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PUBLICATION

B Corp Certification in Canada: Part I – Amending the Articles of Incorporation

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Business law is developing in a new direction in Canada. That direction is firmly based on profitability and material prosperity. However, that prosperity is increasingly being linked to a more sustainable, environmentally responsible and widely shared model of carrying on business.

B Lab is an international NGO that certifies for-profit companies that demonstrate their positive impact on society and the environment. According to B Lab, certification involves two elements. The first is demonstrating a positive impact under B Lab's rigorous B Impact Assessment. The second element requires adoption of a legal structure that locks the mission into the company's core.

B Lab investigates the state of corporate law in every jurisdiction that grants certifications. In some jurisdictions, B Lab has determined that the existing law does not permit mission lock and has lobbied for statutory change such as the adoption of benefit corporation statutes in the USA and elsewhere. In Canada, B Lab has suggested amendments to a corporation's articles to lock that mission. This article discusses that amendment.[1]

We have done two articles - Part I and Part II. This article, Part I, reviews B Lab's suggested amendments from a legal perspective and may be of interest to lawyers who are advising companies seeking B Corp certification. Part II - *B Corp Certification in Canada: What else should I be asking my lawyer?* is likely to be of more interest to CEO's considering seeking B Corp status and investors investing in a certified company.

The Situation in Canada:

In Canada there is no for-benefit corporation legislation in place to allow existing for-profit corporations to adopt the characteristics of for-benefit corporations such as a commitment to a

general or specific social mission and an express commitment to all stakeholders.[2] This type of legislation is common in the USA.

Even if we had benefit corporation legislation, B Corp certification is not an alternative to benefit corporation status under statute. They are distinct. Through its certification process, B Lab provides a way for companies in Canada to demonstrate their commitment to sustainability.

Under the common law in Canada, directors of for-profit corporations "*may*" take into account the interests of a broad range of stakeholders and the courts will accord deference to the decisions of the Board of Directors in that regard. This has been ruled upon by the Supreme Court of Canada and is governed by the "business judgment rule".[3] In the USA, directors may consider such factors but only as they relate to shareholder value.

B Lab's proposed amendments require that a corporation "*shall*" take into account the interests of all stakeholders. That is the key distinction and key requirement of being certified as a B Corp.

The Legal Step: What is being suggested?

Certification is a final step towards a commitment to transparency which, together with performance and accountability, is a key foundational principle of the B Corp movement.

While the purposes are clear and laudable, we question whether the required amendments are entirely effective without benefit corporation legislation.

In Canada, the most common practice for those corporations who do want to amend their articles is to limit those amendments to the issues dealing with the decisions of the Board of Directors. Amending the articles to add a particular or general social mission of the type you see in benefit corporation legislation in the USA is not something B Lab requires.

Amending a corporation's articles under the *Business Corporations Act* (Ontario) ("OBCA") and the *Canadian Business Corporations Act* ("CBCA") requires a special resolution of the corporation's shareholders passed by at least two-thirds of the votes cast at a special shareholder meeting and the filing of articles of amendment.

B Lab's Required Amendments:

B Lab currently requires the following four paragraphs as amendments to a company's articles.[4]

Paragraph 1

The directors shall, acting fairly and responsibly, consider the short-term and the long-term interests of the corporation, including, but not limited to, the corporation's shareholders, employees, suppliers, creditors and consumers, as well as the government and the environment (the "Stakeholders"), and the community and society in which the corporation operates, to inform their decisions.

The above paragraph takes the permissive view of the Supreme Court of Canada respecting the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment and makes it mandatory. That portion should not be controversial from a legal perspective.

B Lab's amendments are, for the most part, compulsory. They are rules to meet the threshold for certification. As we have stated, B Corp certification is distinct from benefit corporation status under legislation. If future benefit corporation legislation takes a permissive approach in line with the Supreme Court of Canada's decision in *BCE Inc. v. 1976 Debentureholders*[5] the B Lab standard would be a different standard.

Paragraph 2

In discharging his or her duties, and in determining what is in the best interests of the corporation, each director may consider all of the Stakeholders (defined above) and shall not be required to regard the interests of any particular Stakeholder as determinative.

In this paragraph, the provisions are giving direction not only to the Board of Directors as to how to manage the relative interests but could be an asset in managing stakeholders' expectations. The best interests of the corporation are still the primary obligation and consideration for the Board of Directors, not the best interests of any particular stakeholder group. However, under the "shareholder primacy doctrine" the best interest of the Corporation has historically and practically been co-extensive with the interests of the shareholders.[6]

Paragraphs 3 and 4

Nothing in this Article express or implied, is intended to create or shall create or grant any right in or for any person other than a shareholder or any cause of action by or for any person other than a shareholder.

Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in enforcing his or her rights hereunder, and under provincial law and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share.

These paragraphs address concerns that are dealt with in most benefit corporation legislation. The concern is that by explicitly broadening the stakeholder group you may be giving rise to a broader category of legal actions against the corporation and its directors and perhaps creating a larger class of claimants. Whether that will be the case will be determined having regard to the language of the Supreme Court compared to the language of paragraphs 1 and 2. In the meantime, it is unlikely corporations will be afforded new protections at law by including the language of paragraphs 3 and 4 in their articles. However, perhaps these provisions will assist in setting reasonable expectations and expectations are important, as discussed further below.

Canadian jurisprudence already enables directors to consider the interests of shareholders as well as other stakeholders.[7] The existing case law should therefore inform the interpretation of B Lab's required amendments.

The CBCA and the OBCA allow certain stakeholders, referred to as complainants, to bring a derivative action or an application for oppression.[8] These stakeholders include current or former security holders, directors or officers, or any other person who is a proper person to make an application in the discretion of the court.[9]

The oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors.[10] It is an equitable remedy in which courts have the jurisdiction to enforce "not just what is legal but what is fair."[11] Courts can look at "business realities, not merely narrow legalities."[12] It is fact-specific and is judged by the reasonable expectations of the stakeholders "in the context and in regard to the relationships at play."[13] A two-step analysis is undertaken by the courts in order to assess a claim of oppression:

(1) Does the evidence support the *reasonable expectation* asserted by the claimant; and

(2) Does the *evidence establish that the reasonable expectation was violated* by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. (Emphasis added.)[14]

The Supreme Court identified the following factors as useful in determining whether a reasonable expectation exists: (i) general commercial practice; (ii*)* the nature of the corporation; (iii) the relationship between the parties; (iv) past practice; (v) steps the claimant could have taken to protect itself; (vi) representations and agreements; and (vii) the fair resolution of conflicting interests between corporate stakeholders.[15]

We believe an emphasis on expectations and the nature of the corporation will be very relevant in how the decisions of the directors of the B Corp will be judged.

Including language in a corporation's articles limiting a right of action to its shareholders would not change the existing legislation or common law which allows a broad range of stakeholders, in addition to shareholders, to bring an application for oppression or a derivative action. The oppression remedy and derivative actions are already available to security holders, creditors, directors and officers. However, the inclusion of the language of paragraph 3 would presumably be another factor in assessing the reasonable expectations of the complainant and the efforts made by the corporation to explain the nature of the corporation would also be relevant.

Logistics of Amending Articles

Not all corporations seeking B Corp certification amend their articles in such a way as to include all of the foregoing paragraphs. For instance, the third and fourth paragraphs are sometimes not included, perhaps because they may be construed as trying to unilaterally amend the existing

law under statutes and common law. The first and second paragraphs are mandatory according the B Lab.

The practice is to make these amendments in the “other provisions” section of the articles and expressly not the “purposes” section. Most companies have nothing inserted under the “purposes” section of their articles. In that way, there is no limitation on the business that can be conducted other than that it complies with the laws of the jurisdiction in which the company operates. If a corporation wanted to add a general or specific social purpose then that provision would presumably be inserted under the “purposes” section of the articles.

If a corporation places restrictions in its articles, then it is bound by them. Directors and officers must comply with the articles and by-laws of a corporation.[16] If restrictions are placed in a corporation’s articles on the business that it may carry on or on its powers and the corporation subsequently engages in the restricted business activities or exercises such powers, the directors and officers could be held liable for actions that are *ultra vires* the corporation.

Conclusion

B Lab provides companies a way to identify themselves as committed to a sustainable way of carrying on business with profit, people and the planet in mind. Companies that have strong CSR programs are often looking for that next step in their commitment. Companies must also be committed to transparency, performance and accountability and agree to B Labs requirements. The certification process is meant to be meaningful so it is not easy. Companies seeking B Corp certification will have to consider the issues and decide for themselves. As part of that they should be very careful to communicate with, involve and manage the expectations of their stakeholders.

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[1] This article is another in a series of articles about the for-benefit corporation movement. Explanations of the history and relevance of the for-benefit corporation movement can be found in our earlier articles on our website: https://www.blaney.com/practice-areas/benefit-corporations-and-csr

[2] While this article was being written there was draft benefit corporation legislation proposed in British Columbia. Nova Scotia and BC both have legislation that provide for a hybrid, for-profit corporate form which must have a community purpose set out in its articles but also restrict a corporation's ability to distribute profits to shareholders and there is an asset lock.

[3] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para 40, [2008] 3 SCR 560 [*BCE*].

[4] B Lab, "Legal Requirements" online: B Lab <https://bcorporation.net/certification/legal-requirements>.

[5] *BCE, supra* note 4 at para 39; *Peoples Department Stores Inc. v. Wise*, 2004 SCC 68 at para 42, [2004] 3 SCR 461.

[6] *BCE, supra* note 4 at para 37.

[7] *Ibid* at para 39.

[8] *Canadian Business Corporations Act*, RSC 1985, c C-44, s 239 and 241 [*CBCA*]; *Business Corporations Act* (Ontario), RSO 1990, c B 16, s 246 and 248 [*OBCA*].

[9] *Ibid* at para 245; *CBCA, supra*, s 238.

[10] *BCE, supra* note 4 at para 45.

[11] *Ibid* at para 58.

[12] *Ibid.*

[13] *Ibid* at para 59.

[14] *Ibid* at para 68.

[15] *Ibid* at para 72.

[16] *CBCA, supra note 9,* s 122(2); *OBCA, supra* note 11, s 134(2).