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This newsletter is designed to bring news of changes to the law, new law, interesting deals and other matters of interest to our commercial clients and friends. We hope you will find it interesting, and welcome your comments.

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CANADIAN BAR ASSOCIATION URGES PARLIAMENT TO CHANGE THE LAW TO ENCOURAGE THE CREATION OF BENEFIT CORPORATIONS (B-CORPS)

Dennis J. Tobin

Public benefit corporations (PBCs), for-profit businesses that seek to generate public benefits in addition to financial profit, are attracting increasing attention in Canada and have been established in more than 20 states in the United States. Blaney McMurtry partner Dennis Tobin has helped incorporate PBCs and wrote about them for Blaneys on Business last September (http://www.blaney.com/articles/evolution-corporation-public-benefit-corporation). In the coming weeks, he will update us on other initiatives in Canada in the areas of corporate governance, socially responsible enterprises (SRE), benefit corporation legislation, B-Corps and corporate social responsibility (CSR). In the meantime, the following article summarizes the recent recommendations of the Canadian Bar Association on these issues. Dennis was on the panel that assisted the Canadian Bar Association in the development of these recommendations.

The Canadian Bar Association (CBA) has recommended that Parliament change the federal statute under which businesses are established to make it clear that corporations can pursue public benefit purposes beyond pure profit.

The recommendations were made by the CBA in May, 2014 as part of Industry Canada's consultation regarding possible revisions to the *Canada Business Corporations Act* (CBCA), the legislation governing federally-incorporated companies.

The recommendations give a bit of background to benefit corporations (B-Corps), make specific suggestions for amendments to the CBCA, and also try to distinguish B-Corps from charities and other not-for-profits.

The whole idea of the corporation as an explicit force for creating public benefits beyond financial benefits for itself and its shareholders has drifted in and out of favor over the last century. In the current social environment, there is gathering support for the "triple bottom line – profit, people, and planet."

The U.S. State of Delaware, which has more active public companies on its registry than any other jurisdiction in the world, has had a law in force for the last year that permits for-profit enterprises to set out, in their articles of incorporation, business purposes that seek to deliver outcomes that serve the public interest beyond financial profit for shareholders.

The Delaware statute describes such a public benefit corporation as a for-profit body that is intended to produce a positive effect (or a reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders), and to operate in a responsible and sustainable manner.

It states that a PBC "*shall be managed in a manner that balances the stockholders' pecuniary interests, the best*

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"Shareholders are not to be ignored and they may have a justification for some activism if the broader purpose which the corporation intends to pursue has not been communicated and approved."

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interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation." In that certificate, the PBC "*shall (i) identify …one or more specific public benefits to be promoted by the corporation, and (ii) state within its heading that it is a public benefit corporation.*"

B-Corp legislation has no impact on existing business forms. This legislation is voluntary. In Delaware, the primary stakeholder of the for-profit company is the shareholder and the primary purpose is profit.

Canada is different. In Canada, the CBCA leaves it open to directors to have their corporations pursue and earn non-financial results that are, in the judgment of those directors, "in the best interests of the corporation." Profit is the primary focus but it need not always be, according to the common law. In two seminal decisions since 2004, the Supreme Court of Canada has supported the "business judgment rule," which favors judicial deference to the reasonable and defensible business decisions of the directors over judicial second-guessing of those decisions.

Nevertheless, despite the current social climate, directors and officers continue to be gun-shy about their corporations pursuing such public benefits over profit.

In the last several business generations, the phrase, "the best interests of the corporation," has been taken to mean the best financial interests only. There is certainly room in Canada's statutes and case law to argue that other forms of benefit are in the best interests of the corporation. But testing this in court against activist shareholders driven to increase the share price could be both financially and emotionally exhausting. Shareholders are not to be ignored and they may have a justification for some activism if the broader purpose which the corporation intends to pursue has not been communicated and approved.

It is as against this background that the CBA has encouraged the Minister of Industry to ask Parliament to implement the existing common law principles into the CBCA and thereby provide direction and protection for directors, accountability, transparency and clarity of purpose in the statute.

The CBA made three recommendations, as excerpted here:

"*Amend the business judgment rule contained in Section 122 of the CBCA to incorporate into the statute the (following) common law principles…. (set down by) the Supreme Court of Canada. When considering what is in the best interest of the corporation, permit directors (or, in the context of a benefit corporation, require directors) to consider not only the interests of shareholders, but also other stakeholders, including employees, creditors, consumers, governments, and the environment in their decision-making. As well, allow directors to consider both short-term and long-term interests of the corporation, including benefits that may accrue to the benefit corporation from its long-term plans, and need not give priority to any particular interest.*

"*Make it clear that the directors need not give priority to a particular interest over any other interest or factor unless the corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors.*"

"*Amend the CBCA to permit the incorporation of, or conversion of, existing CBCA corporations to a new kind of specialized business corporation, the 'benefit corporation.' For those corporations with a specific mission and/or just social values, provide a corporate structure that utilizes the existing corporate legislation and adds provisions for "purpose, accountability and transparency." This will promote CSR (Corporate Social Responsibility) objectives and provide protection to shareholders, investors, and Directors.*"

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"[T]here are certain circumstances where the courts will 'look behind' or 'lift the corporate veil' to find individuals responsible for bad company acts."

Amy Gates, a graduate of Queen's University Faculty of Law, did her articles at Blaney McMurtry LLP, was called to the bar in June, and has just joined the firm's commercial litigation practice group.

B-Corps are not charities and will pay taxes like other for-profit businesses. We have to be careful not to take a paternalistic and regulation-prone approach to them. The CBA recommendation makes the point that "*Benefit corporations would be more analogous to, and would compete among, traditional for-profit corporations. Benefit corporations would be created and governed by the same legislation as existing for-profit corporations with the key distinguishing feature of the requirement to declare a purpose that creates a general public benefit. On the other hand, charities and not-for-profit organizations are constrained in the type of activity they may carry on. Charities must be established and operated exclusively for charitable purposes.*"

Also, the recommendations make a very important distinction as to where the benefit corporation fits in the spectrum of enterprise types when it states: "*It is acknowledged that current regulation constrains the ability of a tax exempt organization to engage in social enterprise. However, it is arguable that these constraints are reasonable in exchange for the special tax treatment enjoyed by these organizations. Public benefit corporations, which would not be eligible for special tax treatment, would be better suited to fill the void between traditional for-profit corporations and tax exempt organizations.*" ■

PIERCING THE CORPORATE VEIL: WHEN DIRECTORS, OFFICERS AND SHAREHOLDERS OF A CORPORATION WILL BE PERSONALLY LIABLE

Amy Gates with Kym Stasiuk

Most business people understand that a company is a separate legal "person" from its members and, by its creation, limits the personal liability of any individual officer, director or shareholder for its behavior.

This legal principle has been around since the 1800s, established in the now famous English House of Lords case, *Salomon v Salomon*. It is not always applied by the courts, however, and there are certain circumstances where the courts will "look behind" or "lift the corporate veil" to find individuals responsible for bad company acts.

A recent decision by the Ontario Court of Appeal, *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, illustrates how these circumstances are continually evolving and, more importantly, confirms the legal test the court will apply in determining whether the corporate veil should be pierced.

In *Shoppers*, under a contract between Shoppers Drug Mart Inc. and 6470360 Canada Inc., carrying on business as Energyshop Consulting Inc./Powerhouse Energy Management Inc. (647), Shoppers directed utility companies to send their bills for Shoppers to 647. 647 then collected and organized the bills and periodically sent a remittance summary to Shoppers, setting out the total amount of that period's utility bills payable by Shoppers.

On receiving a remittance summary, Shoppers would transfer the invoiced amount to a bank account that was in the joint names of 647 and 647's sole officer, director and shareholder, Michael Wayne Beamish. This "clearing" account was used to receive all funds from Shoppers, and in turn, to pay Shoppers' utility bills. Beamish signed off and approved every transfer from the clearing account. 647 either used the funds received from Shoppers to pay Shoppers' utility bills or transferred them to a separate bank account that was used to pay 647's operating expenses. The "operating" account was also in the joint names of both 647 and Beamish.

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"[T]he Court confirmed that the leading Court of Appeal case on the question of when the corporate veil may be pierced in Ontario and when an individual may be exposed personally is 642947 Ontario Ltd. v. Fleischer and is therefore the appropriate test to apply."

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Soon after Shoppers received an anonymous telephone call and fax indicating that funds it paid into the clearing account were being used for activities other than the payment of utility bills, it concluded that something was amiss with its relationship with 647 and then delivered a notice to 647, terminating its services.

Following receipt of the termination letter, instead of paying Shoppers outstanding utility bills, Beamish caused 647 to transfer large sums of money from the clearing account to the operating account. After this, Shoppers began to receive notices of default from various utility providers in respect of outstanding invoices that, in its view, 647 ought to have paid.

Shoppers commenced an action against both 647 and Beamish to recover its funds and brought a motion for summary judgment against them seeking payment of the funds that had been misappropriated. Beamish responded with two motions to dismiss the action against him *personally*.

The motions judge found for Shoppers against 647, but dismissed Shoppers' claim against Beamish personally, relying solely on English case law for this determination. Shoppers appealed.

On appeal, Madam Justice Sarah E. Pepall stated that the motions judge had erred in reaching the conclusion that Beamish had not been unjustly enriched by the misappropriation and that the "corporate veil" -- the protection against personal liability that incorporation can provide -- should not be pierced. She set aside the order dismissing the action against Beamish and substituted an order granting Shoppers judgment against Beamish personally.

In doing so, the Court confirmed that the leading Court of Appeal case on the question of when the corporate veil may be pierced in Ontario and when an individual may be exposed personally is *642947 Ontario Ltd. v. Fleischer* and is therefore the appropriate test to apply.

Quoting from *Fleischer*, the Court stated that "only exceptional cases that result in flagrant injustice warrant going behind the corporate veil" and continued:

> "Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in control expressly direct a wrongful thing to be done"… "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct."

Applying the correct legal test from *Fleischer*, the Court said there was no doubt that Beamish was the directing mind and caused a misappropriation and misrepresentation by 647 and the ensuing unjust enrichment. He had sole signing authority over the accounts and authorized the transfer of significant amounts of money, which were supposed to be dedicated to the payment of utility bills, to an operating account in the names of himself and a company of which he was the sole shareholder. He expressly directed and caused the wrongful act. In these circumstances, therefore, there was an unjust enrichment and it was appropriate to pierce the corporate veil.

Not only is *Shoppers* a case of "what-not-to-do" as a sole officer, director and shareholder of a company, but it also serves as a pointed reminder that incorporation does not always afford protection from personal liability. ■

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"In a ground-breaking decision, the Workplace Safety and Insurance Appeals Tribunal has found that a provision in the Workplace Safety and Insurance Act, which denied benefits to workers suffering from non-traumatic mental stress, is unconstitutional."

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NURSE'S COMPENSATION CLAIM FOR STRESS UPHELD BY TRIBUNAL: APPEAL EXPECTED

Elizabeth J. Forster

This article appeared originally in the June, 2014 issue of Employment Update, the newsletter of Blaney McMurtry's Employment and Labour Law practice group.

In a ground-breaking decision, the Workplace Safety and Insurance Appeals Tribunal has found that a provision in the *Workplace Safety and Insurance Act* (the *Act*), which denied benefits to workers suffering from non-traumatic mental stress, is unconstitutional.

Background

The *Act* is designed to provide benefits to employees who have suffered personal injury in the course of their employment. However, the *Act* provides that employees are not entitled to benefits for mental stress unless the stress is "an acute reaction to a sudden and unexpected traumatic event" in the course of employment.

This is seen by many as unjust. The Ministry of Labour has indicated that approximately 30 per cent of disability claims involve mental illness. Nevertheless, employees suffering from workplace stress, unlike employees who have suffered physical injury, are denied access to workers' compensation benefits.

The Decision

This decision involved a claim by a nurse who worked at the same hospital for 28 years. For 12 of those years she claims she was subjected to mistreatment by a doctor who worked with her.

She claimed the doctor yelled at her and made demeaning comments to her in front of both colleagues and patients. Co-workers brought her mistreatment to the attention of management, but no steps were taken to deal with the issues and the doctor's behaviour continued.

After a particularly difficult incident, the nurse complained to management about her treatment by the doctor. The hospital responded by demoting her. The worker was so distressed that she sought medical attention. She was diagnosed with an adjustment disorder with anxiety and depression attributable to the stress she suffered in the workplace.

The Workplace Safety and Insurance Board (WSIB) denied the claim because the nurse's condition was not the result of an "acute reaction to a sudden and unexpected traumatic event."

The case was appealed to the Workplace Safety and Insurance Appeals Tribunal (WSIAT). The Tribunal concluded that the nurse would have been entitled to benefits but for the restriction on awarding benefits as a result of mental stress.

The Tribunal went on to find that the provisions of the *Workplace Safety and Insurance Act*, which deny benefits for mental stress, violated the guarantee of equality under the *Charter of Rights and Freedoms*.

Implications of the Decision

Although the Workplace Safety and Insurance Board is not bound to follow the decisions of the Tribunal, it is expected that this case will form the basis of a new policy by the WSIB to accept claims based on mental stress.

In 2011, the WSIB allowed 677 claims for traumatic mental stress. The potential claims arising out of "non-traumatic" mental stress will no doubt greatly exceed this number. The Government of Ontario has stated that one in five Canadians is affected by

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"[W]hile there is generally no requirement to pay taxes owing immediately, the process of delaying payment can prove to be an expensive proposition, considering the interest that accrues on unpaid taxes."

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mental illness every year. Certainly not all mental illness arises because of workplace stress. However, if the WSIB allowed 677 claims for traumatic mental stress in 2011, it is a reasonable assumption that there are many more "non-traumatic" claims for workplace mental stress.

Concerns have been expressed that the increased number of claims expected as a result of this ruling will result in sky-rocketing increases in WSIB premiums at a time when employers are already complaining about the high cost of WSIB coverage.

The Appeals Tribunal addressed those arguments. It noted that there was little evidence regarding the cost of mental stress claims in Ontario. It also noted that any argument that people with mental stress claims would put an unjustified burden on the workplace insurance system merely served to "exacerbate the historical disadvantage faced by persons with mental disabilities" because it assumes that they are not deserving of benefits and places the burden on society.

It is likely that the Ontario government will challenge this ruling in the Divisional Court. In the meantime, applications for benefits based on non-traumatic mental stress are likely to be entertained. ■

TAXPAYERS HAVE TIMING OBLIGATIONS TO THE CRA BUT, COURTS POINT OUT, CRA HAS OBLIGATIONS, TOO

Paul L. Schnier

Readers of *Blaneys on Business* may recall an article in the December, 2011 issue suggesting that, while there is generally no requirement to pay taxes owing immediately, the process of delaying payment can prove to be an expensive proposition, considering the interest that accrues on unpaid taxes.

Two recent court decisions, however, provide a vivid reminder that timing obligations are not the taxpayer's alone. The Canada Revenue Agency (CRA) has them, too.

Once again, the process begins with filing an income tax return (both for individuals and corporations) within the time prescribed in the *Income Tax Act* (the Act). The Act then requires the CRA to examine these returns "with all due dispatch" and then issue a Notice of Assessment. A Notice of Assessment will indicate what taxes are payable as well as any interest that is owing on taxes unpaid at the time. This interest continues to accrue on a daily basis until the taxes are paid.

The CRA may then review and reconsider a return and reassess the taxpayer by issuing a Notice of Reassessment within three years from the date of the original assessment. (There is no time limit if there is fraud or misrepresentation). Where an assessment or reassessment is issued, if the taxpayer disagrees, he may file a Notice of Objection and the CRA must again, "with all due dispatch," reconsider and then vacate, confirm or vary the assessment or reassessment.

But what if the CRA delays the performance of its obligations in either the assessment or objection process?

Two recent developments are very interesting in this regard. First, in a 2013 case in Winnipeg, the CRA was sanctioned by the Federal Court for unwarranted delay in issuing Notices of Assessment and refunds in cases where investors had invested in a certain tax shelter.

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The court found that the CRA had abused its authority by attempting, through this delay, to discourage taxpayers from investing in tax shelters.

More recently, the Ontario Superior Court of Justice found that the CRA was not entitled to collect the interest that had accumulated on unpaid taxes where the CRA had failed to deal with the Notice of Objection on a timely basis and essentially had "sat on the file" for approximately three years.

While the court did not specifically discuss the CRA's motives in this latter case, it was apparent that the intent, again, was to discourage tax shelter investments that the CRA did not like.

None of this is to suggest that taxpayers should not pay their taxes on time. But it does point out that the CRA has obligations to the taxpayer and that the taxpayer has certain judicial remedies where the CRA does not discharge its obligations in an appropriate manner.

In essence, the courts are saying that, when it comes to discharging tax obligations, it's a two-way street and both sides have to play fair. ■

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