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PUBLICATION

Benefit corporations: Legislators should tread lightly

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The advent of the burgeoning benefit corporation movement represents a subtle but fundamental change in the way for-profit companies choose to do business. And Canadian legislators, who have been slow to act in support of this movement, should address it with comparable subtlety, recognizing that the movement is an evolution of existing law, bears no relationship to the not-for–profit sector and does not require a host of new regulatory approaches.

The corporation's pursuit of profit has come a long way since King Charles II gave the Hudson Bay Company a charter to exploit North American resources and to wage war with the inhabitants in furtherance of its business. So much so that in 2008, the Supreme Court of Canada (SCC) declared (*BCE v. 1976 Debentureholders* 2008 SCC 69) 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." The ruling has provoked a reconsideration of how the rules of corporate engagement in Canada work.

Hence the emergence of legislation in Canada that allows corporations the option of being "benefit" corporations. Generally speaking, to effect this option, they must:

- adopt a general or specific public benefit mission or purpose in their articles;
- shareholders must agree, by special majority, to forgo the shareholder primacy model; and
- they must also accept that, in carrying on its business, the corporation will focus on a "Triple P" bottom line — profit, people and the planet.

What's unique about a benefit corporation, then, is that the articles enshrine the requirements of good corporate citizenship.

Here, Canada lags behind the U.S., where a majority of states have already passed enabling legislation. In support of their inaction, our legislators have frequently voiced their belief that the SCC has resolved the issue of shareholder primacy and Canadian corporations can, as a matter of law, adopt a broader stakeholder view of business in Canada.

Although it's not at all clear that legislation is required, it is important to consider what shape this legislation should take, bearing in mind that the challenge in crafting for-profit benefit legislation is to hold the directors and officers to the public benefit purpose enshrined in the articles while enabling the company to maintain its independence as a private company and remain competitive.

It's also important to remember that benefit corporations are governed by the same laws as other for-profit corporations, meaning that legislators should realize that they need to do as much as possible to ensure that they do as little as is necessary. Benefit corporations will get no tax breaks, no public money and cannot issue charitable receipts. With this in mind, legislators need to limit their concerns to key issues that arise from placing a public benefit purpose in a company's articles.

The SCC has already explained what it means to "act in the best interest of the corporation viewed as a good corporate citizen." Directors are given the discretion, within the bounds of informed and disinterested processes, to decide which considerations "may" be relevant. If a company includes a public benefit purpose in its articles, existing statute law already requires that the directors "must" act accordingly. Regulation that goes any further touches on not-for-profit type limits, which are clearly inappropriate for profit-oriented companies.

Transparency and accountability are also fundamental issues for consideration. But precisely how a private company achieves its goals should be between the corporation and its shareholders, and not the subject of new standards. We should resist any inclination to impose public reporting and third-party standards, like B Corp certification, on private companies.

Boards should be allowed to rely on existing, well-entrenched processes that mandate diligence and good faith. In the end, adherence to current legal principles means that — for the benefit corporation as it is for others — it all comes down to one "best interest," namely the best interest of the corporation.

Legislators must also address liability issues. A company and its directors should be at no greater risk for failing to achieve a public benefit than they should for failure to earn a profit. Shortcomings should remain between the shareholders and the board. Legislation that does not provide protection against new classes of claims based solely on attempts to achieve a public benefit will not be attractive to existing for-profit companies.

Finally, lawyers need to be educated about benefit corporations and when clients should consider them. Indeed, while benefit corporations will align with some clients' needs, they are not appropriate for all.

Businesspeople have told me many times that their lawyers have counselled them against amending their articles, for fear of limiting the corporation's activities. But enshrining a benefit purpose is precisely the point of the benefit corporation. Its proponents want to create a business with a distinct character that is not subject to the whims of successive CEOs and raiders. They want to attract like-minded investors, employees and suppliers who are enticed by the benefit corporation's goal of benefitting the public as well as its shareholders.

Benefit corporations, after all, are not the kind of companies that choose to sit on the fence simply to keep all their options open.

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