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A Critical Canadian Perspective on the Benefit Corporation

Carol Liao
Allard School of Law at the University of British Columbia, liao@allard.ubc.ca

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CONTENTS

INTRODUCTION

Business law does not exist in a vacuum. Escalating concerns over climate change, rising socioeconomic inequality, and other complex challenges have accelerated the search for sustainable relationships to bind our global community.[1] Our growing awareness of the risks at hand has resulted in mounting expectations for corporations to transform, innovate,

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[*] Assistant Professor, Faculty of Law, University of Victoria. Thank you to Kyle Fogden, Chuck O'Kelley, Lori Lamb, the participants of The Benefit Corporation and the *Firm Commitment* Universe symposium at the Adolf A. Berle, Jr. Center on Corporations, Law and Society at Seattle University School of Law, and Stephanie Gambino and the editors of the *Seattle University Law Review*, for helpful comments. Thank you also to Sergio Ortega (University of Victoria, J.D. 2018) for exceptional research assistance.

1. *See* WORLD ECONOMIC FORUM, GLOBAL RISKS (10th ed., 2015), http://reports.weforum.org/global-risks-2015/executive-summary/ [https://perma.cc/7AUL-YBHS].

and play a role in lessening those risks.[2] The term "corporate social responsibility" (CSR) may no longer be an appropriate descriptor for trends within the movement.[3] Rather, "social innovation" is becoming the new catchphrase of the day, emerging as the auspicious cousin to CSR as corporations move toward integrating business concepts with social activism in order to solve pressing social and environmental problems.[4] The growth of the "social enterprise," often referring to either a for-profit trying to "do good," an enterprising nonprofit, or a corporate group formation of the two, suggests a shift in the business landscape.[5] Legislators are beginning to craft new corporate legal entities to meet growing demands from social entrepreneurs seeking governing infrastructure to house their social businesses.

Corporate hybridity is a new innovation in business law that had its start in industry and is garnering attention within academic scholarship. In the corporate context, a "hybrid"[6] can be defined as a corporate legal structure that blends traditional for-profit and nonprofit legal characteristics that enable—and at times, require—businesses to pursue both economic and social mandates. Canada has begun to act upon this new legal phenomenon, with two provinces adopting hybrid corporations similar to the community interest company in the United Kingdom (U.K.),

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2. *See, e.g.*, David A. Lubin & Daniel C. Esty, *The Sustainability Imperative*, HARV. BUS. REV., May 2010.

3. The prospect of defining CSR is not an easy one, and this Article refrains from delving into that debate. Dirk Matten and Jeremy Moon explain the difficulty in that "[f]irst, . . . CSR is an 'essentially contested concept,' being 'appraisive' (or considered as valued), 'internally complex,' and having relatively open rules of application. Second, CSR is an umbrella term overlapping with some, and being synonymous with other, conceptions of business-society relations. Third, it has clearly been a dynamic phenomenon." Dirk Matten & Jeremy Moon, *"Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility*, 33:2 ACAD. MGMT. REV. 404, 405 (2008) (internal citations omitted). Ultimately, "[t]heories of corporate social responsibility cast a potentially broader net, emphasizing all of the social costs of corporate activity, and therefore embrace, for example, environmental or political concerns as well as stakeholder interests." David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1002 n.5 (2000).

4. *See, e.g.*, Tim Draimin, *Corporate Social Responsibility is Dead, Long Live Corporate Social Innovation*, SOC. INNOVATION GENERATION (July 12, 2010), http://www.sigeneration.ca/corporate-social-responsibility-is-dead-long-live-corporate-social-innovation%E2%80%A8/ [https://perma.cc/M9BS-NF5X]; Chris Atchison, *Corporate Social Responsibility: A Clear Business Case*, GLOBE & MAIL (Mar. 16, 2010), http://www.theglobeandmail.com/news/national/education/corporate-social-responsibility-a-clear-business-case/article599864/ [https://perma.cc/3ZU9-4J5Q].

5. *See, e.g.*, Victor Pestoff & Lars Hulgård, *Participatory Governance in Social Enterprise*, 27 VOLUNTAS 1742 (2016).

6. Also known as a "blended enterprise." *See, e.g.*, Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619 (2010).

providing traditional nonprofit organizations with a means to raise equity capital and issue a capped amount of dividends.[7]

In past years, Canadian legislators have felt pressure to implement the American benefit corporation model into existing provincial and federal corporate laws.[8] The benefit corporation aims to address the needs of social purpose businesses operating in the for-profit sector by requiring a "public benefit" purpose, among other governing features. B Lab, the nonprofit organization behind the American B Corporation certification, has actively lobbied its own state governments to adopt the benefit corporation form. At one point it seemed B Lab had saturated the Canadian social sector, partnering with several of Canada's leading social innovators to advocate for the benefit corporation model.[9] Ontario and British Columbia (B.C.) were particular hotspot provinces where benefit corporation legislation was being contemplated. MaRS Discovery District, a Canadian hub in social innovation, initiated a White Paper urging legislators to create an equivalent to the benefit corporation, calling it "an opportunity for Canada."[10] In 2012, the B.C. Council for Social Innovation issued an action plan to maximize social innovation in B.C., which

7. The British Columbia "community contribution company" (known as the C3) was made available to businesses in July 2013. *See* Business Corporations Act, S.B.C. 2002, c. 57 (Can.). A similar hybrid was made publicly available in Nova Scotia in 2016. *See* Community Interest Companies Act, S.N.S. 2012, c 38 (Can.). The B.C. and Nova Scotia hybrids are modeled after the U.K. community interest company, with governing features that include an asset lock and dividend cap. The U.K. CIC has had considerable success since its implementation in 2005, with more than 12,500 registered CICs to date (overtaking the number of cooperatives in the country). *See* Office of the Regulator of Community Interest Companies (@CICRegulator), TWITTER (Nov. 18, 2016, 2:17 AM), https://twitter.com/CICRegulator/status/799557182815670272 (tweeting the number of CICs on public record as of November 18, 2016, at 12,579); *see also* OFFICE OF THE REGULATOR OF COMMUNITY INTEREST COMPANIES, CIC REGULATOR: ANNUAL REPORT 2015 TO 2016 (2016). In B.C., the C3 has not been nearly as successful. For more on the C3 model, see Carol Liao, *Limits to Corporate Reform and Alternative Legal Structures*, *in* COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 297 (Beate Sjåfjell & Benjamin Richardson eds., 2015).

8. *See, e.g.*, Simon Avery, *Canada Playing Catch-up in Social Enterprise*, GLOBE & MAIL (Oct. 19, 2010), http://www.theglobeandmail.com/report-on-business/small-business/sb-growth/canada-playing-catch-up-in-social-enterprise/article1316055/ [https://perma.cc/VAB9-H79X].

9. Adam Spence, *In Search of the Benefit Corporation*, MARS CTR. FOR IMPACT INVESTING (Nov. 25, 2010), https://www.marsdd.com/news-and-insights/in-search-of-the-benefit-corporation/ [https://perma.cc/DK3C-BYGD]; Rachel Mendleson, *Canadian 'B Corps' Put Their Money Where Their Branding Is On Social Causes*, HUFFINGTON POST CAN. (Feb. 3, 2012, 6:25 AM), http://www.huffingtonpost.ca/2012/02/02/canada-b-corps-benefitcorporations_n_1251383.html [https://perma.cc/FSR7-R32E];

10. STACEY CORRIVEAU ET AL., BENEFIT CORPORATIONS IN CANADA: A TOOL TO SUPPORT BLENDED ENTERPRISE IN CANADA, MARS CENTRE FOR IMPACT INVESTING (2011) (on file with author).

included the recommendation that the government explore the possibility of creating public benefit corporations.[11]

While the American benefit corporation has been heralded as the innovative solution to the shareholder primacy model of governance, many advocates tend to assume that Canadian corporate laws are one and the same as the United States' (U.S.) corporate laws. These advocates have failed to compare the legal features of the American benefit corporation alongside existing Canadian corporate laws to ensure a meaningful alternative is offered. Canada should explore the creation of legal hybrids that offer social enterprises with governing infrastructure to pursue dual economic and social mandates. However, adopting the American benefit corporation model does not make legal sense in Canada, as most of its stakeholder-based governance features are equal to or even weaker than Canada's existing model of governance. This Article will explain why the adoption of the benefit corporation in Canada is unadvisable, in hopes of shifting energies toward more effective reform efforts in Canada.

Part I of this Article provides a brief background and description of the American benefit corporation. Part II then delineates the Canadian model of corporate law and governance as it currently stands in the statutes, common law, and in practice. Part III applies the information gathered from the previous two sections to explain why the legal features in the American benefit corporation model are largely redundant to existing Canadian corporate laws. It also addresses how the implementation of the benefit corporation in Canada would conflate incorrect assumptions on Canada's model of governance and potentially impede the progressive development of Canada's corporate laws. The Article concludes by offering suggestions to the leaders of the American benefit corporation movement in the wake of the 2016 U.S. Presidential election.

I. BRIEF BACKGROUND OF THE AMERICAN BENEFIT CORPORATION

The consideration of stakeholder interests has generally been allowed in for-profit corporations under several American state laws since the 1980s. The takeover boom saw several states implement "other constituency" (also known as "nonshareholder constituency"[12] or "corporate constituency"[13]) legislation expressly permitting directors to

11. BC SOCIAL INNOVATION COUNCIL, ACTION PLAN RECOMMENDATIONS TO MAXIMIZE SOCIAL INNOVATIONS IN BRITISH COLUMBIA 11 (2012), http://tamarackcci.ca/files/social-innovationbc_action_plan.pdf [https://perma.cc/DWC5-6QHA].

12. Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 991, 973 (1992).

13. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 579–80 (1992).

consider interests of groups in addition to shareholders in decision-making.[14] A large majority of American states are now "other constituency" states[15]—only six states to date have not implemented such legislation.[16]

The nonprofit B Lab began in 2008 and capitalized on the "other constituency" statutes by creating a certification system that also requires corporations to enshrine stakeholder interests into their governing documents.[17] The B Corporation certification is unique in this regard; B Lab has elected to address governance issues in a way that is unrivalled by other CSR certifications on the market. Self-imposed and privately regulated, B Lab is attempting to establish a new kind of company that harnesses the power of business to solve social and environmental problems.[18] At the time of this writing, the B Lab website indicates that there are more than 1,929 certified B Corporations, including 927 American B Corporations and 160 Canadian B Corporations,[19] with the remaining number representing B Corporations originating from other countries.[20]

While the numbers are sizable given the grassroots nature of the B Corporation, they are of course small relative to the number of corporations existing in the United States, which, according to the U.S. Census Bureau, totals more than 27 million businesses.[21] Corporations may choose to become B Corporations so they can align themselves with like-minded companies. The B Corporation branding may "draw in directors committed to a blended mission and investors willing to enforce

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14. For more on this, see Andrew R. Keay, Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value and All That: Much Ado About Little? (Jan. 4, 2010) (unpublished manuscript); Bainbridge, *supra* note 12; Mitchell, *supra* note 13.

15. Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 833 n.78 (2003).

16. *Corporation Legal Roadmap*, B CORPORATION, http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/1061-corporation-legal-roadmap [https://perma.cc/JX3X-55B4]. The states without non-shareholder constituency statutes are Alabama, Arkansas, Kansas, Michigan, North Carolina, and Oklahoma.

17. *Corporation Legal Roadmap*, *supra* note 16.

18. B CORPORATION, http://www.bcorporation.net.

19. These numbers were determined using the website's country search engine. *Find a B Corp*, B CORPORATION, https://www.bcorporation.net/community/find-a-b-corp [https://perma.cc/UR86-Q27B]. It should be noted that inconsistencies are likely, given that the number of B Corporations listed on their homepage differs from the number of B Corporations listed on their B Community page (1,929 versus 1,730). *Id.*

20. *See Find a B Corp*, *supra* note 19.

21. *Quick Facts*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/BZA010214/00 [https://perma.cc/EX7Q-K3QZ] (this number is as of 2012; more recent statistics are unavailable).

it."[22] It could one day be a certification popularly recognizable by a wider number of consumers.

Since B Lab is a private organization and does not have the authority to manipulate existing laws, it instead works with existing laws to guide corporations to change their framework. While it was fair to say that early on B Lab's focus seemed to lean toward attracting mass participation rather than ensuring proper regulation, there have been notable changes in its governance. In the past, B Lab was a relatively small organization that was not equipped to regulate a large number of companies, particularly given its additional involvement in legislative policymaking and attention to marketing its brand.[23] B Lab has since expanded in size, improved its oversight, and collaborated with several international partners in the pursuit of global brand recognition.

In order to become a certified B Corporation, a company is first required to take a "B Impact Assessment" that asks questions relating to accountability, employees, consumers, community, and the environment.[24] A corporation is "certified" by B Lab once an acceptable score is obtained under their rating system (80 out of 200), and the company is required to submit supporting documents for a portion of the answers.[25] B Lab relies on this self-reporting assessment and a separate auditing system to ensure B Corporations are pursuing and achieving their social mandates.[26] Within an allotted time following certification, B Corporations are required to amend their articles of incorporation to require directors to consider more than just shareholder interests when carrying out their duties.[27] Companies that have benefit corporation legislation in their states are required to adopt the benefit corporation status within two years of certification.[28] Previously, B Lab required companies to be incorporated in an "other constituency" state, or re-incorporate in one in order to make such amendments and be a certified B Corporation. Now, B Lab allows companies in states that are not "other constituency" states to simply build stakeholder interests into a signed

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22. Brakman Reiser, *supra* note 6, at 643.

23. *Find a B Corp*, *supra* note 19.

24. *Assess your Impact*, B IMPACT ASSESSMENT, http://bimpactassessment.net/how-it-works/assess-your-impact [https://perma.cc/W7GG-TACY].

25. *Performance Requirements*, B CORPORATION, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements [https://perma.cc/5RCV-FBFZ].

26. For a detailed analysis of the B Impact Assessment, please see Michael Dorff, *Assessing the Assessment: B Lab's Effort to Measure Companies' Benevolence*, 40 SEATTLE U. L. REV. 515 (2017).

27. *Protect Your Mission*, B CORPORATION, https://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/protect-your-mission [https://perma.cc/W3Q6-ZR7A].

28. *Corporation Legal Roadmap*, *supra* note 16. In a few states, companies are given the option to simply amend their articles of incorporation. States that fall under this exception include Idaho, Louisiana, and New York.

term sheet.[29] If the company's resident state eventually creates a benefit corporation, the company must adopt benefit corporation status within the later of four years of the legislation or two years after certification.[30]

In addition to marketing its certification process, B Lab has been influential in persuading state legislators to create benefit corporations. In 2010, the states of Maryland and Vermont each passed benefit corporation legislation, facilitating new corporate structures designed to create both social benefits and shareholder value.[31] Maryland's benefit corporation laws took effect in October 2010[32] and Vermont's in July 2011.[33] Twenty-nine states have since followed suit with various forms of the benefit corporation, with Delaware being a notable state that passed legislation in 2013.[34] B Lab states that seven other states are in the interim stages of implementing legislation.[35] The governing features in benefit corporations vary somewhat from state to state, but many common features across several of the states echo those first enacted in Maryland and Vermont, and later in the Model Benefit Corporation Legislation;[36] thus, these two states are used as the example.[37]

The purpose of a benefit corporation is to create a "general public benefit," which is defined as "a material positive impact on society and the environment, as measured by a third-party standard, through activities that promote some combination of specific public benefits."[38] A corporation seeking benefit corporation status must include or make a clear a prominent statement in its articles of incorporation that it is a benefit corporation.[39] There are no specific criteria to qualify as a benefit

29. *Id.*

30. *Id.*

31. Press Release, Maryland First State in Union to Pass Benefit Corporation Legislation (Apr. 14, 2010), http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation [https://perma.cc/LJB4-UAS9]; *Vermont Becomes Second State to Pass B Corporation Legislation Outdoor Industry Association*, OUTDOOR INDUSTRY ASS'N (June 2, 2010), https://outdoorindustry.org/article/vermont-becomes-second-state-to-pass-b-corporation-legislation/ [https://perma.cc/BVR8-58A9].

32. MD. CODE ANN., Corps. & Assn's §§ 5-6c-01 through 5-6c-08 (West 2010).

33. Vermont Benefit Corporations Act, VT. STAT. ANN. tit. 11A, § 21 (2011).

34. *State by State Legislative Status*, BENEFIT CORPORATION, http://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/Y7U5-72UC]. For the Delaware legislation, see 8 DEL. CODE ANN. §§ 361–368 (West 2013).

35. *Id.*

36. *Model Legislation*, BENEFIT CORPORATION, http://benefitcorp.net/attorneys/model-legislation [https://perma.cc/5MP2-QMNR].

37. For a look at the differences between state statutes, please see J. Haskell Murray, Corporate Forms of Social Enterprise: Comparing the State Statutes (Jan. 15, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556.

38. MD. CODE ANN., Corps. & Assn's §§ 5-6c-01(c) (West 2010); VT. STAT. ANN. tit. 11A, § 21.03(4) (2011).

39. MD. CODE ANN., Corps. & Assn's §§ 5-6c-03, 5-6c-05; VT. STAT. ANN. tit. 11A, § 21.05.

corporation so long as proper company approvals have been met, and that also applies if a company wishes to withdraw from being a benefit corporation. Existing state corporate laws fill any gaps in the benefit corporation laws.

The assumed purpose behind the legal amendments required to become a benefit corporation is to carve these corporations out of the well-known court decision of *Revlon, Inc. v MacAndrews & Forbes Holdings, Inc.*[40] (*Revlon*). In *Revlon*, the Supreme Court of Delaware held that directors owe a fiduciary duty to maximize shareholder value in takeover contexts, regardless of nonshareholder stakeholder interests.[41] The *Revlon* decision is generally regarded as the leading judicial precedent in support of shareholder primacy in corporate America, and B Lab has elected to address the matter directly. B Lab's language to be included in a B Corporation's articles of incorporation requires directors to consider various stakeholder interests.[42] Obligating directors to consider

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40. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

41. *Id.* at 182.

42. The language is as follows:

a) In discharging the duties of their respective positions and in considering the best interests of the Company, the board of directors, committees of the board, and individual directors shall consider the effects of any action or inaction upon:

i) the members of the Company;

ii) the employees and work force of the Company, its subsidiaries, and its suppliers;

iii) the interests of its customers as beneficiaries of the purpose of the Company to have a material positive impact on society and the environment;

iv) community and societal factors, including those of each community in which offices or facilities of the Company, its subsidiaries, or its suppliers are located;

v) the local and global environment;

vi) the short-term and long-term interests of the Company, including benefits that may accrue to the Company from its long-term plans and the possibility that these interests may be best served by the continued independence of the Company; and

vii) the ability of the Company to create a material positive impact on society and the environment, taken as a whole.

b) In discharging his or her duties, and in determining what is in the best interests of the Company, a Director shall not be required to regard any interest, or the interests of any particular group affected by such action, including the shareholders, as a dominant or controlling interest or factor.

c) A director does not have a duty to any person other than a shareholder in its capacity as a shareholder with respect to the purpose of the Company or the obligations set forth in this Article, and 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 [or the corporation].

d) Notwithstanding the foregoing, any director is entitled to rely on the provisions regarding "best interests" as set forth above in enforcing his or her rights hereunder, and under state law and such reliance shall not, absent another breach, be construed as a breach of a director's duty of care, even in the context of a change in control transaction where, as a result of weighing the interests set forth in subsection (a)(i)-(vii) above nonshareholder stakeholders, rather than simply permitting them to do so, is a significant legal difference. Obligatory duties hold directors to a higher standard, and B Lab's language has evolved considerably in the past years. It formerly included the insertion of "as the Director deems relevant," which considerably softened the obligation and echoed common law. At the time of this Article, the proposed language is far lengthier, but similarly offers considerable softening of such obligations.[43]

This codification of stakeholder interests in directorial decision-making for B Corporations is regarded by some as a significant feature emulated by the benefit corporation laws, if not the most important feature. In Maryland, a director is required to consider the effects of any action or inaction on stockholders,[44] employees, subsidiaries, suppliers, customers, community and societal considerations, and the local and global environment.[45] Vermont has an additional sixth factor, encompassing "the long-term and short-term interests of the benefit corporation, including the possibility that those interests may be best served by the continued independence of the benefit corporation."[46] In contrast to the standard articulated in *Revlon*, this additional factor provides substantially the same protection as offered by the B Corporation model by relieving directors of the duties to maximize shareholder value in a takeover situation.

> [which lists certain stakeholder interests], a director determines to accept an offer, between two competing offers, with a lower price per share.

Corporation Legal Roadmap, *supra* note 16.

43. *Id.*

44. In Maryland and certain other states, the term 'stockholder' is used instead of 'shareholder.' *See* MD. CODE ANN., Corps. & Assn's § 5-6c-07(a)(1)(i) (West 2010).

45. MD. CODE ANN., Corps. & Assn's § 5-6c-07(a)(1). Vermont has some *de minimis* differences in wording. *See* VT. STAT. ANN. tit. 11A, § 21.09(a)(1) (2011).

46. VT. STAT. ANN. tit. 11A, § 21.09(a)(1)(F). The explicit inclusion offers symbolic vindication for Vermont, home of the socially minded ice cream business Ben & Jerry's Homemade, Inc. (popularly known as Ben & Jerry's). The board of Ben & Jerry's had multiple offers to purchase the company in 2000, but had no choice but to sell to the highest bidder or risk a shareholder lawsuit. News Release, Ben & Jerry's Homemade, Inc., Ben & Jerry's and Unilever to Join Forces in Ice Cream (Apr. 12, 2000), http://www.benjerry.com/company/media-center/press/join-forces.html [https://perma.cc/32BL-AGN4]; Dave Gram, *States Move to Let Firms Pursue Social Mission*, BOSTON GLOBE (Apr. 11, 2010), http://archive.boston.com/news/local/vermont/articles/2010/04/11/states_move_to_let_firms_pursue_social_mission/. *But see* Anthony Page & Robert A Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211 (2010) (arguing that Ben & Jerry's had strict anti-takeover defenses that their board declined to test, and that negative reactions to the sale of social enterprises may be misguided since such sales may create more opportunities for social enterprises to do good work). Ben & Jerry's has since become the first wholly owned subsidiary to become a B Corporation. Press Release, Ben & Jerry's Joins the Growing B Corporation Movement (Oct. 22, 2012), http://www.csrwire.com/press_releases/34773-Ben-Jerry-s-Joins-the-Growing-B-Corporation-Movement [https://perma.cc/7NM9-CWKB].

In Maryland, the director has no duty (fiduciary or otherwise) to a person who is a general public beneficiary of the benefit corporation.[47] Vermont, however, has slightly expanded the definition of fiduciary duties for their directors. Vermont directors have fiduciary duties only to those persons entitled to bring about a benefit enforcement proceeding against the benefit corporation.[48] A benefit enforcement proceeding means a claim or action against a director or officer for failing to pursue the public benefit purpose set forth in its articles of incorporation, or for violating any duty in the statute.[49] These persons have been identified as shareholders, directors, persons, or groups of persons that own 10% or more of the equity interests in an entity where the benefit corporation is a subsidiary, or any other persons specified in the articles of incorporation of the benefit corporation.[50]

While the expansion may seem slight, it is important. Shareholders, and shareholders of any parent company, can bring proceedings against the benefit corporation for violating the broader, codified stakeholder interests.[51] However, directors have the same immunity from liability as directors of regular, for-profit corporations.[52] American courts have validated the business judgment rule, meaning that the courts will defer to the board's judgment so long as the directors brought an appropriate degree of diligence in reaching a reasonable business decision at the particular time that it was made.[53] So, provided that the board's decision is within a range of reasonable alternatives and any actions do not constitute fraud or negligence, the courts are unlikely to intrude upon a director's business judgment.

A benefit corporation is also responsible for creating an annual benefit report, with Vermont requiring board approval prior to the report being sent out to shareholders.[54] The report is required to include: (1) a description of how the benefit corporation pursued a public benefit during the year and the extent to which the public benefit was created; (2) any

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47. MD. CODE ANN., Corps. & Assn's § 5-6c-07(b).

48. VT. STAT. ANN. tit. 11A, §§ 21.09(d), (e), 21.13.

49. *Id.* § 21.13(c).

50. *Id.* § 21.13(b).

51. Vermont's expansion of duties has thus required setting out proper parameters of directors' duties. *See* § 21.09(a)(3) (directors are not obligated to give priority to the interests of a particular group or person listed under § 21.09(a)(1)); *see also* § 21.09(a)(4) (directors are not subject to a different or higher standard of care when decisions may affect the control of the benefit corporation); § 21.09(c) (a director is not liable for the failure of a benefit corporation to create general or specific public benefit).

52. VT. STAT. ANN. tit. 11A, §§ 21.11(d), 21.02(b) (2011).

53. Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) (outlining the business judgment test).

54. VT. STAT. ANN. tit. 11A, § 21.14(a), (c) (2011). MD. CODE ANN., Corps. & Assn's § 5-6c-08(a) (West 2010).

circumstances that hindered the creation of the public benefit; and (3) an assessment of the societal and environmental performance of the benefit corporation, prepared in accordance with a third-party standard.[55] Vermont includes explicit instructions on how the report must be constructed, such as outlining specific goals or outcomes, disclosing the amount of compensation paid to each director, and the name of each shareholder owning 5% or more of the shares.[56] These additions add a heightened level of transparency and accountability that echoes some of the disclosure requirements of public companies.[57] Vermont has also created the requirement for one director of the board to be designated as a "benefit director," who is required to be independent and prepare an annual statement detailing whether, in the opinion of that director, the company acted in accordance with its benefit purpose, and if not, why.[58] This statement and the annual benefit report are to be delivered and approved by the shareholders and also posted on the company website.[59]

The benefit corporation is regarded as a potential alternative to shareholder primacy to combat negative corporate behavior that may be damaging to broader community, environmental, or other stakeholder interests.[60] Several states do not track the names and number of benefit corporations, so it is difficult to determine how many are currently in operation, but there are estimations putting the number at approximately 2,600 or more nationally in 2016.[61]

II. CANADA'S MODEL OF CORPORATE GOVERNANCE[62]

Consistently ranked as one of the best places to live by the United Nations Annual Human Development Report,[63] Canada is an interesting

55. VT. STAT. ANN. tit. 11A, § 21.14(a). Vermont has also required a statement of the corporation's specific goals or outcomes, and actions the corporation has taken to attain them while also improving its social and environmental performance. VT. STAT. ANN. tit. 11A, § 21.14(a)(1)(D).

56. *Id.* § 21.14(a)(4)–(7).

57. *See, e.g.*, VT. STAT. ANN. tit. 11A, §§ 21.14(b), 21.14(d); MD. CODE ANN., Corps. & Assn's § 5-6c-08(b)–(c).

58. *See, e.g.*, VT. STAT. ANN. tit. 11A, § 21.10.

59. VT. STAT. ANN. tit. 11A, § 21.14(c)–(d).

60. Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287, 287 (2013).

61. *Find a Benefit Corporation*, BENEFIT CORP INFORMATION CENTER, http://benefitcorp.net/businesses/find-a-benefit-corp [https://perma.cc/G58Z-237K]; J. Haskell Murray Presentation at the Seattle University Law Review Symposium: Berle VIII: Benefit Corporations and the *Firm Commitment* Universe (June 27–28, 2016).

62. As noted above, this Part II summarizes the findings from Carol Liao, *A Canadian Model of Corporate Governance*, 37 DALHOUSIE L.J. 559 (2014) [hereinafter Liao, *CFGR Study*]. Much of the language in this Part II closely tracks some portions of the CFGR study.

63. UNITED NATIONS DEVELOPMENT PROGRAMME, UN HUMAN DEVELOPMENT REPORT, http://hdr.undp.org/en [https://perma.cc/RW4U-HCPU] (various years).

country in which to study the growing development of hybrid business laws. Understanding Canada's existing legal model of governance, however, has its own set of challenges. Canadian directors are inundated with American corporate governance research, leading many directors to assume Canadian and American governance fundamentals are identical. In fact, there are important differences found in Canadian corporate laws that are highly relevant to the discussion of whether benefit corporations are warranted in Canada. This Part II identifies some of Canada's foundational corporate laws and colors them with insights from a qualitative study conducted by this author and sponsored by the Canadian Foundation for Governance Research (the CFGR study), where leading senior practitioners in Canada opined on matters involving shareholder primacy, director duties, stakeholder interests, the courts, regulators, and the future direction of Canadian corporate governance.[64] The candid observations from the practitioners, who provided comments in the CFGR study on a not-for-attribution basis, reveal a surprising legal and regulatory landscape in Canada.

A. "Best Interests of the Corporation"

Under Section 122 of the Canada Business Corporations Act (CBCA), directors and officers are required to manage the corporation in the "best interests of the corporation."[65] This is notably different from the United States, where most states require directors to act in the "best interests of the corporation and its shareholders[,]" but shareholder interests (equating to shareholder value) are prioritized.[66] The topic of the debate, then, is whether or not the difference between "best interests of the corporation" and "best interests of the shareholders" is simply a technical one or if there is a noteworthy difference. In the CFGR study, a majority of the practitioners noted how even if there was a theoretical difference it was "largely indistinguishable" in practice because a business case could be made that best interests of the corporation equated to that of the shareholders.[67] Others held comparably strong views on the fact that there was a significant distinction, including one prominent practitioner, who stated:

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64. *See* Liao, *CFGR Study*, *supra* note 62.

65. Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122 (Can.) [hereinafter CBCA] ("[E]very director and officer of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation" and "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.").

66. Dodge v. Ford Motor Company, 170 N.W. 668 (Mich. 1919).

67. Liao, *CFGR Study*, *supra* note 62, at 572.

> It's entirely different, that is not our common law….It should be a matter of complete indifference to the directors what the interests of the shareholders are, except if it makes a difference to the corporation. There's nothing wrong with taking shareholders' interests into account, but that's incidental….I don't think the law could possibly be clearer if you look at the corporate statutes and look at what the courts have said.[68]

Now, this difference may only be realized in a small number of situations, particularly mergers or acquisitions when a company is being faced with a takeover. Nevertheless, the difference is there, certainly in theory if not in practice. Shareholders are important stakeholders in any corporation, and their interests are certainly not ones that boards should take lightly, but Canadian law is clear that the board's primary duties are to the corporation.[69]

One practitioner in the CFGR study distinguished how American jurisprudence "is more clearly articulate that the interest of the shareholder should be foremost in the thoughts of the board in terms of maximizing shareholder value than perhaps has been articulated historically in the Canadian jurisprudence."[70] There is, therefore, "a slightly different focus in Canada."[71] In terms of its application, one practitioner described it as a "kind of continuum," where the obligation to consider decreases as the strength of the relationship with other constituents decreases.[72] Many practitioners expressed how one can easily make an argument that if the corporation is acting in the best interests of all of its stakeholders, over time the wealth of shareholders will be maximized.[73] Most agreed (with a few exceptions) that the shareholders should be the foremost priority for directors, with other stakeholders' interests being considered depending on the issue at hand.[74]

One of the practitioners that found a stark difference between the best interests of the corporation versus the shareholders admitted that "certainly the entire shareholder community in Canada would say it's all about the shareholders, absolutely."[75] Nevertheless, the practitioner

68. *Id.* at 571.
69. CBCA, *supra* note 65.
70. Liao, *CFGR Study*, *supra* note 62, at 571.
71. *Id.*
72. *Id.*
73. *Id.*
74. A number of practitioners implied that the negligible difference could become relevant in narrow circumstances. For example, the difference could become acute in times of financial distress or when a significant stakeholder is involved. Two practitioners gave the example of a pipeline across the First Nations territory, where, in that scenario, the corporation should have regard to the broader interest of stakeholders. Liao, *CFGR Study*, *supra* note 62, at 571.
75. *Id.*

reiterated that doing what is in the best interests of the corporation is really something for the directors to determine, and is not beholden to any particular stakeholder group, including shareholders.[76] When this practitioner was informed that other participants felt that "best interests of the corporation" and "best interests of the shareholders" were of negligible difference, the practitioner responded:

> If you are trying to advise a board in a manner that keeps them out of harm's way, that's different. Providing that kind of advice, practically speaking for a lawyer advising a client, is much different than talking about the legal theory. Because you can have all kinds of laws, but when you've got one group who is the most likely to sue you, you tend to worry about that group…People's sense of right and wrong will also change over time but I don't think the legal theory is going to change. So it is kind of a flexible concept that can accommodate a lot of different views of a lot of different kinds of directors.[77]

A few practitioners echoed this sentiment, reflecting on how Canada is more flexible in that it can, in any particular set of circumstances, put the best interests of the corporation to a wider group of stakeholders.[78] In a change of control context, unlike Delaware and other states, the Canadian board is not beholden to act as an auctioneer with the sale going to the highest bidder. The courts have also gone on to draw a more notable distinction in this fundamental difference in governance, as will be seen in the subsequent sections.

B. The Oppression Remedy and Other Stakeholder Protections

There are several minority protections within Canadian corporate law and the oppression remedy is one of Canada's most notable protections. The oppression remedy, set forth in Section 241 of the CBCA and similar provincial statutes, offers a broader right of action on behalf of certain stakeholders to apply to a court to rectify matters complained of where:

> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

76. *Id.*
77. *Id.*
78. *Id.* at 573.

> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.[79]

The oppression remedy has been acknowledged as "beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world,"[80] and this right of action goes beyond the shareholders of a corporation. Ultimately, the remedy seeks to prevent unfair disregard of stakeholder interests. The complainant can be a current or former security holder, current or former director or officer, the Director under the CBCA, or any other proper person as determined by the court.[81] Courts in the past have allowed claims by creditors, certain employees, and minority shareholders in widely held corporations to bring forth claims, and there are indications of potential broadening under this provision.[82] If the court does find oppression, unfair prejudice, or unfair disregard to the interests of any security holder, creditor, director or officer, or other person, then the court "may make an order to rectify the matters that are being complained about."[83] The test that has developed from the courts has been one of foreseeability and reasonable expectations that can arise through the relationship with the corporation, and these reasonable expectations seem capable of changing over time.[84] Non-monetary interests may be reasonable expectations and have been taken into account by the courts.[85]

As to the kinds of remedial orders a court can make, American counterparts are often surprised to learn how much discretion is left to the courts. Section 241(3) of the CBCA provides a non-exhaustive list of possible remedies available.[86] Judges have commented on the breadth of the oppression remedy and how it "gives the court tremendous latitude" allowing a judge "to use his [or her] ingenuity to effect the remedy most

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79. CBCA, *supra* note 65, at s. 241.

80. Stanley M. Beck, *Minority Shareholders' Rights in the 1980s*, *in* CORPORATE LAW IN THE 80S, SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 312 (1982) (quoted in Sparling v. Javelin Int'l Ltd. [1986] R.J.Q. 1073, 1077 (Que. S.C.) (Can.)).

81. CBCA, *supra* note 65, at s. 238.

82. MARKUS KOEHNEN, OPPRESSION AND RELATED REMEDIES (Carswell 2014). Koehnen notes that the standing provisions for oppression actions in Canadian corporate law statutes are the broadest in the common law world. *Id.* at 7 n.12.

83. CBCA, *supra* note 65, at s. 241(2).

84. Stephanie Ben-Ishai & Poonam Puri, *The Canadian Oppression Remedy Judicially Considered: 1995-2001*, 30 QUEEN'S L.J. 79, 83 (2004).

85. *Id.* at 82.

86. CBCA, *supra* note 65, at s. 241(3).

suitable to the situation."[87] Courts can set aside a transaction, make a corporation or another person buy the oppressed party's shares or pay money, dissolve the corporation, or any other appropriate remedy.[88] The court has discretion to offer any appropriate remedy it wants to rectify the oppression, and scholars have noted that Canadian courts have been rather innovative in creating remedies for successful applicants.[89]

In the CFGR study, many practitioners noted that Canada is home to several controlled companies and, as such, strong minority protection is particularly important.[90] It is easy for both founding and institutional shareholders to be able to exert extreme pressure on boards.[91] Due to those significant players and illiquid stock, one practitioner noted how "movement in the stock can be quite dramatic."[92] That being said, there was overwhelming agreement that the principle of minority shareholder protection was "baked into our corporate law."[93] Given the several options available to minority shareholders and other stakeholders, there tended to be consensus that in Canada, "we are well taken care of."[94] The oppression remedy and, in the context of public companies, Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (MI 61-101)[95] from the securities regulators were often cited by practitioners as significant protections.[96] Others also raised the ability to

87. *See* 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113, 123 (Can.).

88. CBCA, *supra* note 65, at s. 241.

89. Ben-Ishai & Puri, *supra* note 84, at 106.

90. Liao, *CFGR Study*, *supra* note 62, at 583.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* There were two notable exceptions in the group. One practitioner felt that there "is not enough of a corporate perspective to protect the minority—it needs to go further" and "would just prefer to see it dealt with in corporate legislation, rather than securities." *Id.* at 584 n.41. Another, who did support the principle of minority protection, felt somewhat less sympathetic towards the plight of minority shareholders, reflecting on how "if I buy shares as a minority in a controlled corporation, I do so knowing that it is a controlled corporation and that there's going to be a controlling shareholder at the end of the day." *Id.*

95. Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*, OSC MI 61-101, 31 OSCB 1321, (Feb. 1, 2008) [hereinafter MI 61-101].

96. Liao, *CFGR Study*, *supra* note 62, at 584.

bring derivative actions,[97] and to specific rules under the Toronto Stock Exchange requiring minority approvals.[98]

In particular, a number of practitioners expressed how the minority protection principle was "more true in Canada than in the US," in that "we are fairly unique" by having the concept of an oppression remedy as it protects not only minority shareholders but other stakeholders as well.[99] One commented on how the oppression remedy in the past was existing "but only theoretically available," whereas now it becomes an important tool in corporate law.[100] Another expressed that the remedy "really does work" in that "it scares the majority shareholders more than anything. You can get into court in pretty short order; courts do listen even though the cases may have gone a lot of times the other way."[101] Regarding MI 61-101, most felt it had gone a long way toward ensuring procedural and substantive fairness in related party transactions.[102]

Overall, most felt there was a good balance between the oppression remedy and MI 61-101 in protecting minority interests.[103] Reflecting on Canada's position, a few practitioners expressed how the strength of Canada's statutory remedies, some of which specifically take into account the interests of other stakeholders, meant that Canada "cannot have a

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97. A derivative action set forth under s. 239 of the CBCA and similar provincial statutes creates a broader right of action for certain stakeholders (such as creditors), in addition to shareholders, to bring an action on behalf of a corporation to enforce the directors' duty to the corporation when the directors are themselves unwilling to do so. A complainant, who may be a registered or beneficial holder of a security (including shares and debt obligations), a director or officer or former director or officer of the corporation, or "any other person who, in the discretion of the court, is a proper person to make an application," may bring an action, to enforce a right of the corporation, including rights correlative to the duties of the officers and directors of the corporation, upon obtaining the leave of the court. *See* CBCA, *supra* note 65, at s. 239. A few practitioners noted that, while derivative actions were possible in Canada, they were not common and "terribly expensive to launch," and very few practitioners referenced this option. Others highlighted how the Toronto Stock Exchange has provided greater protection for minority shareholders by providing majority and minority requirements for approval of certain types of transactions, which listed companies are required to follow. Liao, *CFGR Study*, *supra* note 62, at 585.

98. For further discussion on the role the Toronto Stock Exchange has played in Canadian corporate governance, see Liao, *CFGR Study*, *supra* note 62, at 593.

99. Liao, *CFGR Study*, *supra* note 62, at 584.

100. *Id.*

101. *Id. See also* Ben-Ishai & Puri, *supra* note 84, at 81. In reviewing oppression cases in Canada, Ben-Ishai and Puri contend that Canadian courts have applied the remedy in a way that reflects the primacy of shareholder interests and nexus of contracts model in corporate law. However, the increasing success of creditors as non-shareholder applicants pointed to a possible change in attitude by the courts. Ben-Ishai and Puri suggest the cautious approach by the courts is likely to continue in the near future.

102. There was an exception made by one practitioner, who felt that the rule did not prevent enough transactions that some would consider abusive because "it simply becomes a kind of formula to get through" and therefore in many instances "it just degenerates into a process." Liao, *CFGR Study*, *supra* note 62, at 585.

103. *Id.*

model that is a hundred percent shareholder primacy."[104] Clearly, there are built-in principles in Canadian common law designed to protect minority shareholders from exploitation at the hands of controlling shareholders. While there were some nuances as to how effective certain protections were in practice,[105] the general sentiment amongst practitioners was that minority shareholder protections are well supported in Canadian statutory and common law rules, and that Canada also offers statutory protections to other stakeholders beyond shareholders.[106] As seen in the following section, these qualities have recently been highlighted by our highest court.

C. Common Law and Stakeholder Interests

Landmark decisions by the Supreme Court of Canada (SCC) have emphasized the statutory differences between Canada and the United States regarding stakeholder interests, causing many practitioners to inform boards that they can—and indeed should—take into account nonshareholder value issues. Stakeholder interests may have always had a role in governance under Canadian statutory laws, but the courts have now generated a need for boards to document their process of considering those interests.

The 2004 case of *Peoples Department Stores Inc. (Trustee of) v. Wise*[107] stimulated several responses from legal professionals and scholars on its significance to the future of Canadian corporate governance.[108] In brief, after the bankruptcy of the Peoples Department Stores Inc., the trustee brought an action against the company's directors for breaching their fiduciary duties; prior to the bankruptcy, the company directors implemented a credit scheme that favored Peoples' parent company, Wise Stores Inc., over its creditors.[109] Regarding the "best interests of the corporation," the SCC stated:

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104. *Id.*

105. For example, one practitioner in the CFGR study pointed to some limitations in the oppression remedy. It is only available against shareholders that own more than 50% of the company and a claimant also has to be an affiliate of the company to be a proper defendant. Since there are many Canadian companies controlled by 40%–45% of shareholders, the practitioner felt that the remedy had more limited use than one would assume. *Id.*

106. *Id.*

107. Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461 (Can.).

108. Readers are encouraged to review the several summaries and analyses that are available. *See, e.g.*, Catherine Francis, Peoples Department Store Inc. v. Wise: *The Expanded Scope of Directors' and Officers' Fiduciary Duties and Duty of Care*, 41 CAN. BUS. L.J. 175 (2005); Edward Iacobucci, *Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties*, 48 CAN. BUS. L.J. 232 (2009); Darcy L MacPherson, *Supreme Court Restates Directors' Fiduciary Duty – A Comment on* Peoples Department Stores v. Wise, 43 ALTA L. REV. 383 (2005).

109. *Peoples Department Stores Inc.*, 3 S.C.R., at para. 17.

> [I]t is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders.". . . [I]n 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.[110]

The court cited with approval the 1972 case of *Teck Corp. v. Millar,* in which it was held that if directors "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."[111] *Peoples* also marked the first instance where the court specifically validated the business judgment rule.[112]

The Supreme Court took it a step further in its highly anticipated 2008 decision in *BCE Inc. v. 1976 Debentureholders*.[113] The court affirmed *Peoples* and appeared to further temper the shareholder primacy norm.[114] In brief, debenture holders of Bell Canada, a subsidiary of BCE Inc., used the oppression remedy to seek relief concerning the privatization of BCE by a consortium of private equity buyers under a plan of arrangement that had been determined by BCE's directors to be in the best interests of BCE and its shareholders. Upon the completion of the arrangement, the debenture holders stood to lose approximately twenty percent of the short-term trading value of their holdings. The SCC again found that directors may look to other stakeholders and also those directors were "not confined to short-term profit or share value," but "[w]here the corporation is an ongoing concern, it looks to long-term interests of the corporation."[115] Furthermore, the court found that when conflicts arise,

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110. *Id.*, at para. 42.

111. Teck Corp v. Millar, [1972] 33 DLR (3d) 288, 2 W.W.R. 385 (BCSC) para. 97 (Can.).

112. *Peoples Department Stores Inc.*, 3 S.C.R., at paras. 64–65.

113. BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560 (Can.).

114. Readers are again invited to review the summaries and analyses available for greater details on the case. *See, e.g.*, Jeffrey Bone, *The Supreme Court Revisiting Corporate Accountability:* BCE Inc. *In Search of a Legal Construct Known as the 'Good Corporate Citizen'*, ALTA. L. REV. ONLINE SUPPLEMENT, http://www.albertalawreview.com/index.php/alr/supplement/view/BCE-in-search-of-good-corporate-citizen; Sarah P Bradley, BCE Inc. v. 1976 Debentureholders*: The New Fiduciary Duties of Fair Treatment, Statutory Compliance, and Good Corporate Citizenship?*, 41 OTTAWA L. REV. 325 (2010); Mohammad Fadel, *BCE and the Long Shadow of American Corporate Law*, 48 CAN. BUS. L.J. 190 (2009); J Anthony VanDuzer, BCE v. 1976 Debentureholders*: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision Since* Peoples, 43 U. B.C. L. Rev. 205 (2009).

115. *BCE Inc.*, 3 S.C.R., at para. 38. (regarding the oppression remedy, the court found there was no violation by the directors in their fiduciary duties).

> …it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on oppression, taken as a whole, confirm that this duty *comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another.* 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 considerations, *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.* Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one.[116]

The court did not go further in describing its concept of corporate citizenry, so the concept's legal viability remains to be seen. The court also reinforced its support for the business judgment rule.[117]

In many ways, the *BCE* decision added confusion surrounding directors' duties, particularly on whether directors *may*, *should*, or *are obligated* to consider stakeholder interests. It is simply unclear from the decision whether this is a mandatory duty, as some parts of the judgment indicate that it is permissive and others imply that it is required.[118] Thus, in an attempt to see if there was some consensus among the group of leading Canadian practitioners in the CFGR study, all were asked the question: "Do you believe directors may, should, or are obligated to consider stakeholder interests?"[119]

Several practitioners did not commit to one option, but chose two (such as "between may and should" or "they should and they are obligated to"). On the continuum of 'may' being the least restrictive for directors, and 'obligated' being the most, where the most restrictive answer was used as the recorded answer of the practitioner, 44% of practitioners said

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116. *Id.*, at para. 81–83 (emphasis added).

117. *Id.*, at para. 40.

118. *See, e.g.*, Ed Waitzer & Johnny Jaswal, Peoples*,* BCE*, and the Good Corporate "Citizen,"* 47 OSGOODE HALL L.J. 439, 461 (2009). Regarding the decision, Waitzer and Jaswal noted how:

> Even the questions of whether directors may consider, should consider, or are obliged to consider stakeholder interests, and, if so, at what point, were not addressed clearly by the Court. Early in its reasons, it noted that, in *Peoples*, "this Court found 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". Later, the Court stated that 'the duty of directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders… equitably and fairly.' Is this duty mandatory?

Id.

119. Liao, *CFGR Study*, *supra* note 62, at 581.

directors were obligated to consider stakeholder interests, 40% felt that directors should consider them, and 16% felt directors may consider them.[120] However, even in circumstances where one believed the law requires less than obligatory consideration, several practitioners recommended caution on the matter, saying "it's an easy test to meet and it's a foolish test to fail."[121] One practitioner in particular pointed out that "if you don't pay attention to a stakeholder interest, then you are left defending yourself saying, 'I didn't have an obligation to do it.'"[122] The practitioner went on to state:

> Why not just pay attention to it and then decide to dismiss it? This is where we get caught up in process so much as lawyers. It's just a safer thing to do. Turn your mind to it. Decide if it's important then move on. Our job is to protect our clients and so, it'd just be crazy for us to say, 'you don't have to consider that.' It's much safer to say, 'Consider it, balance it, then decide what you think is the right thing to do.'[123]

Most found that there was little change to corporate decision-making subsequent to *BCE*, and a handful felt that this was because Canadian corporate law had already progressed to incorporating stakeholder interests through the oppression remedy and "best interests of the corporation," among other things. It may be that in the past "it just wasn't as open a discussion" as one practitioner put it,[124] but the consideration of stakeholder interests is a very live issue in Canadian corporate governance practices.

In the aftermath of *BCE*, practitioners cited a range of reasons why directors should consider stakeholder interests, including the business case for doing so, to simply play it safe given the ambiguity of Canada's legal position on the matter, and concerns regarding the oppression remedy.[125] While *Peoples* and *BCE* are somewhat unclear as to whether or not the consideration of stakeholder interests is a mandatory requirement, practitioners have been advising boards to document their consideration of stakeholder interests since the effort is minimal enough when weighed against the risks. The ambiguity has resulted in an interpretation that favors less risk. Thus, it seems that not only has the consideration of stakeholder interests in Canada been calcified in board practice but so has the act of documenting such consideration.

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120. *Id.*
121. *Id.* at 582.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

D. The Impact of the Securities Regulators

Despite the fact that Canadian statutes and common law have tended to favor a more stakeholder-based governance model, Canadian legislators and the courts have often taken a backseat in the development of corporate governance standards. Eliciting legislative change is an extremely slow progression and corporate legislation operates on a jurisdictional basis. Substantial corporate cases in Canada are also few and far between, meaning Canadian courts do not have the instrumentalities to promote good behavior. Whether by choice or through the process of elimination, the securities commissions are now playing a major role in shaping Canadian corporate governance practices. By virtue of the fact that the securities commissions have a ‘public interest’ jurisdiction to protect the capital markets,[126] and by design are investor-focused, their influence has pushed Canadian public companies toward a more shareholder-centric model of governance.

It is a curious Canadian phenomenon that the securities regulators are significantly affecting the corporate legal sphere. Practitioners in the CFGR study recounted how extraordinarily controversial it was more than a decade ago when the securities regulators initially began encroaching on a space that was traditionally for the legislatures and the courts.[127] Now, people seem to have moved past the notion that the securities commissions are overstepping their jurisdiction and have generally accepted the regulators’ role in shaping Canadian corporate governance. Since the Canadian Securities Administrators (CSA) are able to act on a coordinated basis across the nation, the organization has become a very convenient place to deal with change. Institutional investors deliberately seek out the CSA to enhance shareholder rights, even if, from a philosophical perspective, corporate legislation is the more appropriate venue.

Practitioners in the CFGR study cited some notable disadvantages to having the regulators dominate corporate governance in Canada. Several pointed to the fact that the commissions have often disregarded findings from the courts, are not well-versed in evidentiary rules, and often fail to establish principles that can guide lower courts.[128] A few felt that there was no need for securities regulators to interfere with the carefully engineered corporate structure, with one practitioner voicing the common sentiment that “what’s in the best interest of the shareholder doesn’t align with better governance—that’s where [the practice] falls down.”[129]

126. Securities Act, R.S.O. 1990, c. S-5, s. 127(1), para 3 (Can.).
127. Liao, *CFGR Study*, *supra* note 62, at 590.
128. *Id.* at 592.
129. *Id.*

Overall, the practitioners' viewpoints in terms of the appropriateness of the commissions' role in governance tended to vary. The majority of practitioners felt the regulators were "better than the alternative."[130] For example, a few practitioners noted how the Alberta Securities Commission has been quite effective in reform, commenting on how their past involvement in the *National Policy 58-201 Corporate Governance Guidelines*[131] has helped increase the overall quality of corporate governance in Canada. Absent the securities commissions establishing rules and guidelines and the courts enforcing them, Canada would not have the robust system that exists today. Another pointed out that the commissions have probably gone as far as they can in the governance sphere, and "having got to that point, nobody's going to come out today and say, oh get rid of all that, it doesn't do anything."[132] Some pointed to how the commissions have "been a positive in creating more fairness in transactions" under MI 61-101.[133] Whether the practitioners agreed or disagreed with what the securities commissions did generally, many conceded that the regulators are "knowledgeable and better equipped" than governmental or judicial bodies in the field, and the courts are helpful in providing outside constraints when the securities commissions" become a little bit too zealous."[134]

E. The Future of Canadian Corporate Law

In the CFGR study, practitioners' views on Canada's overall model of governance tended to depend in large part on what each practitioner found most compelling: the constancy of the corporate statutes and trajectory of the common law, or the power and influence held by the securities regulators.[135] Leaving aside change of control transactions for the moment, the building blocks of Canadian corporate law have some notable differences when compared to the academic definition of Anglo-American shareholder primacy, and common law developments have emphasized those differences. The legislation requires management to act in the "best interests of the corporation" while the oppression remedy and other minority protections are fused into our statutes and common laws. Taken with the 2004 *Peoples* decision and the 2008 *BCE* decision, practitioners tended to agree that Canadian corporate law has

130. *Id.* at 591.

131. *See National Policy 58-201 Corporate Governance Guidelines*, ONTARIO SEC. COMM'N, http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20050617_58-201_corp-gov-guidelines.pdf [https://perma.cc/886X-VQJ9].

132. Liao, *CFGR Study*, *supra* note 62, at 591.

133. *Id.* at 591–92.

134. *Id.*

135. *Id.* at 597.

"overtones of a broader stakeholder model."[136] One practitioner put it succinctly:

> In fact, the shareholders do not have primacy in the corporate context in Canada, although directors generally think that they do. It's a very difficult distinction that the Canadian courts made based upon our corporate statutes and it's a very difficult distinction to explain to boards of directors.[137]

And perhaps this difficult distinction may be why many practitioners in the CFGR study tended to keep those nuances in a Canadian model limited to boilerplate provisions. Several practitioners found the differences in Canadian law compelling and important, but the majority found the practical impact of these differences largely boiled down to a change of the process in corporate decision-making only.[138] Indeed, as one practitioner commented, "the areas of distinction between Canada and U.S. that's recognized by high-end M&A corporate lawyers in Canada probably isn't recognized anywhere else."[139] Another practitioner found the distinction to be due to the fact that "the Canadian public, in my mind, is so influenced by the U.S. experience, the U.S. media, and U.S. information that it doesn't even know whether the law in Canada is the same or different."[140] For many practitioners, de-emphasizing the difference does little to no harm; from a legal standpoint, keeping the focus on ensuring the process is complied with, even if one ends up with the same answer, is a far less controversial route.

The conflicting theoretical positions from the courts and the securities commissions have enriched the dialogue on the current environment of Canadian corporate governance. One practitioner expressed how "we're still digesting the *BCE* decision—we've got a ways to go" and another wondered if Canada is experiencing "an overture in decisions."[141] While most felt that Canadian governance norms and culture are becoming quite well-developed, the frequent pull in different directions from the regulators and influential power sources in Canada has left Canadian governance in a "period of uncertainty . . . we're still trying to figure out what the model should be."[142] Corporate statutes have not changed, but power dynamics can shift. The rise of board education and influence has created more robust mechanisms to govern corporations,

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 598.
142. *Id.*

while the mobilization of collective action by shareholder advisory groups, like the Canadian Coalition for Good Governance and the Institutional Shareholder Services Inc., has meant that that the institutional investors in Canada are a significant force to be reckoned with.[143]

Canadian common law has made the process of considering stakeholders in the best interests of the corporation more overt, well beyond what is assumed in Anglo-American corporate legal scholarship. Layered onto this corporate legal base, the securities commissions have provided other measures to bolster the field of corporate governance in Canada while seeking to protect the integrity of the capital markets and the interests of investors within those markets. These efforts, along with those from other organizations, have raised and normalized governance standards, created more robust checks and balances, and helped to develop a stronger voice in the corporate governance movement within the last several decades of Canadian history.

In summary, with respect to the directors' consideration of stakeholder interests specifically, these considerations are already required under Canadian laws. The directors' duties to the "best interests of the corporation" and strong minority stakeholder protections have already codified the importance of stakeholder considerations in Canadian statutes. For anyone that was doubtful of the impact of these existing laws, the decisions by the Supreme Court of Canada in *Peoples* and *BCE* have confirmed the notion that boards are to consider stakeholder interests in their decision-making. Indeed, leading practitioners across Canada have acknowledged that they are continually advising their clients to record evidence of the consideration of stakeholder interests, implementing a documentation process beyond what is required under the laws to better protect their clients from liability risks.

Since *BCE*, there has been a notable shift in the debates in Canadian corporate governance. Leading corporate law textbooks in Canada have been updated and revised to reflect the changing governance landscape after the SCC decisions.[144] The theme of the National Conference of the Institute of Corporate Directors, representing more than 9,000 directors across Canada, in 2012 was "Sustainable Development: Embracing Environmental, Social and Geopolitical Challenges Responsibly."[145]

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143. *Id.*

144. *See* POONAM PURI ET AL., CASES, MATERIALS AND NOTES ON PARTNERSHIPS AND CANADIAN BUSINESS CORPORATIONS (Thomson Reuters, 6th ed. 2016). The upcoming 2nd edition of ROBERT YALDEN ET AL., BUSINESS ORGANIZATIONS: PRINCIPLES, POLICIES AND PRACTICE is also being revised to account for those decisions and the shift in the Canadian governance landscape (this author is a co-author to the 2nd edition).

145. Press Release, Sustainable Development the Focus of 2nd Annual Institute of Corporate Directors National Conference, https://www.icd.ca/About-the-ICD/Media-Centre/ICD-News/Press-

These examples are but a few. The path that the common law is embarking upon is uncharted, and while practitioners continue to wrestle with the ramifications of the *BCE* decision, one thing seems certain: the Supreme Court of Canada has taken the concept of shareholder primacy and has stood it on its head.

III. WHY CANADA SHOULD NOT ADOPT THE BENEFIT CORPORATION

The implementation of a benefit corporation in Canada, when compared to several of the findings in Part II, raises some immediate concerns regarding redundancy when compared to Canadian corporate laws. The most significant legal innovation in the American benefit corporation is the requirement that directors consider stakeholder interests in their decision-making.[146] This feature echoes what is already available under Canadian laws, specifically under the requirement that directors manage the corporation in the "best interests of the corporation," the oppression remedy, and findings from the *Peoples* and *BCE* decision regarding the consideration of stakeholder interests.[147] Indeed, as indicated by the practitioners, the effect of the *BCE* decision has made this particular requirement to consider stakeholder interests much more potent, as directors feel the pressure to document and record evidence of the process they took to consider stakeholders' interests in their decisions.[148] On this requirement alone, the Canadian model of governance is already more stringent than this legal offering by the benefit corporation.

Numerous practitioners in the CFGR study cited how, in practice, the "best interests of the corporation" and consideration of stakeholders leads, more often than not, to the same conclusion that would be reached if directors' fiduciary duties were solely for the shareholders' best interests.[149] This would certainly be the case under the auspices of a benefit corporation as well, given the business case for considering stakeholders in order to improve long-term corporate performance. There are also those who would argue that the benefit corporation is better equipped to pursue a social value mandate when this pursuit runs against economic interests of the company. This may be correct, but not for reasons that have anything to do with the construction of the corporate laws. Flexibility in corporate decision-making in Canada was not lost on the senior practitioners in the CFGR study. The board is not confined to short-term

Releases/Sustainable-Development-The-Focus-Of-2nd-Annual-In.aspx [https://perma.cc/H5Z4-39T6].

146. *See supra* text accompanying note 42.

147. BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560 (Can.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461 (Can.).

148. Liao, *CFGR Study*, *supra* note 62, at 579.

149. *Id.* at 572–73.

profit or share value, nor required to consider only shareholders' interests. The board does not simply act as an auctioneer in the face of a takeover bid, as per *Revlon* in the United States,[150] but is required to determine what is in the best interests of the corporation. As for what equates to the best interests of the corporation, that is up to the directors to determine. The SCC also specifically validated the business judgment rule in *Peoples* and *BCE*.[151] This is in addition to the SCC's comment that directors are to look to the best interests of the corporation "viewed as a good corporate citizen."[152] If there is any legal import to be taken behind those words (and one day, there may), then in that sense, all Canadian corporations should be acting as benefit corporations.

There is also a need here to point out the differences from a private versus public company standpoint. A private corporation in Canada that falls outside the purview of the securities regulators has little to fear in pursuing a dual mandate. In its simplest form, as one practitioner put it, "that person can be the shareholder, director, president, and chief bottle washer . . . their interests are aligned with the company's interest so the better the company does, the better they do."[153] Closely held companies can pursue whatever mandate they want without conflict if there is agreement, and indeed, several practitioners in the CFGR study practicing in the private company sphere were clear that these companies had great flexibility to pursue profit-maximizing goals, corporate social responsibility, and entirely philanthropic and/or social goals, among other things. If a company elects to expand its shareholder base and cultivates it, there is little concern in pursuing a dual mission of economic and social value in its corporate pursuits.[154] Provided that the board's decision is within a range of reasonable alternatives, the court will always defer to that judgment. Directors pursuing dual mandates are well-protected under Canadian corporate laws.

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150. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, (Del. 1986).

151. *BCE Inc.*, 3 S.C.R., at para. 40; *Peoples Department Stores Inc.*, 3 S.C.R., at paras. 64–67.

152. *BCE Inc.*, 3 S.C.R., at para. 66.

153. Liao, *CFGR Study*, *supra* note 62 (unpublished notes with the author).

154. For added comfort, directors may be constrained using several legal tools to ensure the continuance of a social objective. As one practitioner noted:

> In a private corporation, you can put all kinds of constraints on the directors. You can use a unanimous shareholders' agreement or constrain them in the articles and bylaws and say, 'Look, we're the six shareholders and we don't want you to leverage this company over this ratio, and we're going to stick that in the bylaws….We're going to put a passage in the shareholder's agreement that you can't do that,' and they can't. The shareholders are able to step in the place of directors in a private company all they want.

Id. The practitioner went on to note this is not the case in a public company as the shareholders will keep changing. *See id.*

On the other hand, it is much harder for public companies to move away from focusing on shareholders' interests, which most often translates to meaning an increase in share value. This is due to a variety of reasons, including general competitive business pressures—directors are under much higher scrutiny and institutional shareholders hold considerable influence, among other things. These pressures tend to force companies to be drawn to the short-term bottom line, which, at times, is to a company's own detriment,[155] and there have been movements, led by organizations that hold considerable weight in Canada, to combat this type of short-term behavior.[156] Because the question being examined is in regard to the added value of implementing benefit corporation legislation in Canada, there do not seem to be any added legal features in the benefit corporation that would combat any of the pressures that exist for the regular Canadian public corporation. The Model Benefit Corporation Legislation requires a benefit director to be on the publicly traded benefit corporation's board—which one would assume is only meant to identify the specific tasks beholden to the benefit director and not the inherent reflection of a unique intent behind the benefit director's decision-making, as all directors are beholden to their fiduciary duties.[157] Other than this feature, there are currently no other protections offered to support the social benefit side of the benefit corporation in a public company context. The legislation is not equipped to counter the pressures that public companies face in the global capital markets. Section D of Part II touched upon how Canada's legal and regulatory landscape is in a theoretical conflict with the securities commissions, which have a significant voice in governance practices. By nature, these regulations are designed to protect shareholders, and shareholders' approvals on governance matters have grown considerably in the last few decades. Public benefit corporations would still be subject to rules regarding takeover bids and defensive tactics, including any sort of amendments. Benefit corporations would have the exact same issues as all other public companies in that regard.

As noted in Part I, Vermont's legislation does specifically state that directors, in considering the long-term and short-term interests of the benefit corporation, may determine that those interests "may be best

155. *See, e.g.*, John R. Graham, Campbell R. Harvey & Shivaram Rajgopal, *Value Destruction and Financial Reporting Decisions*, 62 FIN. ANALYSTS J. 27 (2006).

156. A few practitioners in the CFGR study mentioned the joint initiative between Mark Wiseman, the President and CEO of the Canadian Pension Plan Investment Board, and Dominic Barton, the Global Managing Director of McKinsey & Company, entitled *Focusing Capital on the Long Term*. *See* Dominic Barton & Mark Wiseman, *Focusing Capital on the Long Term*, HARV. BUS. REV., Jan.–Feb. 2014.

157. This is reflected in the model benefit corporation legislation, but not necessarily in every state benefit corporation's laws. *See Model Legislation*, *supra* note 36.

served by the continued independence of the benefit corporation."[158] The added statement may offer some solace if directors are particularly struggling in their decision and fear certain ramifications in the face of a takeover bid. From a corporate theorist's perspective, the added statement is not necessary as directors already have that right under Canadian laws. Practitioners in the CFGR study elaborated on how in select circumstances, even in a public company context, an alternative decision other than the highest bid offer, though rare, is already feasible in Canada.[159] Legal advisors would simply not recommend testing the parameters unless the conditions were right, but that is beside the point. There may be business reasons for inserting this language beyond what is necessary in the law, and that is understandable. It is just unclear if corporate legislation is the appropriate place for it as opposed to contractual means, as the board discretion already exists in Canada, and regardless, takeovers in a public company context would still be subject to the usual takeover bid rules issued by the securities regulators.

When the stakeholder requirements are stripped away from the benefit corporation structure, the remaining legal elements seem somewhat bare. The requirement that a benefit corporation create "a general public benefit measured by a third-party standard" seems impressive at first glance, but a cursory glance at the benefit corporations listed on the Benefit Corporation Information Center's directory indicates that there are would be very few businesses that consider themselves excluded from this standard.[160] How does the sale of pastries, for example, provide a general public benefit? How does a regular cleaning business (with no mention of anything publicly beneficial on its website, not even eco-cleaning supplies) create a public benefit? [161] One practitioner in the CFGR study mentioned Coca-Cola's somewhat counterintuitive campaign to fight obesity.[162] Could Coca-Cola be a benefit corporation? The "third-party standard" measure seems to be a low one. Any corporation that has embraced the CSR movement and adopted some form of CSR practices in their business can become a benefit corporation. Benefit corporations also have no legal features to combat the limitations in CSR. Empirical studies have shown that CSR trends have been consistent with theories of strategic CSR and rational, profit-seeking

158. VT. STAT. ANN. tit. 11A, § 21.09(F) (2011).

159. Liao, *CFGR Study*, *supra* note 62, at 580.

160. *Find a Benefit Corporation*, *supra* note 61.

161. This is not meant to single this company out, as it was one of several benefit corporations that had little evidence of any general or specific public benefit on its website.

162. *Coming Together: Help Us Fight Obesity*, COCA-COLA CO., http://www.coca-colacompany.com/press-center/press-releases/the-coca-cola-company-reinforces-its-commitment-to-help-america-in-the-fight-against-obesity [https://perma.cc/T96X-QZTN].

management decision-making.[163] "Greenwashing"—where companies spend significantly more time and money on green advertising rather than on environmentally sound practices—is a real concern.[164] There are no built-in legal mechanisms to prevent this type of corporate behavior in a benefit corporation beyond what is already available for regular Canadian corporations.

The trouble is that the benefit corporation's definition of a "general public benefit" fits perfectly into the dogma that has been at the core of modern economics since Adam Smith's *Wealth of Nations*, where he famously opined: "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[165] Smith's concept of the 'invisible hand' has resonated within the theoretical economic underpinnings of the corporation for some time now. It postulates that shareholders have powerful incentives to maximize the value of the firm and monitor corporate directors' and officers' conduct. Managers, as shareholders' agents, seek to maximize shareholder wealth through the increase of share value and dividend payments, which presumably includes ensuring that stakeholders are appeased[166] and ultimately translates into benefits to consumers and society as a whole. Charles Elson, an advocate of shareholder primacy in the U.S., stated: "It's politically correct to suggest that a company benefit the public rather than its investors. But investors are the public."[167] If indeed the proponents behind the benefit corporation believe the hybrid is offering something clearly different from the mainstream corporation, and presumably they do, their legal features need to be more explicit and set them apart from the classic economic definition of how business translates to public benefit. Of course, benefit corporations also have the option to include the requirement to produce a "specific public benefit" in their governing documents —but so can a regular Canadian corporation.

The last two elements of the benefit corporation to be discussed briefly are its benefit enforcement proceedings and its annual reporting

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163. *See, e.g.*, Donald Siegel & Donald Vitaliano, *An Empirical Analysis of the Strategic Use of Corporate Social Responsibility*, 16 J. ECON. & MGMT. STRATEGY 773 (2007); Ronald Fisman, Geoffrey Heal & Vinay Nair, *A Model of Corporate Philanthropy* (Columbia Business School, Working Paper No. 1331, 2007).

164. *See, e.g.*, Lorianne D. Mitchell & Wesley D. Ramey, *Look How Green I Am! An Individual-level Explanation for Greenwashing*, 12(6) J. APPLIED BUS. & ECON. 40 (2011).

165. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 18 (Edwin Cannan ed., Chi. Univ. Press 1977) (1776).

166. *See, e.g.*, REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 61–66 (Oxford University Press, 2nd ed. 2009).

167. Angus Loten, *Can Firms Aim to Do Good if It Hurts Profit?*, WALL ST. J., Apr. 11, 2013, at B6.

requirements. As discussed in Part I, directors in a benefit corporation have fiduciary duties only to those persons entitled to bring about a benefit enforcement proceeding against the benefit corporation. As seen in Section B of Part II, the benefit enforcement proceeding is less stringent than the Canadian oppression remedy, which is available to stakeholders against majority shareholders, and through derivative actions claims which can be made against directors for violating their duties to the corporation. This is in addition to protections under MI 61-101 in a public company context.[168] The legislation does indicate that proceedings can be brought against directors for failing to pursue a public benefit, but as earlier stated, there are inherent problems with the definition of public benefit, thus it would seem unlikely anyone would be able to bring a valid claim under that provision that would not already be captured under other tortious claims.

The annual benefit reporting requirement is certainly something that is not required of Canadian private companies. Public companies have their own disclosure requirements that presumably would capture much of the content within the benefit corporation's reporting requirements, but private companies do not have 'benefit' reporting requirements. Therefore, this legal feature does offer something that private Canadian companies seeking to pursue both economic and social value are not required to implement. However, it remains to be seen whether annual benefit reporting will include disclosures more substantial than puff pieces provided by the businesses to promote their brand as 'good' companies.

Overall, there is a concern that the benefit corporation may resort to a branding exercise if it is implemented in Canada. The value likely lies in the marketing and branding for 'do-gooding' corporations, not in making any legal sense as a distinct alternative to the mainstream corporate model. There are no meaningful teeth behind the benefit corporation legislation, and its offerings to Canadian corporate law are minimal. In fact, some of its standards are weaker, such as the minority protection statutes, which pale in comparison to Canada's oppression remedy. Even worse, the adoption of the benefit corporation may only confuse or misrepresent the current state of Canadian corporate law. If the hybrid is regarded as a clear alternative to the mainstream corporate model, there is a risk that entrepreneurs may erroneously think that they are not able to pursue both social and economic value in their businesses without running some sort of legal risk. That would hinder the very social goals that leaders behind the benefit corporation are presumably trying to achieve.

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168. *See* MI 61-101, *supra* note 95.

Of late, the Canadian federal government has made some significant moves to foster the burgeoning field of social enterprises. In 2016, the Ministry of Innovation, Science, and Economic Development provided the following definition on its website: "A social enterprise seeks to achieve social, cultural or environmental aims through the sale of goods and services. The social enterprise can be for-profit or not-for-profit *but the majority of net profits must be directed to a social objective with limited distribution to shareholders and owners*."[169] At the same time, the federal government began the development of a national Social Enterprises Directory on its Canadian Company Capabilities database.[170] Organizations that self-identify as social enterprises based on the Ministry's definition are permitted to register and be featured on the directory.

The definition provided by the federal government is, in most all respects, a higher standard of expectation on what constitutes a social enterprise when compared to the benefit corporation. Benefit corporations have no obligation to direct their net profits to a social objective. While their purpose is to create a "general public benefit," as aforementioned this broad definition can apply to a wide variety of businesses with little change to the status quo, and there are no restrictions on the amounts that boards can declare as dividends to their shareholders. How many current benefit corporations would fall under the ambit of Canada's definition of social enterprise? In providing a definition, the Canadian government has gone ahead and raised the bar on what kind of businesses should be self-labelling as social enterprises. This is how Canada is choosing to address this burgeoning field, and these are early days.

There are good reasons for Canada to wait and see how the benefit corporation fares in the longer term. Indeed, discussions are bubbling up in the United States as more practitioners are beginning to pay attention to the benefit corporation in states with "other constituency" statutes, among other nuances in its corporate laws.[171] This author suggests patience, further research, and a willingness from Canadian social leaders backing the benefit corporation to better understand the state of Canadian corporate governance and its trajectory given recent court decisions and emerging business megatrends. The American benefit corporation movement is designed to address American corporate governance needs for corporate

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169. *Directory of Canadian Social Enterprises*, GOV'T CAN., http://www.ic.gc.ca/eic/site/ccc_bt-rec_ec.nsf/eng/h_00016.html [https://perma.cc/L3MF-6KK3] (emphasis added).

170. *Id.*

171. Noam Noked, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012), http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/ [https://perma.cc/D69K-78AX].

reform and social progress. Within the global development of social enterprises and accompanying hybrid business laws, Canada needs a made-in-Canada approach.

CONCLUSION

The leaders of the B Corporation certification have made considerable strides within the United States to collect like-minded corporate leaders and bring them together to work towards improving the world in which we live. For their efforts, they should be commended. In only a short number of years, the B Corporation has managed to situate itself squarely within the niche of business law as it relates to the CSR movement. The B Corporation certification process carries with it many virtues in helping to improve the American business landscape, and hopefully it will have continued success.

B Lab's lobbying effort to create benefit corporation laws across the United States has been an interesting one, and rather remarkable given the number of states that have willingly adopted these laws. As for B Lab's past lobbying efforts to implement the benefit corporation in Canada, this Article has identified how some of B Lab's efforts may be misplaced and potentially detrimental to the legal development and progress in Canada, and could as well for other countries if tried there. B Lab should be cognizant of these risks as they champion American ideals of corporate goodness within other legal systems. Having the support of a handful of local advocates does not negate these risks, nor absolve B Lab from ignorance over local and national laws, customs, and culture.

Some clarifications need to be made at this point. While this author does not doubt the sincerity of the leaders of B Lab in improving the world, their eagerness to market benefit corporation laws worldwide needs to be tempered and carefully guarded against ethnocentrism. The goal is to change the corporate landscape and support businesses that govern themselves as they seek out ways to improve the world. B Lab has acknowledged that Canada is an important "market" for them as there are now more than 160 Certified B Corporations in Canada. B Lab has also indicated that the obligation to consider stakeholder interests must be 100% affirmed under Canadian law before they will allow Canadian companies to forego their article amendment process. When told of Canada's statutory requirement that directors exercise their fiduciary duties in the "best interests of the corporation," the oppression remedy and other minority protections, the Supreme Court of Canada's 2008 *BCE* decision, etc., B Lab's position did not change. It seems that the only way B Lab can be satisfied is if Canadian statutes provide language that mirrors the B Corporation's. This is problematic.

B Lab has also cited legal memoranda produced pro bono by Canadian lawyers verifying the B Corporation amendments as a reason it remains necessary. The nature of these memoranda are to respond to questions posed by B Lab, which presumably asks whether there were any inherent risks under Canadian law in requiring companies to adopt the language B Lab has offered. The affirmation that there is little risk does not in itself imply that the language is needed. Responding to a question on legal risk is far different than addressing the policy need and implications behind the implementation of particular laws.

While Canadian corporate laws are often quietly lumped together with American legal scholarship under the assumption that the fundamentals of Canadian governance mirror those in the United States, that is simply not accurate. Certainly, Canadian laws do have features that in many ways reflect and respond to those in the United States—but just as there are cultural similarities between the two nations, there are also stark differences.[172] These differences need to be taken into account before implementing American hybrid alternatives with features that are weaker from a social governance standpoint than Canada's existing laws.

There is one final point to consider regarding the future of the benefit corporation, and B Lab's ongoing pursuit of global influence and impact. This Article began with the statement that business law does not exist in a vacuum. On November 8, 2016, Canada and the rest of the world watched as American voters elected Donald Trump as their next President of the United States. As B Lab contemplates its next moves in the world, perhaps the organization should concentrate on its own American constituents, and prepare for the inevitable battles that are going to arise as their new President takes office. As a great deal of the country's reputational capital around the world will likely be the squandered over the next few years, this author hopes B Lab will be emboldened to take their lobbying clout and focus on protecting the environment, the marginalized, the weak, and those that become targets of hate under this new administration. To be complicit now would ring hollow B Lab's message to "use business as a force for good" and "B the Change."[173] Now is the chance for B Lab to take a more meaningful leadership role in good business in its own home country. Canada will be watching.

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172. *See, e.g.*, Ronald B. Davis, *Fox in S-OX North, A Question of Fit: The Adoption of United States Market Solutions in Canada*, 33 STETSON L. REV. 955, 981 (2004).

173. B CORPORATION, *supra* note 18.