BY NEILL MAY

Investments with benefits

Dealing with Americans is a virtual inevitability in contemporary transactional commercial law practice. Due to varying statutory frameworks, experiences, politics, and other differences, those dealings predictably raise conflict-of-law and lost-in-translation issues, but as a practical matter the number of meaningful differences of principle with practical consequence is small. The issue of directors' fiduciary duties is one of them.

The question of fiduciary duties is like a memory of an excruciatingly embarrassing thing one did earlier in life — it fades, but never quite goes away. (I could have a column on repression, but it's not an area of expertise; for me, it's more of a hobby.)

A recent development highlighting the issue of fiduciary duties, as well as the differences between Canadian and American perspectives on the matter, was the adoption in July of legislation permitting the formation of "public benefit corporations," known colloquially as "B-corps," in Delaware (the corporate law epicentre of the United States). B-corps are for-profit corporations, but a B-corp's governing documents specify one or more public benefits it will pursue, which could include objectives of an "artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technical nature." The directors of the B-corp will be required, by law, to balance shareholders' pecuniary interests, interests of those materially affected by the corporation's conduct, and the public benefit(s) identified in the certificate of incorporation. B-corps are required to report to shareholders at least biannually on their success in achieving their objectives. B-corps, therefore, provide an alternative structure to other U.S. corporations where shareholder primacy is paramount. For non-B-corps directors are duty bound to focus primarily on the interests of the corporation's shareholders.

The concept of balancing interests that inform the B-corp innovation has parallels in Canada. Here, based on the principles outlined by the Supreme Court of Canada in *Peoples Department Stores Inc. (Trustee of) v. Wise* and in *BCE Inc. v. 1976 Debentureholders*, directors owe their fiduciary duties not to any specific group (such as shareholders), but to the corporation itself. There has been much discussion about the meaning of this approach, usually focusing on the question of how this standard should be applied where different groups of stakeholders have incompatible or imperfectly aligned interests. To paraphrase one commentator, it is as if the driver of a bus were told his duty was to drive not in the best interests of the passengers, the owners, the other vehicles on the road, or the communities through which he drives, but in the best interest of the bus. The separate legal identity of the corporation, so critical for limited liability reasons and to permit modern corporations to function as they do, is unhelpful because, like the bus, the corporation has no interests in its own right.

BCE is generally considered to say the interests of different stakeholders should be taken into consideration; though the duty to act in the best interests of the corporation does not necessarily require a balancing of those interests. Whatever the test requires, it implies a different approach than shareholder primacy.

Were questions concerning fiduciary duties easy, the debate would have subsided long ago. The arguments in favour of the shareholder-primacy model include the fact, in relative terms, it provides a plain and enforceable standard, clear guidance for directors, and, particularly in the context of a change of control, protection for shareholders. There is also the argument directors' fiduciary duties should not be the vehicle for addressing any balance thought necessary or appropriate between stakeholders. However, directors and those involved in advising them will often encounter circumstances where the interests of stakeholders other than shareholders appear to be at stake, and it is not always clear how those interests would be (or could have been) at least factored into the equation or protected to the extent possible or appropriate if not part of the board's analysis.

And so unlike in Canada, Americans will now have a clear choice between shareholder primacy and a vehicle with balanced objectives. How B-corps will work in practice remains to be seen. The structure raises questions similar to those we have tackled in Canada as to how fiduciaries are to balance competing interests. B-corps may also have to face the challenge of tactical and nuisance claims based on stakeholder interests. Ultimately, there is the question of whether companies will embrace the structure. Delaware is the 19th state to pass enabling legislation, and according to B Lab, a non-profit that tracks such things, there are currently 786 B-corps. There may well be corporations that will benefit in both sales and fundraising initiatives from marketing their status as B-corps, analogous to the successes of so-called ethical mutual funds. Patagonia, the outdoor gear and clothing company, for instance advertises its status as a B-corp to customers.

What may help the concept along is the catchy moniker "B-corp." If corporate law is trending in the direction of offering different structural alternatives, we might be seeing some other investment alternatives in the near future, and appealing labels may help them succeed. It is early to say, but alternatives might include: the Y-corp, through which investors may pose existential questions; the U-corp, where everyone gets to be CEO for a day (or all at once!); the R-corp, dedicated to piracy; and the F-corp, which rudely refuses your investment and then fails. CL

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