions to its corporate statute similar to the additions made in Bill-86.

This article provides only general information about legal issues and developments, and is not intended to provide specific legal advice. Please see our [disclaimer](#) for more details.

AUTHORS



M. Sandra Appel

Partner

Toronto | T: +1 416 365 3500

sandra.appel@dlapiper.com
