B Corps, Benefit Corporations and Socially Oriented Enterprises in Canada

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1 An Introduction to B Corps and Benefit Corporation Law in Canada

New forms of hybrid for-profit companies are being created in response to social dissatisfaction with the negative social, economic and environmental impacts of capitalism, which ignores the balancing of the "3Ps"—people, profit and planet. These hybrid forms seek to avoid the shortcomings of not-for-profit companies, which may be limited by a lack of financial sustainability, thus at times limiting their ability to scale up and/or create a wider impact. In addition, social, economic and

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environmental challenges require many more resources, given the retreating role of the state.[1] Citizens and entrepreneurs wishing to link business with "doing good" have sought legislative responses around the world in an attempt to give directors and officers leeway to pursue other interests and goals other than strictly financial. In doing so, they also want greater transparency for investors, consumers and other stakeholders so that they can influence social and environmental impact and outcomes. In Canada, such new forms of hybrid companies include the B Corp, benefit corporations, community interest/contribution companies, and co-operatives and social enterprises. This chapter is predominantly concerned with B Corps and benefit corporations.

The first B Corp community established outside of the United States was in Canada, and the first Canadian B Corp, "FlipGive", formerly "Better the World", was certified in 2009 and founded in Ontario. FlipGive currently operates across Canada, predominantly in Alberta, British Columbia, Ontario, Quebec and Saskatchewan. Its initial concept was to have collaborating companies donate a small percentage of all members' purchases to a designated fundraising account. Presently, there are over 400 certified Canadian B Corps in the B Lab registry, representing a diverse range of industry sectors.[2] Common B Corps known to Canadian citizens include the Business Development Bank of Canada (loans, investments and advisory services for small and medium-sized enterprises (SMEs)), Danone Canada (food and beverages), Optel Group (traceability systems for diverse industries such as pharma, food, natural resources), Beau's Brewery (natural brewery), Fiasco Gelato (wholesale and retail gelato, events and catering), Bullfrog Power (renewable energy provider) and SPUD.ca (organic food delivery). These numbers can be expected to grow across all sectors.

In addition to B Corp certified companies, "benefit corporations", which have a legal status different than that of not-for-profits and corporations, have also been established in the province of British Columbia, the first Canadian province to recently adopt it. In April 2019, the Green Party of British Columbia introduced a private member's bill, with the aim to allow corporations to incorporate as "benefit companies" in British Columbia. It was the first private member's bill to be directly translated to law in British Columbia, and B Lab was a stakeholder in such process. This required an amendment to the *Business Corporations Act (British Columbia).* The *British Columbia Bill M 209, Business Corporations Amendment Act (No. 2), 2019*,[3] which received royal assent on 16 May 2019, came into force on 30 June 2020. This provincial legislation created a sub-type of corporate entity that, according to the statute, is "committed to conducting its business in a responsible

[1] Strange (1996). See also Mazzucato (2018), for a discussion of the retreating state and the re-emergence of entrepreneurial state action for the public good.

[2] See the B Corp directory https://www.bcorporation.net/es-es/find-a-b-corp/search?query=canada&refinement=countries%3DCanada (accessed 25 January 2022).

[3] https://www.bclaws.ca/civix/document/id/bills/billsprevious/4th41st:m209-3 (accessed 25 January 2022).

and sustainable manner and promoting one or more public benefits". This means that the company may promote public benefits that have a positive effect on a group of people, such as communities, organisations or the environment, other than the company's shareholders.

It is unknown how popular benefit corporations will become in British Columbia and whether other Canadian provinces will follow in adopting such legislation. Investors and pension funds are increasingly interested in finding sustainable and responsible investment opportunities, and benefit corporations may fill such need.

2 Sources and Legislative Features

2.1 Antecedents to B Corps and Benefit Companies

In the United States, benefit corporations spread rapidly across state legislatures, after having been introduced in 2010. Such companies were introduced to supposedly remedy the very strong shareholder primacy theory espoused by scholars like Milton Friedman, who in 1970 famously argued that the "social responsibility" of companies was to increase their profits and that their purpose was to maximise shareholder value.[4] The hybrid company was seen as a necessary remedy to counterbalance such position and to reign in unabated capitalism. However, the strict adherence to the theory of shareholder value at the expense of all other stakeholder interests may be put in doubt, despite the rhetoric, due to "other constituency" legislation across the majority of US states.[5] For this reason, B Lab attempts to enshrining the consideration of other constituencies and stakeholders in its certification process, for the avoidance of doubt. However, while Canada is influenced by its neighbour to the South, its legal tradition is substantially different from that of the United States, relying on UK jurisprudence for precedent. In fact, until an act of the Canadian Parliament in 1949[6] abolished all remaining rights of appeal to the Judicial Committee of the Privy Council, making the Supreme Court of Canada the ultimate appellate tribunal, the Crown was still considered the "fountain of justice" for appeals from "colonial courts" to ensure that justice was being done.[7] After the Canadian Constitution was passed in 1982, resource to US constitutional law jurisprudence was cautiously considered, but not as a binding precedent.

Legal traditions are different in the two countries with respect to corporate law, particularly given the shareholder primacy often seen to be enshrined in US judicial interpretation or, for example, the obligation of directors to seek the highest price in a change of control or takeover bid in order to maximise profit for shareholders.

[4] Friedman (September 13, 1970).

[5] See discussion in Liao (2017), p. 687.

[6] Supreme Court Act, 1949, 13 Geo. VI, c.37 (Canada).

[7] Livingston (1950), pp. 104–112 (9 pages).

Canadian law has a tradition of granting protection to interests other than those of the shareholders, as can be noted by its very strong "oppression remedy",[8] allowing complainants to bring action against a corporation where conduct that is oppressive or unfairly prejudicial or unfairly disregards the interests of a shareholder, creditor, director or officer has occurred. In addition, several Supreme Court of Canada (SCC) cases have further distinguished Canadian jurisprudence from that of the United States.

While the creation of a distinct category of benefit companies in British Columbia was a first for Canada, the concept of expanding the scope of the fiduciary duties of directors and officers of a corporation has arguably been underway since the SCC's *Peoples Department Stores Inc (Trustee of) v Wise*[9] ruling in 2004 and was recently reinforced by amendments to s. 122 of the *Canada Business Corporations Act*, which codified central aspects of the *Peoples* ruling. The SCC, in a unanimous ruling, addressed the principal question, raised on appeal from the Quebec Court of Appeal, of whether directors of a corporation owe a fiduciary duty to the corporation's creditors comparable to the statutory duty owed by such directors to the corporation. On this specific point, the SCC concluded that directors owe a duty of care to the corporation's creditors, but that duty does not give rise to a fiduciary one. It also found that this duty of care extended to other stakeholders and the environment, and that in determining the statutory fiduciary duty, the best interests of the company included other factors beside the economic.

Section 122(1) of the Canada Business Corporations Act (CBCA) establishes two distinct duties to be discharged by directors and officers in managing, or supervising the management of, the corporation:

> **122.** (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The Supreme Court observed that "the first duty" has been referred to in this case as the "fiduciary duty". It is better described as the "duty of loyalty". The SCC observed:

[8] Section 241 of the *Canadian Business Corporations Act* gives a complainant the right to bring a court action against a corporation where conduct has occurred which is oppressive, unfairly prejudicial or which unfairly disregards the interests of a shareholder, creditor, director or officer. This right is commonly referred to as the "oppression remedy" and has been interpreted by courts and legal scholars as imposing a general standard of "fair" conduct on Canadian corporations and their management. When this standard has been breached, complainants may apply to court for an order rectifying the oppressive conduct. The court may make any order it thinks fit, including awarding money damages, appointing a receiver, dissolving the corporation, forcing the acquisition of securities and amending charter documents.

[9] 2004 SCC 68 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2184/index.do (accessed 25 January 2022).

> [T]his duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the "duty of care". Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.

The SCC held that the trial judge did not apply or consider separately the two duties imposed on directors by s. 122(1) and that the Court of Appeal had correctly observed that the trial judge appears to have confused the two duties and that they are, in fact, distinct and are designed to secure different ends.

The SCC also clarified that the appeal did not relate to the *non-statutory* duty that directors owe to shareholders but rather concerned itself only with the statutory duties owed under the CBCA. It held:

> Insofar as the statutory fiduciary duty is concerned, *it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders"*. From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation. [10] However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation (emphasis added).

The SCC then referred to *Teck Corp. v. Millar*, [11] where Berger J. stated, at p. 314:

> A classical theory that once was unchallengeable must yield to the facts of modern life [. . .] *if the directors were to consider the consequences to the community of any policy that the company intended to pursue*, and were deflected in their commitment to that policy as a result, *it could not be said that they had not considered bona fide the interests of the shareholders* (emphasis added).

The SCC when on to say:

> [I]t would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees [12] but *if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense,* that will not [. . .] leave directors open to the charge that they have failed in their fiduciary duty to the company (emphasis added).

The SCC also referred to the case of *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.*[13] and held that it

> [A]ccepted as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, *the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment* (emphasis added).

[10] *The SCC referred to E. M. Iacobucci (2003), pp. 400–401.*

[11] *(1972), 33 D.L.R. (3d) 288 (B.C.S.C.).*

[12] *Parke v. Daily News Ltd., [1962] Ch. 927.*

[13] (1986), 59 O.R. (2d) 254 (Div. Ct.), approved, at p. 271, the decision in Teck, supra.

However, the SCC also found that directors and officers would not be held to be in breach of the duty of care under s. 122(1)(b) of the CBCA if they act prudently and on a reasonably informed basis, which is known as the "business judgement rule". That is, perfection is not demanded, but an appropriate degree of prudence and diligence should be brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

Another interesting SCC precedent from 2008,[14] which is related to fiduciary duties, declared that the directors of for-profit corporations have a fiduciary duty to act in the best interest of the corporation as a "good corporate citizen". In the context of an oppression remedy, the SCC held:

> In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, *having regard to all relevant consideration, including, but not confined to the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen* (emphasis added).

The ruling prompted a reconsideration of the characterisation of corporate behaviour in Canada but left ambiguous whether directors "may", "should" or "are obligated" to consider stakeholder interests.

2.2 Other Socially Oriented Business Types

Canada has other socially oriented business forms, such as B Corps, community interest/contribution companies, co-operatives and other social enterprises. The report entitled "Social Enterprise in Canada" finds that "five main types of social enterprises emerge, which cut across the cultural and policy regimes in Canada: co-operatives, non-profit organisations, community development/interest organisations, First Nations businesses, and business with a social mission".[15] The Social Enterprise Council of Canada[16] defines social enterprises as "community-based businesses that sell goods or services in the market place to achieve a social, cultural and/or environmental purpose; they reinvest their profits to maximize their social mission". In 2014, it was incorporated as a federal non-profit corporation in order to create a greater capacity for social enterprise practitioners, supporters, intermediaries, funders and thinkers to engage in building the social enterprise sector. Many of its members are B Corps or, if applicable, benefit corporations.

In addition to benefit corporations, British Columbia also allows for the creation of community contribution companies (CCCs). In 2012, amendments were made to the British Columbia *Business Corporations Act*, which legislated the first hybrid

[14] BCE v. 1976 Debentureholders 2008 SCC 69) Aegon Capital Mgt. Inc. v. BCE Inc., AZ-50497605.

[15] McMurtry et al. (2015) https://www.researchgate.net/publication/279199611_Social_Enterprise_in_Canada_Context_Models_and_Institutions (accessed 25 January 2022).

[16] https://secouncil.ca/ (accessed 25 January 2022).

for-profit social enterprise structure in Canada, known as the community contribution company. The option has been available in British Columbia since July 2013, following changes to the British Columbia *Business Corporations Act* (SBC 2002) c. 57, which permitted the creation of community contribution companies, effective 29 July 2013. Directors and officers of CCCs must "act with a view to the community purposes of the company set out in its articles". However, uncertainties exist. It is unclear whether this obligation would be subordinate to the general obligation to act with a view to the best interests of the company. In addition, directors and officers are not clearly protected from liability should acting with a view to the community purpose of the company have a negative impact on its best interests. CCCs are also subject to certain restrictive financial provisions that could make them less attractive to investors, such as limits on return on investments.[17] While their aim is also to attract socially conscious investors, CCCs have additional rules, such as requiring a company to allocate 60 per cent of its profits towards a social purpose, with only the remainder distributed to shareholders. CCCs are also required to have three directors when they incorporate and have a partial asset lock, wherein they must direct at least 60 per cent of their value towards a social purpose upon dissolution. CCCs cannot convert to benefit companies, although both are for-profit enterprises with a social purpose. Fifty community contribution companies have been incorporated in British Columbia as of summer 2019.

Nova Scotia's social enterprise hybrid structure, the community interest company (CIC), was introduced in 2016 under the Community Interest Companies Act (CICA).[18] The law allows new and existing businesses incorporated under the Companies Act (Nova Scotia) to apply for designation as a CIC. Following the model used in British Columbia's *Business Corporations Act* for community contribution companies and the UK's Companies (Audit, Investigations and Community Enterprise) Act for its own CICs, the Nova Scotia Act provides a governance framework for social enterprises incorporated in Nova Scotia. As a hybrid corporate vehicle, Nova Scotia CICs combine certain characteristics of for-profit businesses with the social purpose nature of non-profit entities. CICs must have a community purpose, defined as "a purpose beneficial to: society at large; or a segment of society that is broader than the group of persons who are related to the CIC". A CIC may not carry on any of its activities with a political purpose, although this has not been defined under the Act or its Regulations. CICs may issue shares, but there is a limit on return on investments, restrictions on transfer and an "asset lock" upon dissolution. As a business corporation, the income of a CIC is taxable at the rate applicable to all other business corporations.

[17] For more information, see the British Columbia government information on incorporating CCCs: https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/permits-licences-and-registration/registries-packages/pack_01_ccc_-_bc_community_contribution_company_incorporation_package.pdf (accessed 25 January 2022).

[18] Community Interest Companies Act Chapter 38 of the Acts of 2012 as amended by 2014, c. 34, s. 3 https://nslegislature.ca/sites/default/files/legc/statutes/community%20interest%20companies.pdf (accessed 25 January 2022).

3 Legal Requirements and Characteristics of B Corporations and Benefit Corporations

The legal requirements and characteristics corresponding to a certified B Corp and a benefit company differ. Requirements to become a certified B Corp Canada-wide are set out below, followed by the requirements to incorporate as a benefit company, the latter currently available only in British Columbia.

3.1 Requirements and Characteristics of B Corporation Certification

"Certified B Corporations" have typically been certified in Canada by the not-for-profit "B Lab" after an assessment has been completed. One of the steps for obtaining certification is meeting what B Lab calls the "legal requirement". In jurisdictions where benefit companies do not exist, B Lab requires companies to add provisions to their constating documents allowing the company to act in a way that considers its impact on society and the environment and protects the directors and officers from liability arising from those considerations. It is questionable, under Canadian law, whether the inclusion of these provisions in the articles of a company that is not a benefit company would allow the directors and officers of the company to pursue activities that, while socially important, might negatively impact the company's financial interests, beyond what is already provided under recent SCC precedent, set out above. The amendments to the *Business Corporations Act* (British Columbia) allowing for the creation of benefit companies attempt to clarify this dilemma in British Columbia, but the rest of the provinces are still in mainly uncharted territory.

The first step to becoming a certified B Corporation in Canada requires a corporation to amend its articles since it is considered a "fundamental change", thus requiring a "special resolution" by the shareholders. Across Canada, provincial business corporation acts generally consider that a "special resolution" requires not less than two-thirds of the votes cast by the shareholders who voted in respect of that resolution. Companies have until one year after certification as a B Corp to complete this process to amend their articles.

To incorporate stakeholder interests, B Lab suggests that Canadian companies amend their articles to include the following language (although B Lab cautions that such suggestions should not be considered legal advice).

In English:[19]

[19] https://assets.ctfassets.net/l575jm7617lt/7IZhGrSMLclpJXtkpHilDr/c3366a52ef3accf528c3235492b82d5b/Canada_B_Corp_Memo_.pdf Suggestions in the French language: https://www.bcorporation.net/en-us/legal-requirement/country/canada/province/quebec/corporate-structure/corporation/ (both accessed 25 January 2022).

1. The purpose of the Company shall include, but is not in any way limited to or restricted by, the creation of a positive impact on society and the environment, taken as a whole, from the business and operations of the Company, which impact is material in view of the size and nature of the Company's business
2. The Directors shall, when deciding what is in the best interests of the corporation, consider the short-term and the long-term interests of the corporation and the interests of the corporation's shareholders, employees, suppliers, creditors and consumers, as well as the government, the environment, and the community and society in which the corporation operates (the "Stakeholders"), to inform their decisions.
3. In discharging his or her duties, and in determining what is in the best interests of the corporation, each director shall consider all of the Stakeholders (defined above) but shall not be required to regard the interests of any particular Stakeholder as determinative.
4. Nothing in this Article express or implied, is intended to create or shall create or grant any right in or for any person other than a shareholder or any cause of action by or for any person other than a shareholder.
5. Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in enforcing his or her rights hereunder, and under provincial law and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a change in control transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share.

For corporations incorporated under the federal legislation, the *Canadian Business Corporation Act*, B-Corp suggests that the Sect. 5 above, suggested for provincially regulated companies, be amended as follows:

> 5. Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in enforcing his or her rights hereunder, and under federal law and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a change in control transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share.

With respect to the province of British Columbia, a company meets the legal requirement for B Corp certification if it meets the provincial requirement of being a "benefit corporation" (see below for benefit corporation requirements for British Columbia).

Credit unions must also add an amendment to their by-laws and seek approval for the amendment from their members in order to become a certified B Corporation in Canada. Credit unions have until one year after certification to complete such process.

To incorporate stakeholder interests into the by-laws of credit unions, the following language is suggested by B-Lab:[20]

> The purpose of the Credit Union includes, but is not in any way limited to or restricted by, the creation of a positive impact on society and the environment, taken as a whole, from the business and operations of the Credit Union, which impact is material in view of the size and nature of the Credit Union's business.

[20] https://www.bcorporation.net/en-us/legal-requirement/country/canada/province/ontario/corporate-structure/credit-union (accessed 25 January 2022).

> The directors shall, in accordance with their applicable statutory and regulatory duties and requirements and in alignment with the co-operative principles of the Credit Union and its purpose, act with a view to the best interests of the Credit Union. In considering the best interests of the Credit Union, the directors shall consider the interests of the Credit Union's members, shareholders, employees, suppliers and creditors, as well as the government, the natural environment, and the community and society in which the Credit Union operates (collectively, the "Stakeholders") and the short-term and long-term interests of the Credit Union, to inform their decisions. In discharging their duty to act with a view to the best interests of the Credit Union, the directors shall consider the interests of all of the Credit Union's Stakeholders and shall not be required to consider the interests of any particular Stakeholder as determinative, in exercising their judgment.

3.2 Requirements and Characteristics of Benefit Corporations in British Columbia

A benefit company in British Columbia is incorporated under the rules set out in the *Business Corporations Act* (British Columbia), which is applicable to all companies incorporated in the province. However, the notice of articles of a benefit company must contain the following "benefit statement":

> 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 articles of a benefit company must also include a "benefit provision" specifying the public benefits to be promoted by the company. "Public benefit" refers to something that has a positive effect that benefits (i) a class of persons other than the shareholders of the company in their capacity as shareholders or a class of communities or organisations or (ii) the environment. The "environment" includes air, land, water, flora and fauna, and animal, fish and plant habitats. The positive effect can be artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, and/or technological.

In accordance with the language of the amendment, the articles must also set out its commitments to conduct its business in a responsible and sustainable manner and to promote such public benefits that it has specified in its by-laws. "Fair and responsible manner" is defined as "a manner of conducting the business that (a) takes into account the well-being of persons affected by the operations of the benefit company, and (b) endeavours to use a fair and proportionate share of available environmental, social and economic resources and capacities".

An existing British Columbia company may convert to a benefit company if its shareholders pass a special resolution altering its notice of articles and articles to include the required benefit statement and benefit provision. To cease to be a benefit company, its notice of articles and articles must be altered to delete the benefit statement and benefit provision. The company must file a notice of alteration with the company's registry. Shareholders (including non-voting shareholders) have dissent rights in respect of the special resolution, giving them the right to alter the

company's notice of articles or articles to include or delete the benefit statement or benefit provision. If the special resolution is approved, they may be entitled to be paid the fair value of their shares.

The directors and officers of a benefit company are required to act honestly and in good faith with a view to conducting its business in a responsible and sustainable manner and promoting the public benefits that the company has identified in its benefit provision. This somewhat augmented fiduciary duty requires the balancing of their public benefits duty against their duties to the company. Currently, there is no guidance with respect to achieving this balance and complying with the "Balancing Duty". However, the amendments state that the public benefits duty does not create a duty on the part of directors or officers towards persons who are affected by the company's conduct or who would be personally benefitted by it.

Several significant provisions in the amendments relate to enforcement and remedies where duty is breached. Shareholders are the only persons who are able to bring an action against a British Columbia *Business Corporation Act* benefit company's directors and officers over an alleged violation of their duty relating to public benefits. Only shareholders that, in the aggregate, hold at least 2% of the company's issued shares may bring such an action (in the case of a public company, a $2-million shareholding, in the aggregate, will also suffice), and the court may not order monetary damages in relation to a breach of that duty. Other remedies, such as removal or a direction to comply, would still be available.

4 Activity

Given the fact that the benefit corporation status is new in Canada and applicable only with respect to British Columbia at this writing, it is difficult to ascertain its scope. However, certified B Corps are well embedded, with more than 400 certified B Corps.[21] Newfoundland and Labrador do not have B Corps, although they do have social enterprises. In addition, B Corps such as SkyFire Energy Inc of Alberta (provider of turnkey residential, commercial and utility solar PV system solutions) operate in all three territories. The Business Development Bank of Canada also provides services.[22] The range of activities of B Corps is wide across diverse sectors, including advisory services, financial services, technology solutions, eco and environmental services, utilities and energy, food and household products, cultural and educational offerings, etc.

[21] https://www.bcorporation.net/en-us/find-a-b-corp/search?query=canada&refinement=countries%3DCanada (accessed 25 January 2022).

[22] https://www.mun.ca/socialenterprise/ (accessed 25 January 2022).

5 Registration, Transparency and Control

A benefit corporation is incorporated under the Business Corporations Act. All the regular incorporation rules apply to a benefit corporation, including filing the incorporation application with the registry. A benefit company must include the benefit statement in its notice of articles, as well as have the benefit provision in its articles.

The benefit corporation must produce an annual benefit report that provides an assessment of the company's performance compared against a third-party standard. A third-party standard means a standard for defining, reporting and assessing the performance of a benefit company in conducting its business in a responsible and sustainable manner and in relation to its public benefits. The benefit corporation itself must annually choose a third-party standard that it will use to assess its performance in meeting its commitments. It is important to underline that the benefit corporation applies the assessment to itself; the third party does not perform the assessment, and there is no government oversight of the assessment.

Benefit corporations must provide the report to their shareholders and keep their benefit reports at the company's registered office where it is accessible to the public. If the benefit company has a publicly accessible website, it must also post the benefit report on that website. The benefit report is not filed with the registry. The benefit report must disclose the following:

(a) a fair and accurate description of the ways the benefit corporation demonstrated commitment to conducting its business in a responsible and sustainable manner, and to promoting the public benefits specified in its articles;
(b) a record of the third party assessment and the results of that assessment;
(c) the circumstances, if any, that hindered the benefit corporation's endeavours to carry out the commitments set out in its provision;
(d) the process and rationale for selecting or changing the third-party standard used to prepare the benefit report, including, as applicable,

    (i) a statement that the standard was applied in the year before the most recently completed financial year and is being applied in the most recently completed financial year in a manner consistent with the previous application of that standard,
    (ii) a statement that the standard was applied in the year before the most recently completed financial year but is not being applied in the most recently completed financial year, and the reasons for the inconsistency, or
    (iii) if the report is for the first financial year in which the company is a benefit company, a statement that the report is the first benefit report for which the standard was selected and applied.

The directors of a benefit corporation must ensure that the report is approved by the directors and signed by one or more directors to confirm that the approval required under paragraph (a) above was obtained.

If the directors of the benefit corporation do not prepare and post the benefit report as required by the British Columbia *Business Corporations Act*, it is considered an offence with a potential fine of up to $2000 for individuals or $5000 for persons other than individuals.

6 Specific Tax Treatment

In Canada, B Corp companies are taxed under appropriate tax laws for their chosen legal status (e.g. cooperatives, corporate entities, social enterprises, etc. that are B Corps would be taxed under relevant federal and provincial tax codes). Benefit companies are "for-profit" companies and thus are treated in the same manner as other companies for tax purposes.

7 Comments

Although the benefit corporation is new to Canada and is only currently available as a legal form in British Columbia, it has generated some discussion. The main question appears to be whether it is needed or not. In her detailed article,[23] Prof. Liao argues that the adoption of the benefit corporation in Canada is inadvisable. Her argument is that the legal features in the United States' benefit corporation model are largely redundant, given the Canadian corporation laws and Supreme Court of Canada rulings, mentioned above. She points out the risk that the implementation of the benefit corporation in Canada would result in incorrect assumptions about Canada's corporate governance model and that, more importantly, it would impede the further progressive development of Canada's corporate laws. From a practical point of view, she also criticises the laxity in third-party standards and the benefit report and highlights the risk that "greenwashing" or a simple "branding exercises" may occur. She concludes that the benefit corporation legislation has no "meaningful teeth" behind it and that its offerings to Canadian corporate law are minimal, given the existing minority protection statutes and oppression remedy.

However, the author also acknowledges that "[d]espite the fact that Canadian statutes and common law have tended to favour a more stakeholder-based governance model, Canadian legislators and the courts have often taken a backseat in the development of corporate governance standards", leaving securities regulators to dominate and push forward with the shareholder agenda. She goes on to note that institutional investors deliberately seek to enhance shareholder rights.[24] These very observations may also lend support for the necessity of including an explicit

[23] Liao (2017), pp. 683–716.

[24] Ibid., p. 704.

statement of both social and economic goals in the benefit corporation requirements. A more "wait and see" or experimental attitude is taken by other authors, where they note that there is not so much a change in corporations but an evolution in the way that people think about the corporation and its coexisting with planet and people.[25]

In a 2021 systematic literature review[26] on the B Corp movement worldwide, it was found that there was a diverse range of motivations for seeking to be a B Corp and that in some instances, a B Corp reputation resulted in better financial results within a sample of like competitors.

How the benefit corporation evolves in British Columbia and Canada is unknown, of course, particularly given the fact that the only benefit corporation law is barely a year old at the time of writing this chapter. However, what is evident from the growing number of B Corps and the interest in various hybrid business models, such as CICs, CCCs, social enterprises, and co-operatives persisting in a wide array of sectors, is that Canadians seek to harness the familiar and flexible for-profit business form and leverage its strengths to "do good". They want a corporate law that also engages with social, economic and environmental values, even if they are reticent about the importation of a model not "Made in Canada".

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[26] Diez-Busto et al. (2021), p. 2508. https://doi.org/10.3390/su13052508 (accessed 25 January 2022).