

B.C.'s new legislation on benefit companies

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Introduction

As of June 30, 2020, for-profit businesses that are committed to conducting business in a responsible and sustainable way will be able to demonstrate their commitment by becoming a benefit company under the British Columbia *Business Corporations Act* (the Act). British Columbia is the first Canadian jurisdiction to implement legislation to establish benefit companies. Introduced in the State of Maryland in 2010, and now adopted in 36 U.S. states,^[11] benefit company legislation is intended to enable a company to promote social goals while being protected from claims that doing so would breach director fiduciary responsibilities.

What is a benefit company?

A benefit company is a for-profit company that commits, by a “benefit statement” and “benefit provision,” to conduct its business in a responsible and sustainable way and promote one or more “public benefits”:

- *benefit statement* – the notice of articles will state 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”
- *benefit provision* – the articles will specify the “public benefits” chosen to be promoted by the benefit company, and set out commitments to
 - conduct its business in a “responsible and sustainable manner,” and
 - promote the chosen “public benefits”

A “public benefit” refers to a “positive effect” that benefits a class of persons (other than shareholders in their capacity as shareholders), a class of communities or organizations, or the environment.^[22] A potential “positive effect” includes an effect of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.

The Act 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 benefit company, and
- endeavours to use a fair and proportionate share of available environmental, social and economic resources and capacities.

Why become a benefit company?

There is an increasing focus on whether companies, in addition to maximizing their value to shareholders, should have a broader social purpose. This is reflected in the growing trend towards adoption of benefit company legislation in the United States and now in Canada. It is also reflected in the August 2019 Business Roundtable statement in which 181 U.S. CEOs redefined the purpose of the corporation to reflect a collective commitment to lead their companies for the benefit of all stakeholders, including customers, employees, suppliers, communities and shareholders.^[3] Since 1978, Business Roundtable has issued principles of corporate governance, which have now shifted from shareholder primacy to recognizing other stakeholders.^[4] And annual letters from Larry Fink, the Chairman and CEO of BlackRock, have emphasized that a company cannot achieve long-term profits without embracing purpose and considering the needs of a broad range of stakeholders.^[5] In 2006, B Lab, a non-profit organization, created the B Corporation certification program in which companies may designate themselves as "B Corps" if B Lab has assessed the overall positive impact of the company; assures itself the company meets a minimum verified score based on the company's impact on its workers, customers, community and environment; and the company amends its constating documents to include certain provisions required by B Lab.^[6] B Corporation certification has gained in popularity, with an increase of 25% in the number of companies becoming B Corporations in 2019.^[7] There are currently more than 2,500 certified B Corporations, including 1,269 American B Corporations and 275 Canadian B Corporations. A few B Corporations are publicly traded.

Becoming a benefit company may help a company gain social capital and brand recognition with its stakeholders and differentiate itself from its competitors. As investors increasingly focus on environmental and social issues and look to invest in companies that are recognized as leaders in such areas, becoming a benefit company may open a door to additional funding sources from investors looking to invest in companies that have both an economic mandate and a social mandate.

How are director and officer duties different for a benefit company?

For all companies, including benefit companies, directors and officers have a fiduciary duty to act honestly and in good faith with a view to the best interests of the company.^[8]

Directors and officers of benefit companies have two additional responsibilities (the "benefit company responsibilities"):

- to 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,^[9] and
- to balance the above duty with the fiduciary duty.

The Supreme Court of Canada has stated that, in exercising their fiduciary duty and considering the best interests of the company, the directors *may*, but are not required to, give consideration to the interests of various stakeholders, including employees, suppliers, creditors, consumers, governments and the environment.^[10] However, in the case of a benefit company, the interests of certain non-shareholder stakeholders, whose well-being may be affected by the public benefits specified in the articles, *must*, in effect, be considered and the

directors and officers *must* balance those stakeholder interests with the interests of the company generally.

The Act affords some protection to directors and officers in discharging their benefit company responsibilities. A director or officer complying with the benefit company responsibilities does not thereby breach the director's fiduciary duty to act in the best interests of the company. Some commentators have suggested that the ability to define public benefits broadly within a company's articles could substantially weaken accountability for management and board decision-making. However, this does not mean that a director or officer pursuing the public benefits specified in the articles can disregard his or her fiduciary duty to the company, because the director must still balance such responsibility with the director's fiduciary responsibility. As the Act does not provide guidance on how directors and officers are to discharge benefit company responsibilities, it will be up to the courts to determine whether a director or officer has done so.

The Act also provides that directors and officers have no duty to, and no proceedings may be commenced against directors and officers by, any person whose well-being may be affected by the company's conduct or who has an interest in a public benefit specified in the company's articles. Rather, proceedings for breach of the benefit company responsibilities may only be commenced by "shareholders holding, in the aggregate, at least 2% of the issued shares of the company or, in the case of a public company, the lesser of 2% of the issued shares of the company and issued shares of the company with a fair market value of at least \$2,000,000."^[11] As a result of these thresholds, not all public benefits specified in the articles will receive equal attention. The focus is likely to be only on those public benefits that are of interest to a significant portion of the shareholders from time to time.

A court is prohibited from ordering monetary damages in respect of a breach of the benefit company responsibilities. However, a court may still order non-monetary remedies, including an order to comply.

How can a company become a benefit company?

Any new or existing company can become a benefit company by including the benefit statement in its notice of articles and a public benefit provision in its articles with the approval of shareholders by special resolution. A benefit company can cease being a benefit company by deleting the benefit statement in its notice of articles and the public benefit provision in its articles with the approval of shareholders by special resolution.

Shareholders opposed to the addition or removal of such provisions can exercise a right of dissent with respect to any such special resolution and, if the special resolution is approved, are entitled to be paid the fair value of their shares.

What are the ongoing responsibilities of a benefit company?

In order to maintain its status as a benefit company, a company must produce an annual benefit report that provides an assessment of the company's performance of its public benefits against a third-party standard.^[12] Examples of potential third-party standards include the B Corp certification, the Global Reporting Initiative and the Sustainability Accounting Standards Board. Benefit companies must keep their benefit reports at their registered office and post them to the company's website (if they have one). Failure to publish an annual benefit report or to publish or post a report that complies with the Act and any applicable regulations is an offence under the Act, which could subject the company to a fine of up to \$5,000. There is no government oversight of the assessment of the company's performance

of its public benefits.^[13]

Conclusion

There is an increasing focus by entrepreneurs, customers, investors and other stakeholders on whether companies, in addition to maximizing their value to shareholders, should have a broader social purpose. B.C.'s new benefit company legislation explicitly enables a benefit company to pursue both an economic mandate and a social mandate. Becoming a benefit company creates an opportunity for a company to signal to customers, investors and other stakeholders the company's commitment to a social purpose and to differentiate itself from its competitors, using a model that is widely recognized in the United States.

[1] <https://benefitcorp.net/policymakers/state-by-state-status>

[2] The Act – Section 51.991(1)

[3]

<https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>

[4]

<https://www.theglobeandmail.com/business/article-bc-joins-growing-trend-to-benefit-companies-that-do-business-in/>

[5] <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>

[6] <https://bcorporation.net/certification>

[7] <https://bcorporation.net/directory>

[8] The Act – Section 142(1)(a)

[9] The Act – Section 51.993(1)(a)

[10] *BCE v 1976 Debentureholders*, para 40. Recent amendments to the *Canada Business Corporations Act* have 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.

[11] The Act – Section 51.993(4)

[12] The Act – Section 51.994(2)

[13]

<https://www2.gov.bc.ca/gov/content/employment-business/business/bc-companies/benefit-company>