

NEW REQUIREMENTS FOR CBCA CORPORATIONS: JUNE 2019 AMENDMENTS

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The federal government has passed Bill C-97, which amends the *Canada Business Corporations Act* (“**CBCA**”). The Bill received Royal Assent on June 21, 2019. The amendments are aimed at providing greater transparency over company ownership and assisting authorities in prosecuting financial crimes. The amendments will: 1) clarify the fiduciary duties of directors and officers; 2) allow enforcement agencies to access a corporation’s Register of Individuals with Significant Control (“**ISC Register**”); and 3) impose additional disclosure requirements.

1) Duty to Act in the Best Interests of the Corporation

The *CBCA* mandates that directors and officers, in exercising their powers, shall “act honestly and in good faith with a view to the best interests of the corporation.” In *BCE Inc. v. 1976 Debentureholders* (“**BCE**”), the Supreme Court of Canada clarified that the “best interests of the corporation” does not mean the best interests of the corporation’s shareholders. Rather the interests of other stakeholders may be relevant. Following the principles in *BCE*, the legislature has amended the *CBCA* to enumerate different stakeholder interests. The directors and officers may consider the following factors when acting with a view to the best interests of the corporation:

(a) the interests of

- (i) shareholders,
- (ii) employees,
- (iii) retirees and pensioners,
- (iv) creditors,
- (v) consumers, and
- (vi) governments;

(b) the environment; and

(c) the long-term interests of the corporation.

2) Giving Access to Enforcement Agencies

Private *CBCA* corporations are required to maintain a register of individuals with significant control over the corporation. The ISC Register requirement was introduced in earlier amendments to the *CBCA* in December 2018, and is in effect as of June 13, 2019. The recent *CBCA* amendments require a corporation to provide investigative bodies with a copy of the ISC Register or specified information in the ISC Register, on request. Any police force, the Canada Revenue Agency or equivalent provincial agencies, or any prescribed body are considered investigative bodies entitled to access an ISC Register. Access is limited to circumstances where the agency has reasonable grounds to suspect that the information would be relevant to investigating an enumerated offence and that the corporation subject to the request committed the offence, facilitated the offence or protected a person who committed the offence.

A company is guilty of an offence if it fails to comply with the new requirements to provide and/or disclose the register information to an investigative body and may be liable for a fine of up to \$5,000.

3) Additional Disclosure Obligations – Say-on-Pay, Compensation Clawbacks and Diversity

The *CBCA* amendments will impose additional disclosure obligations, but they are not yet in force.

Under the *CBCA*, directors have the power to fix their own remuneration and that of officers and employees. The *CBCA* amendments will create a new obligation on companies to develop an approach to the remuneration of directors and senior management, which they must send to shareholders. The company must also hold a non-binding say-on-pay vote at every annual meeting.

Furthermore, *CBCA* companies must disclose information about clawbacks of incentive benefits paid to members of senior management and information about the well-being of employees, retirees, and pensioners.

The amendments will also require *CBCA* corporations to disclose prescribed information about diversity of directors and senior management. While the regulations have not yet been enacted, past draft *CBCA* diversity regulations suggest that disclosure will include the representation of women, aboriginal peoples, persons with disabilities, and members of visible minorities on the board and in management. These changes mark an era of greater transparency and better corporate responsibility standards in Canadian corporate law.

It is important to note, however, that these amendments only apply to federally incorporated companies. Those incorporated under provincial statutes remain unaffected.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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