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UNIFORM LAW CONFERENCE OF CANADA

CHARITIES PROJECT - PROGRESS REPORT

HYBRID ORGANIZATIONS

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Charities Project – Interim Report
Hybrid Organizations

[1] The concept of a company with a social mission ("CSM") officially saw the light of day in Europe, first in Belgium in 1995 with the "société à finalité sociale" ("SFS"), in France in 2001 with the "société corporative d'intérêt collectif" ("SCIC"), and especially in the United Kingdom in 2005 with "community interest companies" ("CIC") (*Companies (Audit, Investigations and Community Enterprise) Act 2004*, Part 2). This concept crossed the Atlantic to give rise to laws on "benefit corporations" in the United States, starting with Maryland in 2010, then in 75% of American states, including California, which not only has "benefit corporations", but "social purpose corporations" as well since 2011, and even Delaware, in 2013.

[2] The CSM wave hit Canada in 2010, first in British Columbia, with the appearance of "community contribution companies" (the "C3") in Part 2.2 of the *Business Corporations Act*, then in 2012 in Nova Scotia with "community interest companies" ("CIC") created by the *Community Interest Company Act*.

[3] It is important to clearly distinguish between the concepts of CSM and "corporate social responsibility" ("**CSR**"). The authors claim that CSR, now "a must" in business law, [TRANSLATION] "is very closely related to other notions with porous borders that have currently developed in management, finance, sociology, or strategy (including the stakeholder theory and sustainable development)". They add: [TRANSLATION] "Despite distinct theoretical definitions, sustainable development, social responsibility, and "stakeholder theory" all attest to the existence of an interface between the business and its environment. … These notions involve consideration by the firm of economic, environmental, and social data … and assume that the firm's horizon is not limited to its shareholders".

[4] CSR is now viewed as [TRANSLATION] "a strategic tool to bolster the officers' legitimacy vis-à-vis stakeholders that has a positive impact on a company's reputation that might lead to increased sales". "CSR strategy" can align with shareholders' interests, but those interests remain the purpose of the company that officers must pursue and that must always prevail over any social concern.

[5] CSM goes further than a purely cosmetic or strategic CSR, used as a marketing tool by many companies worried about polishing an image tarnished by their activities or conduct. A CSM's social mission is its DNA and transcends profit maximization.

[6] In every case, the law (in practice, by adding to the law governing these corporations) allows a business corporation to expressly include in its articles its social mission, "the social objective" it plans to fulfill to create one or more "specific public benefits". It can then include its CSM status in its name and must report annually on the activities it has conducted to achieve this mission.

[7] That is where the distinction between what we will call "robust" CSM and "light" CSM comes in.

[8] Robust CSM are those whose 1) directors have a duty to promote the corporation's social mission, to the detriment of shareholder interests when necessary, 2) assets are locked to ensure that they are solely purposed for the well-being of the community and 3) dividend and interest payments to shareholders and lenders are capped. These include CIC in the United Kingdom, C3 in British Columbia and CIC in Nova Scotia. CIC in the United Kingdom and Nova Scotia are also subject to oversight by a regulatory body. This kind of CSM is a real hybrid business corporation-non-profit corporation.

[9] Light CSM include "benefit corporations" in the United States, whose assets are not locked, have no restrictions on interest or dividend payments, and whose directors are not bound to promote the corporation's social mission, but only authorized to take it into account without breaching their "fiduciary" duties to the corporation (this last element is somewhat vague in the doctrine). American "benefit corporations" resemble more the fruit of a CSR marketing operation than hybrid entities firmly devoted to a social mission.

[10] It is interesting to note that to date, Canada has opted for the robust CSM, barring British Columbia which added "light" CSM to its legislative quiver in June 2020. The new Part 2.3 of its *Business Corporations Act* authorizes the creation of "Benefit Companies" based on the US model.

[11] The argument by certain commentators that in Canada, the Supreme Court of Canada's judgments in *Peoples* and *BCE* render CSM useless because directors are already authorized, when performing their duties, to consider the interests of "stakeholders" other than shareholders, is not convincing. It might be relevant if applied to US-style "light" CSM but is not with respect to robust CSM like those in Canada.

[12] CSM legislation similar to those now enacted in British Columbia and Nova Scotia would have the following effects:

- the corporation could change or abandon its social mission only by amending its articles, which would require shareholder approval in a special resolution and allow shareholders, if applicable, to exercise their right of dissent and oblige the corporation to redeem their shares at their fair value;
- directors would be bound at all times to act according to the corporation's social mission, and would not be free to prioritize shareholder interests depending on the financial, political, or strategic imperative of the day;
- the corporation could pay shareholders only a slim fraction of its profits, with the majority having to be invested in its mission;
- if the corporation or its directors violated any of these last two requirements, it could give rise to legal proceedings to dissolve the corporation or an order to comply with the law or the articles, not to mention potential actions for liquidation or oppression.

[13] None of this would be possible under the sole authority of *Peoples* or *BCE*.

[14] CSM strikes a balance between two types of legal entities: a business corporation and a non-profit organization. It allows a business corporation, whose purpose is primarily profit-based, to pursue a social mission and raise funds from people who believe in the achievement of that mission. The mission of a "robust CSM" is its heart, its *raison d'être*, that forces directors to attain that mission and guarantees investors that this mission prevails and will continue to prevail over

profits. This guarantee takes the form of locked assets and restricted dividend and interest payments. Naturally, CSM appeals to a particular kind of investor with a more developed social conscience, for whom returns come second.

[15] CSM may however be considered from another perspective, that of non-profit organizations looking for funding. While this kind of entity cannot raise funds by issuing shares (like a business corporation or a cooperative), a CSM is a game-changer. Instead of creating a non-profit organization, it will now be possible to create a business corporation and transform it into such an organization by including the desired social mission in its articles. This allows the entity to raise funds by issuing shares to investors sympathetic to that mission who might have given it money, but who instead would opt to contribute in the form of redeemable capital.

[16] *The Working Group proposes to proceed on the basis of a robust CSM rather than a "light" CSM. This will result in asset lock and dividend restrictions. The Working Group requests that the Conference approve this choice.*

[17] The ULCC Working Group consists of:

Peter Lown, K.C., Chair
Maya Cachecho, Université de Montréal
Mark Gillen, University of Victoria
Kelly Hazlett, Government of British Columbia (until April 30, 2023)
Scott Hood, Government of Alberta
Sointula Kirkpatrick, Government of British Columbia
Darren Thomas, Government of Alberta

Clark Dalton, K.C., ULCC (until February 15, 2023)