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Bill S-285: A Canadian Contribution to the Stakeholder Governance Debate

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Senator Julie Miville-Dechêne recently introduced the *21st-Century Business Act* (Bill S-285), a Senate public bill that proposes substantive amendments to the *Canada Business Corporations Act* (CBCA). The legislative proposal seeks to define the "purpose" of business corporations and link the fiduciary duties of directors and officers to that new concept.

The "purpose of the corporation," as stipulated in a new section of the CBCA, would be

"to pursue its best interest while also operating in a manner that

(a) benefits the wider society and the environment in a manner proportionate to its size and the nature of its operations; and

(b) minimizes any harm that the corporation causes to the wider society and the environment, with the objective of eliminating such harm."

If adopted, Bill S-285, and in particular its proposed amendments to section 122 of the CBCA, would transform the CBCA's approach to a corporation's stakeholders from an incidental consideration to a central one, whereby the benefits provided to various stakeholders would no longer derive from pursuing the best interests of the corporation, but would instead form part of the corporation's purpose, enshrined in law, and would be protected through redefined directors' and officers' duties. The proposed amendments are twofold: they would (i) integrate the notion of purpose, which implicates the wider society and the environment, within the definition of the *fiduciary duty* of directors and officers,[1] and (ii) place under the *duty of care* of directors and officers[2] the stakeholder constituencies that may currently be considered when determining the best interests of the corporation - thus making their consideration mandatory.

Transparency and accountability measures are also proposed in relation to the new concept of corporate purpose. In particular, the amendments would require all CBCA corporations, public and private, to publish annual impact reports using established standards, such as the European Commission's Corporate Social Responsibility Directive (CSRD) or the reporting framework of the Global Reporting Initiative. These reporting obligations could, however, be adjusted according to the size of the corporation. Under the bill, accountability would be achieved through the pre-existing derivative action framework, whose scope would be expanded because complainants could bring derivative actions for failure to adhere to the purpose of the corporation, including its social and environmental benefits.

Bill S-285 rests on the premise that corporations should not only disclose and address the risks that social and environmental issues pose to their operations and profitability, but also be responsible for their broader societal and environmental impacts. It would therefore mark the integration into federal corporate legislation of the "double materiality" principle that has emerged in recent years in the context of sustainability-related financial disclosure (see here for a simple explanation). Whereas "single materiality" or "financial materiality" focuses on how sustainability factors affect a company and its financial prospects, double materiality or "impact materiality" places an equal emphasis on how the firm is affecting society and the environment. Double materiality is a key feature of the CSRD, the Better Business Act (BBA) initiative in the United Kingdom and the French *Loi PACTE*[3] as well as in benefit company legislation and "b-corp" voluntary certification standards in the United States and Canada. It is worth noting that Bill S-285 is in fact directly inspired by the United Kingdom's BBA campaign and includes in its preamble the definition of corporate purpose that was adopted by the British Academy's *Future of the Corporation* research program.[4]

The idea that corporations can focus on considerations beyond immediate profitability to shareholders is already part of Canadian corporate law. Under the CBCA, directors and officers have a duty of care[5] and duty to act honestly and in good faith with a view to the best interests of the corporation[6] (the latter being commonly referred to as a *fiduciary duty*).[7] In the landmark 2008 decision *BCE Inc. v 1976 Debentureholders* (BCE), the Supreme Court of Canada rejected the U.S. "Revlon" duty to maximize shareholder value in connection with a change of control transaction. Instead, the Court reaffirmed its decision in *Peoples Department Stores (Trustee of) v Wise* that "although directors must consider the best interests of the corporation, it may also be appropriate, although not mandatory, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders," including "the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment." The 2019 amendments to the CBCA largely codified the BCE decision by providing that, in acting in the best interests of the corporation, directors and officers "may," but are not required to, consider the interests of various stakeholders, such as shareholders, employees, consumers as well as the environment.

While boards of CBCA corporations already have the option of considering the various perspectives and interests, the changes proposed under Bill S-285 would make the exercise mandatory, leading to more complex decision-making processes and potential legal exposure. On the other hand, it has been argued that amending directors' duties in the way proposed under the bill could bring "greater clarity for directors and a 'safe harbour' in which to better balance shareholder and stakeholder interests."

It is difficult to ascertain the short-term practical implications of the bill because it operates mainly at a conceptual level, without prescribing any specific action or change in corporate practices (other than the filing of annual impact reports). If it were to become law, we expect that corporate boards would continue to have broad discretion in the exercise of their fiduciary duties, due to the application of the business judgment rule.

Because of the federal nature of Canada's system of government, and as observed from past legislative proposals to change Canadian corporate law, a change of this kind in the CBCA could prompt some provincial and territorial legislatures to introduce similar amendments to their own corporate statutes; other legislatures could decide to maintain their corporate statutes in their current form. The adoption of Bill S-285 could therefore potentially lead to a form of jurisdiction shopping as new businesses could choose not to incorporate under the CBCA, and existing federal corporations could choose to be continued under provincial or territorial laws that do not have equivalent requirements. Conversely, some businesses could prefer the federal statute if it aligns with their corporate strategy, in the same way that some businesses have opted for the "benefit corporation" structure.[8] Whether one possibility or the other would materialize remains to be seen.

It should be noted, lastly, that Bill S-285 is a Senate public bill, sponsored by an individual senator and not formally endorsed by any political party as it proceeds through the Senate and, potentially, to the House of Commons. Such bills do not have the backing of government bills and have historically had less success in becoming law. However, some Senate public bills have received royal assent in the recent past, notably the *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, also sponsored by Senator Miville-Dechêne (along with MP John McKay), which came into force on January 1, 2024, and introduced the requirement to prepare a modern slavery report, among other things.

Regardless of the fate of this proposed legislation, Bill S-285 represents an initial Canadian contribution to some of the legal discussions, debates and initiatives surrounding corporate governance and the larger role of business organizations within society that are currently ongoing in the United States, the United Kingdom and Europe. This bill could thus serve as a blueprint for future initiatives revolving around the idea of corporate purpose.

[1] An amended version of paragraph 122(1)(b) of the CBCA would require that directors and officers act honestly and in good faith to pursue the best interests of the corporation "while ensuring that the corporation operates in a manner that (i) benefits wider society and the environment in a manner proportionate to the size and the nature of its operations, and (ii) minimizes any harm that it causes to the wider society and the environment, with the objective of eliminating such harm."

[2] An amended version of subsection 122(1.1) of the CBCA would provide that directors and officers "shall" (rather than "may"), in exercising their powers and discharging their duties, "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances," including toward such constituencies.

[3] The *Loi relative à la croissance et la transformation des entreprises* (known as the *Loi PACTE*) was adopted in France in 2019. It introduced the concept of the "*raison d'être*" of a corporation, although the concept itself is not defined therein.

[4] The initiative is also influenced by various other sources, including B Lab, the Senard-Notat report and similar initiatives.

[5] Paragraph 122(1)(b) of the CBCA provides that every director and officer of a corporation "must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" in exercising their powers and discharging their duties.

[6] Paragraph 122(1)(a) of the CBCA.

[7] Corresponding provincial corporate statutes provide for similar duties.

[8] In Canada, British Columbia is the only province that has implemented legislation to establish benefit corporations, whereas this corporate form is available in over 35 states in the United States.

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