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November 27, 2019

Small Changes, Big Implications: 2019 Sees Significant Corporate and Insolvency Law Amendments

Earlier this year, in Bill C-97, Parliament introduced significant changes to the *Canada Business Corporations Act* ("**CBCA**"), the *Bankruptcy and Insolvency Act* ("BIA") and the *Companies Creditors Arrangement Act* ("**CCAA**"). The changes to the BIA and CCAA have now been proclaimed in force effective November 1, 2019.

At first glance, some of the changes introduced by Bill C-97 may appear either innocuous (as codifying existing law) or technical (as changing certain time periods and prerequisites for initial orders under insolvency legislation). As will be discussed further below, though, the context of these changes may have far-reaching implications, especially when stakeholders rely on context to influence the interpretation of these provisions.

Changes to the BIA and CCAA

The amendments to the CCAA and the BIA on their face appear innocuous, but when considered in context, they may introduce significant changes. These new provisions include the following:

CCAA

- **New Initial order CCAA stay period**. The amendments shorten the initial stay of proceeding period that the courts may grant from up to 30 days to up to 10 days (section 11.02(1), CCAA).
- **DIP financing**. The new amendments stipulate that the court will only approve DIP financing if it is satisfied that its terms are limited to what is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during the CCAA period (in the case of the initial application, up to 10 days) (section 11.2(5), CCAA).
- **Disclosure of financial information of another interested person**. The new amendments provide that any person interested an application by a debtor under the CCAA may make an application on notice to any

other interested person, for an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate. (New section 11.9(1)-(3), CCAA.)

- **New duty of good faith**. The new amendments provide that any interested person in any proceedings under the CCAA shall act in good faith with respect to those proceedings. They also provide that stakeholders can apply to the Court for any order the Court considers appropriate if they can satisfy the Court that an interested person is not acting in good faith (section 18.6, CCAA).

BIA

- **New duty of good faith**. As with the CCAA amendments, the new amendments provide that any interested person in any proceedings under the BIA shall act in good faith with respect to those proceedings. They also provide that stakeholders can apply to the Court for any order the Court considers appropriate if they can satisfy the Court that an interested person is not acting in good faith (New section 4.2, BIA).
- **Reviewable transactions**.
  - The new amendments expand the ability of trustees to apply to Court to look back and upset certain compensation paid to directors and officers and managers of the debtor within a year of insolvency.
  - The amendments provide that the Court may inquire into such transactions and find the directors jointly and severally liable where the payment
    - occurred at a time when the corporation was insolvent o rendered the corporation insolvent,
    - was conspicuously over the fair market value of the consideration received by the corporation, and
    - was made outside the ordinary course of business; and
  - the directors did not have reasonable grounds to believe that the payment
    - occurred at a time when the corporation was not insolvent or would not render the corporation insolvent,
    - was not conspicuously over the fair market value of the consideration received by the corporation, and
    - was made in the ordinary course of business.
  - The new amendments create a reverse onus on directors to defend such payments, but relieves directors who

objected to making them (New sections 101(1), 2.01, 2.1, 3.1 and 5.1)

- Because the CCAA incorporates by reference section 101 of the BIA, the new amendments apply under CCAA proceedings as well.

Changes to the CBCA

- Bill C-97's amendments to section 122 of the CBCA codify the approach to the best interests of the corporation established by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560. A new section 122(1.1), which came into force when Bill C-97 received Royal Assent on June 21, 2019, stipulates that considering the best interests of the corporation includes considering, without limitation, the interests of shareholders, employees, retirees and pensioners, creditors, consumers, governments, the environment, and the long-term interests of the corporation.
- Other changes have been proposed requiring disclosure concerning diversity in corporate governance, as well as disclosure of prescribed requirements concerning "the well-being of employees, retirees and pensioners." Additional provisions concerning executive compensation and "say on pay" votes are also referenced in the new legislation. These latter C-97 amendments to the CBCA await proclamation in force pending the drafting of accompanying regulations.

Overview

The really eye-opening amendments that on their face could cause mischief are the new provisions with respect to good faith in the BIA and the CCAA. By itself, recognizing obligations of good faith is not a dramatic change. Mutual obligations of good faith are an acknowledged reality in insolvency practice, especially on the commercial list. However, the real potential for mischief flows from the new procedure for vindicating parties' good faith obligations that is now baked into both the BIA and the CCAA. Similarly, the new procedure allowing for disclosure of financial information could encourage further inter-stakeholder motions that could complicate proceedings.

What these amendments seem to have overlooked is that insolvency proceedings are always, and inevitably, composed of bitter stakeholders fighting over table scraps. Many, if not most, stakeholders in such proceedings enter them with a

jaundiced perception that everyone else is trying to eat their lunch. This kind of environment is ripe for subjectively sincere but misguided accusations of bad faith. By creating a new procedure to address bad faith allegations, the recent amendments risk encouraging them. Actual, bona fide allegations of bad faith can be, and routinely are, addressed in the context of whatever substantive motion occasions them. While it may be a good idea for the BIA and CCAA to expressly recognize obligations of good faith, inviting motions based on bad faith alone could cause significant mischief.

The balance of the provisions may appear technical or declaratory of existing law, but they take on a different colour when we consider the context in which they were introduced. They all were introduced in a Division of Bill C-97 entitled “Enhancing Retirement Security.” Much of the public justification for introducing these amendments was to show greater solicitude for vulnerable stakeholders such as employees and retirees. Counsel for certain stakeholders may rely on this professed justification to give substance to open ended obligations, such as those owed by directors under the CBCA, and the newly-recognized duty of good faith in the BIA and CCAA.

This may especially be the case, for example, when considering DIP proposals in a CCAA proceeding. These amendments appear to be designed to discourage DIP lenders from entering proceedings with an arbitrage mindset, secure in the knowledge that a super-priority DIP charge will be offered as a hedge against exposure to, for example, statutory deemed trust claims covering pension solvency deficits.