

B.C. Considers Benefit Corporations

By Sarah Fitzpatrick



B.C. may become the first province in Canada to pass legislation that officially allows benefit corporations. Benefit corporations are different from the typical for-profit corporation in that they conduct business for the purpose of creating a general public benefit. They also adhere to a certain level of accountability and transparency. Benefit corporations started as a certification issued by B Lab, a non-profit headquartered in Pennsylvania. Now, 33 U.S. States and the District of Columbia have passed legislation that officially authorize benefit corporations as a type of corporation.

Bill M 216 proposes to amend the B.C. *Business Corporations Act* to create benefit companies. The bill is a private members' bill and passed second reading on May 17, 2018. Because it has passed both first and second reading and it is rare for a private members' bill to pass first reading due to lack of votes, it is expected that Bill M 216 will receive enough support to pass third reading and be enacted into law.

The proposed B.C. benefit companies will be share capital corporations that will have the following "benefit statement" in their notice of articles:

This company is a benefit company and, as such, has purposes that include conducting its business in a responsible and sustainable manner and promoting one or more public benefits.

In its articles, the benefit company must also include a commitment to: (i) conduct its business in a responsible and sustainable manner; and (ii) promote public benefits that are specified in the articles. A “public benefit” is defined as a positive effect that includes an effect of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. The positive effect must also be for the benefit of either a class of persons (excluding the company’s shareholders), communities or organizations, or the environment. “Responsible and sustainable manner” is also defined as a manner of conducting business that takes into account the well-being of persons affected by the company’s operations and endeavours to use a fair and proportionate share of available environmental, social and economic resources and capacities.

A B.C. company can become a benefit company if a special resolution of its shareholders authorize it to include the benefit statement in its notice of articles. A company may cease to be a benefit company by a special resolution of its shareholders. A benefit company must have the words “Benefit Company” or “B.Co.” as part of its name.

A benefit company must publish an annual benefit report that discloses how it conducted its business in a responsible and sustainable manner and promoted the public benefits stated in its articles. The report must also include an assessment of the company’s performance in carrying out its benefit purposes against a third party standard. The report will also advise on any circumstances that hindered its endeavours to carry out its benefit purposes.

Interestingly, the directors and officers of a benefit company will have a duty to act honestly and in good faith with a view to the best interests of the public. This is defined as the best interests of persons who may be materially affected by the company’s conduct and the promotion of the public benefits stated in its articles. The directors and officers will be expected to balance this duty with their standard duty to act honestly and in good faith with a view to the best interests of the company. Bill M 216 clearly favours the duty to act in the best interests of the public over the traditional directors’ and officers’ duties as it further states that directors or officers will not

contravene their duties under s. 142 of the *Business Corporations Act* simply because they acted honestly and in good faith with a view to the best interests of the public. However, the odd result is that directors and officers of benefit companies may be excused from their duties, including the duty to not breach the Act (which can be an offence), if they committed the breach for the best interests of the public.

The proposed legislation does not change the rules for shareholders being able to bring complaints against a company on the basis that the company’s affairs were conducted or the directors’ powers were exercised in a manner that is oppressive to the shareholders or that some act was done that was unfairly prejudicial to the shareholders. If the intention is to give primacy to the public benefit interests over the ordinary business or profit-making interests, the legislation should expressly direct a court, which is considering a shareholder complaint, to consider the public benefit. As Bill M 216 has not yet passed third reading, there may still be amendments to the proposed legislation.

It will be interesting to see where the benefit company model will go in B.C. The benefit company is somewhat similar to the existing B.C. community contribution company (C3) which is a hybrid between a for-profit and a non-profit corporation. C3s are companies that are operated for community purposes and have certain restrictions on their assets (for e.g., no more than 40% of their annual profit can be paid as a dividend to their shareholders). Currently, there are around 60 B.C. C3s. Benefit companies may provide a more attractive alternative to C3s as there are no restrictions on their assets.

If you are interested in the B.C. benefit company structure and whether it is appropriate for you, our Social Impact lawyers would be happy to assist.

Sarah Fitzpatrick is an associate at Miller Thomson LLP in the Social Impact Group in Vancouver. She practices in the areas of not-for-profits, charities and estate planning. She provides general counsel advice to not-for-profit organizations and charities, including governance, charitable registration, and regulatory compliance. She also has assists clients with major business contracts, transactions and restructuring. Sarah can be reached at sfitzpatrick@millerthomson.com.

This article is reprinted with permission.