

B.C. joins growing trend to ‘benefit companies’ that do business in responsible, sustainable manner

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British Columbia is poised to be the first Canadian province to follow a growing U.S. trend with legislation to support “benefit companies,” which commit to do business in a responsible and sustainable manner.

Under the new law, companies could opt to amend their articles of incorporation to reflect that commitment, adding an element of public good to the traditional pursuit of profit. This might reflect the genuine goals of a company’s owners but it could also attract investors interested in environmental and social responsibility.

The B.C. Legislature gave royal assent to amendments to the province’s Business Corporations Act in May, but has not yet issued regulations to put the changes into force.

Yet, a number of law professors and corporate lawyers say the legislation isn’t necessary in the Canadian context and could even have negative effects by placing new limits on who can hold companies liable for their actions.

Canadian corporate law has long required directors of companies to consider the interests of a variety of stakeholders (including employees, consumers and the environment), and not focus solely on the creation of shareholder value. A 2008 ruling from the Supreme Court of Canada in *BCE v. 1976 Debentureholders* is among the seminal cases on this requirement. Recent amendments to the federal Canada Business Corporations Act codified some of those principles.

Carol Liao, assistant professor of law at the University of British Columbia, says there is more debate over the issue of shareholder primacy in the U.S., which is why benefit-company legislation originated there and has now been passed in 33 states and the District of Columbia. She calls the B.C. legislation “a very American solution” to problems that don’t exist in Canada.

Prof. Liao says the B.C. law explicitly prevents anyone other than large shareholders (who own more than 2 per cent or shares worth more than \$2-million) from pursuing

legal action against directors or officers with respect to a company's pledge to promote a public benefit.

In contrast, Canada's current "oppression" remedy allows any stakeholder to launch a claim against a company for actions that infringe on the stakeholder's legitimate expectations. Prof. Liao says the B.C. legislation curtails that remedy and would prevent companies from being held accountable for corporate social-responsibility policies.

"The benefit company is a distraction from meaningful regulatory reform," she said. "[This is] innocuous, feel-good legislation that seems to harm no one. Yet, it creates a harmful dichotomy in Canadian corporate law and it erodes true legal reform."

One of the driving forces behind benefit-company legislation in the U.S. has been B Lab. This Pennsylvania-based non-profit administers a process to certify organizations as "B Corporations," based on meeting certain standards of social and environmental performance. "B Corps" pay an annual fee to B Lab and are not to be confused with benefit companies, which refers to the legal form companies can opt into under the new laws.

Some well-known U.S. organizations that have changed their articles of incorporation to become benefit companies include the crowdfunding site Kickstarter, outdoors apparel-maker Patagonia and the public-radio program This American Life. Patagonia amended its articles in 2012 to include a "commitment to sustainability and treating workers well."

But even the B Corp designation alone can be an attractive branding tool. For instance, the Business Development Bank of Canada said in February it had become the country's first B Corp bank, pointing to the benefits of the B Lab certification on its website, including ways to "differentiate your company brand, attract millennial employees, [and] attract social media interest."

Dennis Tobin, a partner at Blaney McMurtry LLP in Toronto, advocates for benefit company laws in Canada, saying they will give directors of corporations even greater confidence that they can pursue wider public benefits without facing criticism.

"You have to manage shareholder expectations and that's where benefit legislation can help, because it allows you to be more explicit about your mission statement and how you're going to carry on business," he said. "I think the people who object to this want the government to regulate these companies and make them prove they're doing good while they're doing well [financially]."

"I have a fundamental concern that people's natural reaction is to take a paternalistic regulatory approach to this, when what we're trying to do is enable for-profit companies to pursue profit and do it in a way that's acceptable."

Debate over the utility of benefit-company laws comes against a worldwide trend toward responsible investing. In an annual letter last year, Larry Fink, founder and CEO of

BlackRock Inc., said society is demanding that businesses serve a social purpose and committed to advocate for such practices at companies in which the influential asset manager invests.

In August, 181 U.S. CEOs signed a Business Roundtable statement on corporate governance vowing to move away from shareholder primacy and recognize other stakeholders, including customers, employees and communities. And in December, Bank of Montreal issued Canada's first sustainability-linked loan to Maple Leaf Foods.

"I think people have come to understand that philanthropy in and of itself isn't enough to resolve the ills of the world," said Shahir Guindi, a private-equity lawyer and national co-chair of Osler, Hoskin and Harcourt LLP. He said non-profit organizations often struggle with long-term funding and governments have been leaning further to the right, slashing spending as they reduce debt and cut taxes.

"There isn't extra money moving around in the public sector to give to social causes," Mr. Guindi said, saying that a new class of investors and corporations are stepping into that void. "There's a generation of people saying, 'I want to earn a good living. But I also want to contribute and leave something for the generations that come after us.' "

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