A NEW LOOK FOR CORPORATE SOCIAL RESPONSIBILITY: BRITISH COLUMBIA INTRODUCES THE BENEFIT COMPANY

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On June 30, 2020, Bill M 209, *Business Corporations Amendment Act (No. 2), 2019* will come into force, introducing amendments to the *Business Corporations Act* (British Columbia) (the "**Act**") which will provide for the creation of "benefit companies".

What is a "Benefit Company"?

A benefit company is a for-profit company that is committed to conducting its business in a responsible and sustainable manner, and to promoting one or more public benefits.

To conduct business in a "responsible and sustainable manner" means taking into account the well-being of persons affected by the company's operations and endeavouring to use a fair and proportionate share of available environmental, social and economic resources and capacities.

A "public benefit" is defined as a positive effect for the benefit of a class of persons (other than shareholders of the company in their capacity as shareholders), communities or organizations, or the environment, and may be of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious scientific or technological nature.

Benefit Statement and Benefit Provision

A benefit company is incorporated under the Act in accordance with the existing incorporation rules, including filing the incorporation application with the Corporate Registry. However, a benefit company must include the following "benefit statement" in its notice of articles:

> 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.

A benefit company must also include a "benefit provision" in its articles that specifies the public benefits to be promoted by the company and sets out the company's commitment to conduct its business in a responsible and sustainable manner and to promote the specified public benefits.

Any B.C. company can become a benefit company by amending its notice of articles and articles to include the benefit statement and benefit provision, if so authorized by a special resolution of its shareholders. A company may also cease to be a benefit company by removing the benefit statement and benefit provisions from its notice of articles and articles by way of special resolution of the shareholders.

Dissent Rights

Bill M 209 also creates dissent rights for a shareholder of a company, whether or not the shareholder's shares carry the right to vote, to dissent to a resolution to alter the company's notice of articles or articles to include or delete a benefit statement or benefit provision, as the case may be. In such a case, the existing procedure set out in the Act regarding dissent proceedings must be followed.

Benefit Report

Benefit companies are subject to additional disclosure requirements as compared to traditional companies. A benefit company must produce and publish an annual "benefit report" that provides an assessment of the company's performance in carrying out the commitments set out in the benefit provision in its articles against a third-party standard.

A third-party standard is a standard, developed by an independent third party, 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 directors of a benefit company must select the third-party standard against which the company's performance will be assessed and to conduct the assessment. The third party does not perform the assessment, nor is there any government oversight in relation to the assessment.

In accordance with the definition of "publish" in the Act, the benefit report must be presented to the shareholders at the benefit company's annual general meeting, if one is held, and kept at its registered office, where it will be accessible to the public without charge. If the benefit company has a publicly accessible website, it must also post the benefit report on its website. There is no requirement to file the benefit report with the Corporate Registry.

Before a benefit report can be published, it must be approved by the directors and signed by at least one director to confirm such approval.

Bill M 209 makes it an offence under the Act to publish a benefit report that has not been approved or signed by the directors of the company, to fail to publish or post a benefit report, and to publish or post a benefit report that does not comply with the Act or regulations. Committing such an offence can lead to a fine of up to $5,000 in the case of a person who is not an individual, and up to $2,000 in the case of an individual.

Directors and Officer's Duties

Director and officers 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 directors and officers will have to balance these new duties with their existing duties under section 142(1) of the Act, particularly their fiduciary duty to act in the best interests of the company. However, unlike a traditional company, a director or officer does not breach their fiduciary duty to the company only by reason of acting in accordance with the new public benefit duties. It will remain to be seen how this apparent conflict will be resolved by the courts.

Bill M 209 expressly provides that despite the duty to act honestly and in good faith directors and officers of a benefit company have no such duty to a person whose well-being may be affected by the company's conduct or who has an interest in a public benefit specified by the company's articles. In addition, such persons are precluded from bringing legal proceedings against a director or officer of a benefit company for breach of the new public benefit duties. Legal proceedings may only be brought against directors and officers in relation to their public benefit duties by shareholders who hold, in the aggregate, at least 2% of the company's shares, or, in the case of a public company, at least the lesser of 2% of the company's shares or shares with a fair market value of at least $2 million. No monetary damages can be awarded for a breach of the new public benefit duties.

Conclusion

Benefit companies became popular in the United States in response to the shareholder primacy model that prioritizes maximizing profits and/or shareholder value. Corporate law jurisprudence in the United States requires directors to act in the best interests of shareholders and generally prohibits directors from taking the interests of stakeholders into account.

By comparison, Canadian jurisprudence, in light of the landmark decision of the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders* (2008 SCC 69) ("**BCE**"), permits, and may even require, directors to take the interests of affected stakeholders – such as shareholders, employees, creditors, consumers, governments and the environment – into account in considering what is in the best interests of the company.

There has been a great deal of debate in the legal community as to whether the introduction of benefit companies is necessary, or appropriate, in Canada. While directors have a fiduciary duty to act in the best interests of the company, as a result of BCE, directors may take the interests of stakeholders into account. It is unclear, however, whether directors can prioritize public benefits over the traditional interests of the company (i.e. profits and/or shareholder value). Under the benefit company structure, public benefits and the interests of certain stakeholders can be clearly and expressly prioritized. It will remain to be seen whether this bifurcation of corporate law will lead to a recasting of the scope of the fiduciary duty for directors of non-benefit companies.

Benefit companies also offer an alternative to community contribution companies ("**C3s**"), which were introduced in B.C. in 2013. C3s are a hybrid form of corporate structure that possess characteristics of both for-profit and not-for-profit vehicles and may be operated with a mandate to conduct business for community purposes. Benefit companies may prove to be an attractive alternative for companies seeking to prioritize public benefits as they will not be subject to the restrictions on C3s, including the restrictions on the distribution of profits or assets. As a result, benefit companies may also prove to be an attractive investment vehicle for socially-conscious investors.

Should you have any questions about the new benefit company structure and whether it may be appropriate for your business, McMillan's Business Law Group would be delighted to assist.

by Joanna Dawson and Joshua Sved

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.