

B Corps and Benefit Corporations in Canada: The Evolving Story

*For presentation at Ryerson University Institute for the Study of CSR
session on B Corps and Benefit Corporation Law, October 21, 2019,
Toronto, Canada*

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For-Benefit Corporations:

“**Benefit Corporation**” and “**B Corp**” are types of for-profit corporations committed to a “**Triple P**” bottom line of *people*, *profit*, and the *planet*.

In both forms the Corporation must commit to one or more specific public benefits.

B Corp Certification

B Lab is an international NGO that certifies for-profit companies that demonstrate their positive impact on society and the environment.

B Lab requires a corporation to amend its articles of incorporation so that the corporation “*shall*” take into account the interests of all stakeholders.

Difference Between B Corps and Benefit Corporations

B Corp:

Certification through third party certification (“B Lab”)

Certification requires:

- demonstrating a positive impact under B Lab’s rigorous B Impact Assessment
- legal structure that locks the mission into the company’s core

Can be revoked at any time by B Lab

Difference Between B Corps and Benefit Corporations

Benefit Corporation:

Status conferred by statute.

Existing companies can accomplish by amending their Articles of Incorporation.

New companies can incorporate as Benefit companies

What is the issue Benefit Corporations are responding to?

1. Let's give the corporation character.

Corporations are considered to be amoral actors and “***have neither bodies to be kicked nor souls to be damned***”.

2. It is good business.

Chief executive of BlackRock, *Annual letter to CEOs 2018* stated:

“To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society.”

What is the real issue from a legal perspective?

- The real issue is **Shareholder Primacy**-
- Shareholder Primacy is a real issue in the USA.
- Is it a real issue in Canada?
- Can directors practically choose the interests of stakeholders over the financial interests of shareholders?
- Would they if the articles were not explicit?

BCE v. 1976 Debentureholders (2008)

- Was BCE a Shareholder Primacy case where the SCC took the opportunity to make (new) law?
- “*act in the best interest of the corporation viewed as a good corporate citizen.*”
- Do we need legislation to clarify or codify BCE?

The Situation in Canada

- British Columbia first province to introduce B Corp legislation. Given royal assent in spring 2019 and to come into force by regulation
- British Columbia's Community Contribution Companies (CCC) and Nova Scotia's Community Interest Companies (CIC).
- Ontario so far elected not to adopt benefit legislation
- Changes to federal legislation: *Canadian Business Corporations Act* Bill C-97 assented to June 2019.

- **CBCA -Bill C-97** s. 141 - Now in force
Section 122
- Best interests of the corporation
- (1.1) When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation **may consider, but are not limited to**, the following factors:
 - (a) the interests of
 - (i) shareholders, (ii) employees, (iii) retirees and pensioners, (iv) creditors, (v) consumers, and (vi) governments;
 - (b) the environment; and
 - (c) the long-term interests of the corporation.

Issues being addressed in For-Benefit Legislation

	BC Legislation	Delaware	CBCA
<u>Include in Articles</u> Commitment to conducting business in a responsible & sustainable manner: 1. Promoting one or more public benefits 2. A public benefit means a positive effect on one or more categories of persons	Requires both	Requires both	<ul style="list-style-type: none"> • No need to amend articles to consider broader group of stakeholders, environment or long-term interests of corporation • No status as “public benefit” corporation • Can amend articles to include statement in objects or general provisions

<p>Is reduction of negative effects included in the definition of “public benefit”?</p>	<p>No</p> <p>"public benefit" means a positive effect, including of an artistic,</p>	<p>Yes</p> <p>"Public benefit" means a positive effect (or reduction of negative effects) on 1 or more categories of persons,</p>	<ul style="list-style-type: none"> • May take into account interests of other stakeholders • May word amendments to articles anyway they want
<p>“Balancing act”</p> <p>Is there now a new step for directors to document in terms of how they make their decisions?</p>	<p>Balance:</p> <p>Duty to comply with articles and business judgement plus act in accordance with articles</p>	<p>Balance:</p> <p>Balance stockholders’ pecuniary interests, best interests of those materially affected & public benefit identified in articles</p>	<p>Business judgment rule applies to decisions</p> <p>No independent requirement to balance</p>

<p>To whom is the duty owed?</p> <p>Is the business judgement rule intact?</p>	<p>Directors/officers have no duty to any person affected by or who has an interest in the public benefit, and no legal action may be commenced against a director or officer</p>	<p>Director <u>shall not have any duty</u> to any person on account of any interest of such person in the public benefit or public benefits if such director's decision is both <u>informed and disinterested</u></p>	<p>No changes in this regard –</p> <p>Oppression remedy available to broad group</p> <p>Business judgment rule intact</p>
<p>Separate reports</p> <p>Must make available to the public?</p>	<p>Assess performance against third party standard</p> <p>Post on publicly accessible website</p>	<p>Provide stockholders a statement as to corporation's promotion of public benefits at least biennially</p> <p>Articles <u>MAY</u> require a third party standard or certification</p>	<p>No reports</p> <p>Is it a requirement already of the auditor?</p>

Special Majority vote to change or remover public benefit company?	Yes	Yes	Yes to amend articles
Directors protected from actions related to public benefit duty?	<p>Yes</p> <p>Only shareholders can commence action</p> <p>Court cannot order monetary damages</p>	<p>Yes</p> <p>If decision is informed and disinterested</p>	<p>No change</p> <p>Existing law would presumably apply</p> <p>Oppression remedy</p> <p>Derivative action</p> <p>Statutory laws that apply to all corporations</p> <p>Is the liability a director or company liability?</p>

Amendments recommended by B Lab to be a B Corp

- B Corp certification is distinct from benefit corporation status under legislation. If future benefit corporation legislation takes a permissive approach in line with the CBCA and BCE **the B Lab standard would be a different standard.**
- 3. The directors **shall**, acting fairly and responsibly, consider the short-term and the long-term interests of the corporation, including, but not limited to, the corporation's shareholders, employees, suppliers, creditors and consumers, as well as the government and the environment (the "Stakeholders"), and the community and society in which the corporation operates, to inform their decisions.

Amendments recommended by B Lab to be a B Corp

- The following provisions are giving direction not only to the Board of Directors as to how to manage the relative interests but could be an asset in managing stakeholders' expectations.
 - *2. In discharging his or her duties, and in determining what is in the best interests of the corporation, each director may consider all of the Stakeholders (defined above) and shall not be required to regard the interests of any particular Stakeholder as determinative.*

Amendments recommended by B Lab to be a B Corp

- It is unlikely corporations will be afforded new protections at law by including the language of paragraphs 3 and 4 below in their articles.
 - *3. 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.*
 - *4. Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in enforcing his or her rights hereunder, and under provincial law and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a Change in Control Transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share.*
- Number 4 is not always included

Some Advantages :

As lawyers we change the articles while the business professionals change minds.

Companies can build corporate social responsibility (CSR) principles into their legal DNA.

Governments and corporations (both non-profit and for-profit) could partner in the delivery of social services utilizing the for-profit model.

Employees will choose their employer and take pride in and direction from the guiding mission of that employer.

Investors who want their money to have a positive impact on communities will have another tool for identifying companies of like mind.

Protect the mission and “Character of the Corporation”

Thank you