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ARTICLE

Benefit companies arrive in B.C.

Introduction

This bulletin provides an update regarding a new form of company that will be available under the B.C. *Business Corporations Act*¹ (the BCA) effective June 30, 2020. The amendment to the BCA that creates this new form of company, the "benefit company", was put forward as a private member's bill with the stated goal of supporting "companies that choose to put the pursuit of social and environmental goals at the heart of their mission",² allowing them to embed these goals in their articles, and requiring them to remain publicly accountable to those goals.

A 'benefit company' or 'benefit corporation' is a form of business entity that has gained traction in the United States over the past decade and has started to be adopted in other jurisdictions around the world. Since Maryland became the first U.S. state to adopt the form in 2010, 35 U.S. states and the District of Columbia have all adopted benefit corporation legislation.³ British Columbia is the first Canadian province to enact legislation adopting the benefit company structure.

Features of a B.C. benefit company

Under the newly amended BCA, a benefit company is a new type of for-profit company that must include a "benefit statement" in its notice of articles and a "benefit provision" in its articles. There is no requirement for a benefit company to include a specific designation in its name.

The "benefit statement" is a statement in the notice of articles that "this company is a benefit company and, as such, is committed to conducting its business in a responsible and sustainable manner and promoting one or more public benefits". The "benefit provision" in the articles must specify the public benefits the company will promote, as well as set out the company's commitments to (1) conduct its business in a "responsible and sustainable manner" and (2) promote its specified public benefits.

A "public benefit" is broadly defined in the BCA as a positive effect (including of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature), for the benefit of:

- A class of persons (other than shareholders of the company in their capacity as shareholders);
- A class of communities or organizations; or
- The environment (including air, land, water, flora and fauna, and animal, fish and plant habitats).

The BCA provides that a benefit company conducts its business in a "responsible and sustainable manner" if it takes into account the well-being of persons affected by the operations of the company, and endeavours to use a fair and proportionate share of available environmental, social and economic resources and capacities.

Reporting requirements

A benefit company must prepare and publish an annual "benefit report" that assesses the company's performance in carrying out the commitments in its benefit provision against a third-party standard selected by the company's directors for that financial year.

A "third-party standard" for defining, reporting and assessing the company's performance in relation to its benefit provision is one developed by a third-party standard-setting body, and in accordance with any applicable regulations. The third-party standard-setting body must not be related to the benefit company, and must make certain prescribed information public. There are a number of third-party standard-setting bodies that currently meet these criteria, including the B Corp certification, the Global Reporting Initiative and the Sustainability Accounting Standards Board.

The benefit report must include a fair and accurate description of the ways the company demonstrated its commitments in its benefit provision and a description of any circumstances that hindered its endeavours to carry out those commitments. The benefit report must also include a record of the company's assessment of its performance under its selected third-party standard, as well as the process and rationale for selecting or changing the third-party standard used to prepare the benefit report. The benefit company itself makes this assessment; the third-party standard-setting body does not perform the assessment, and there is no government oversight of the assessment.⁴

Before publishing a benefit report, the directors must approve and sign it to confirm such approval. It is then published by the same process described in the BCA for financial statements, by placing it before the shareholders at an annual general meeting and depositing it in the company's records office. If the company does not hold its annual general meeting within the required period, the benefit report can be published by depositing it in the company's records office on or before the annual reference date that relates to that annual general meeting.

Promptly after publishing a benefit report, the directors must post it on the company's publicly accessible website, if it has one. The company must also keep copies of all its benefit reports at its records office, where they can be inspected by any person without charge.

Failure by the company to publish or post a benefit report, or publishing or posting a benefit report that does not comply with the BCA or applicable regulations is an offence under the BCA for which the company could be subjected to a fine of up to \$5,000.

Director and officer liability

The popularity of the benefit corporation form in the U.S. may be attributed in part to the development of case law in that country that has tended to require corporate directors to prioritize the maximization of shareholder value above all else, exposing directors to liability where they attempt to prioritize other stakeholders or concerns.⁵

Current Canadian case law supports the idea that in exercising their duty to act in the best interests of a company, directors “may” consider broader stakeholders (including shareholders, employees, creditors, consumers, governments and the environment).⁶ One of the goals of the new legislation was to create a form of entity for which this permissive standard is strengthened to a mandatory one – where directors of benefit companies must consider broader stakeholders and goals, and balance these in exercising their fiduciary duties.

To this end, the amended BCA provides that a director or officer of a benefit company must act honestly and in good faith with a view to conducting the business in a responsible and sustainable manner, and promoting the public benefits specified in the company's articles (the “benefit duty”). The director or officer must also balance the duty under s. 142(1)(a) of the BCA to act honestly and in good faith with a view to the best interests of the company with the benefit duty (the “balancing duty”). A director or officer of a benefit company does not contravene her duty to act honestly and in good faith with a view to the best interests of the company due only to her meeting the benefit duty or balancing duty.

Despite these new duties, the directors and officers of a benefit company have no duty to (i) a person whose well-being may be affected by the company's conduct, or (ii) a person who has an interest in a public benefit specified in the company's articles. No legal proceeding may be brought by such a person against a director or officer of a benefit company in relation to either the benefit duty or the balancing duty. A legal proceeding under the BCA or any other enactment may be commenced in relation to the benefit duty and balancing duty only by shareholders of the benefit company and only if the proceeding is commenced by shareholders holding, in the aggregate, at least 2 per cent of the issued shares of the company (or in the case of a public company, issued shares of the company with a fair market value of at least \$2,000,000). A court may not order monetary damages in relation to any breach of the benefit duty or the balancing duty, in other words, only non-monetary remedies, including an order to comply, are available.

It is worth noting that the new benefit duty and balancing duty do not derogate from or in any way diminish the other duties owed by directors and officers under s. 142(1) of the BCA at paragraphs (b) – (d), and they must still at all times exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances, act in accordance with the BCA and the regulations, and subject to s.142(1)(a)–(c), act in accordance with the memorandum and articles of the company.

Incorporating or transitioning to a benefit company

A company may become a benefit company by altering its notice of articles to include the benefit statement. This alteration must be authorized by a special resolution of the shareholders that also approves an alteration to the company's articles to set out a benefit provision.

A benefit company may cease to be a benefit company by altering its notice of articles to delete the benefit statement. This alteration must also be authorized by a special resolution.

A shareholder of a company (whether or not their shares normally carry the right to vote) may dissent in respect of a resolution to alter the company's notice of articles to include or to delete the benefit statement, or on any resolution to alter the company's benefit provision. This entitles the dissenting shareholders to be bought out at the fair value of their shares.

Regulations

While no regulations have yet been passed relating to benefit companies, the BCA provides that the Lieutenant Governor in Council may make regulations prescribing:

- The matters that a third-party standard must address and the methods of assessment the standard must require; and
- The information that must be included in a benefit report and the manner in which the benefit report must disclose the required information.

Comments

While still in early days, the benefit company form may gain purchase in B.C. among for-profit companies who wish to differentiate themselves in the marketplace, gain social capital through community recognition of their social responsibility and sustainability commitments, and enshrine core values in their corporate structure.

Another potentially appealing feature of the new benefit company form is the additional protection extended to directors and officers from claims that they may have breached their duty to act in the best interests of the company by choosing to prioritize other stakeholders or public benefits. It is currently unclear what additional level of protection will be afforded to directors and officers of benefit companies in respect of their exercise of the benefit duty and the balancing duty. It is also worth noting that this issue may remain unresolved for some time, with further judicial clarity being contingent on the overall uptake of the form and the inclination of eligible shareholders to test noncompliant benefit companies in court.

Businesses considering whether a benefit company structure might be desirable will of course be interested in how the relatively novel corporate form is likely to be viewed by investors, and in particular impact investors. One recent U.S. study found that benefit corporations are receiving investment at significant rates and that their funding is coming from typical sources of venture capital.⁷ This study observed that the benefit company is gaining acceptance as an investment vehicle that is capable of generating acceptable returns, although the benefit corporation status of the entity may be only a secondary factor in investors' decision-making processes.

At present, there are no tax advantages to the benefit company form.

¹ *Business Corporations Act*, SBC 2002, c 57

² British Columbia, Legislative Assembly, *Hansard*, No. 237 (April 10, 2019) at 8319 (A. Weaver)

³ [Online: Social Enterprise Lawyer Tracker](#)

⁴ Online, Benefit Company

⁵ See, e.g. *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668, 3 A.L.R. 413 (1919) and *eBay Domestic Holdings Inc. v. Newmark*, 16 A 3d 1 (2010)

⁶ *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at ¶ 40; recent amendments to the *Canada Business Corporations Act*, RSC 1985, c. C-44 have further codified that when acting with a view to the best interests of the corporation, the directors and officers of the corporation may consider, but are not limited to (a) the interests of shareholders, employees, retirees and pensioners, creditors, consumers, and governments; (b) the environment; and (c) the long-term interests of the corporation (at s. 122 (1.1)).


⁷ Dorff, Michael B. and Hicks, James and Davidoff Solomon, Steven, *The Future or Fancy? An Empirical Study of Public Benefit Corporations* (February 4, 2020). Harvard Business Law Review, Forthcoming; European Corporate Governance Institute - Law Working Paper, 495/2020; Southwestern Law School Research Paper No. 2019/10.

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