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EXPECT THE BEST

Canadian Bar Association Urges Parliament to Change the Law to Encourage the Creation of Benefit Corporations (B-Corps)

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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 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.*"

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.*" ■