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PUBLICATION

# Corporate Social Responsibility Initiatives Becoming Common for Profit-Seeking Businesses

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*This article advances recent discussions of the legal steps that for-profit companies can take to evolve as socially responsible companies.**[1]** Socially-responsible companies strive to do more than simply earn a profit; they give attention to the:*

*(a) pursuit of the "Triple P" bottom line (profit, people and the planet);*

*(b) consideration by directors of more than just the interests of the shareholders when considering what is in the best interest of the corporation; and*

*(c) regard to both short and long-term interests by directors of the corporation, including benefits that may accrue to the corporation from its long-term plans.*

*Socially responsible companies give effect to such considerations without needing to give priority to any particular interest.*

*The developments in these areas represent corporate law intersecting with social, environmental, economic, cultural and global forces.*

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Corporate social responsibility (CSR) initiatives are becoming the status quo for most for-profit companies, including a large percentage of public companies.

Companies implement CSR for many good reasons but are often questioned about their motivations. However, it is possible to assume that companies are becoming more progressive because it makes business sense. Also, once these CSR programs are started, the irresistible spirit of competition and constant improvement takes over and responsible companies look to move to the next level.

It is becoming commonplace for for-profit companies to showcase and promote employee volunteerism, donations to charitable causes,[2] or to adopt corporate codes of conduct so businesses can be "winning with purpose".[3] As CSR initiatives develop, companies and investors evaluate how CSR can be measured in shareholder value as well as environmental and social contributions. While in some cases it may prove to be an incidental branding exercise, we cannot deny that many investors invest in companies with a high CSR ranking and consumers prefer to buy products and services from companies that have implemented programs to give back to society. CSR can also affect a number of other aspects that impact a business' bottom line such as culture, recruiting and employee retention, as many people prefer to work for socially responsible companies.[4]

What more can a company do to formalize its commitment to CSR and build it into the DNA of the company?

### B Corp Certification:

One option is for companies to obtain the B Corp designation. "B Corp" is a certification (much like LEED for buildings, or Fair Trade for coffee).[5] B Labs, a United States based non-profit operating in Canada and many other countries, began using the assessment system to accredit socially-conscious businesses. The certification gained significant traction and has become a highly recognizable symbol that a company has met rigorous standards of social and environmental performance, transparency and accountability. Traditional corporations can receive the B Corp designation by meeting performance standards and transparency requirements related to factors such as governance, work environment and community service.[6] Online arts and crafts marketplace Etsy Inc., for instance, obtained the B Corp certification due to its demonstration of commitment to its employee welfare.[7] In 2015, Etsy Inc. was the second B Corp to go public, with an IPO valuing the company at $3.38 billion.[8]

### Benefit Corporation:

Another option, known as the "benefit corporation", "public benefit corporation" or "PBC", is available in several jurisdictions, but not yet in Canada. In a previous paper we discussed the benefit corporation, a company that has one or more public benefit purposes built right into its articles of incorporation.[9] It allows officers and directors to take responsibility for an explicit public benefit purpose in the operation of their businesses, while measuring the company's impact and concurrently making a profit.[10] The benefit corporation serves as a for-profit model which enables a company to pursue profit-generating activities while contemporaneously promoting positive effects on society and the environment through a stated public benefit purpose.[11]

Benefit corporations are not subject to the types of restraints that non-profits and charities face (such as asset locks and dividend restrictions). Their directors and officers are free to pursue goals outside of profit-maximization without fear of potential liability for doing so.

To date, 30 U.S. states and the District of Columbia have enacted legislation permitting the incorporation of benefit corporations.[12] There are now over 500 registered benefit corporations

in the U.S.[13] On July 17, 2013, Delaware became the 19th state to enact benefit corporation legislation. This is significant as Delaware is home to most venture-backed businesses, 50 per cent of all publicly-traded companies, and 64 per cent of the Fortune 500.[14] It is one of, if not the most, important states for businesses that seek access to venture capital, private equity, and public capital markets. As a result, it must be considered that there exists a demand for benefit corporations among the millions of for-profit businesses.

For example, Kickstarter and Patagonia have each adopted the benefit corporation model under Delaware law[15] and, in 2013, Plum PBC, a healthy baby food company, became the first PBC wholly-owned by a publicly-traded company (when it was acquired by the Campbell Soup Company).[16] Laureate International Universities, the world's largest for-profit network of degree-granting higher education institutions is getting ready to implement the first public offering by a chartered benefit corporation.[17]Laureate registered as a benefit corporation and has also signed up for B Lab's social audit program. The growth and interest from small private companies to large public companies make it clear that benefit corporation legislation is addressing an unmet need.

### What to do in Canada:

Under Delaware law it might be said that directors can consider whatever they want as long as such considerations are in the best interests of the shareholders. That is why there is a need for benefit corporation legislation in the USA. Under Canadian law, Canadian corporations can probably pursue social and environmental objectives in addition to shareholder profit without amending their articles, as reflected in the *BCE Inc. v. 1976 Debentureholders* decision of the Supreme Court of Canada. Consequently, for-profit corporations can (and in some cases must) consider stakeholders other than shareholders without further legislative changes.

We prefer the approach that expressly gives entrepreneurs and corporations clarity of purpose and a level playing field. For this reason, it should be uncontroversial to implement the changes to allow for the benefit of the corporation model. However, so far in Canada there is no constituency big enough or motivated enough to effectively lobby for change to the corporate laws and adopt benefit corporation legislation.

The vast majority of companies in Canada have articles with no limits on their business purposes. They can carry on any legal business and are subject to the same regulations that affect all businesses. Some lawyers would point out that placing restrictions in the articles on the business that the corporation may carry on could expose directors and officers to increased risk of being held liable for actions which could be considered "ultra vires" the corporation (meaning the corporation carried on a business or exercised powers beyond those explicitly allowed in its articles). However, if a corporation is acting in a manner consistent with the purposes stated in its articles, the risk that a claim may be brought forward by stakeholders (including non-shareholders) is mitigated. The inclusion of an explicit statement of the corporation's purposes in its articles will make it more difficult to argue that the corporation did something the shareholders or other stakeholders did not expect.

Corporations can therefore amend their articles to explicitly mandate the requirement to consider certain social and environmental factors in the operation of the business. B Labs encourages corporations to amend their articles of incorporation to include committing to public purposes in order to maintain B Corp certification. The suggested language varies depending on jurisdiction.[18]

A corporation could also elect to incorporate subsidiaries in jurisdictions such as Delaware where public benefit corporations are possible.

Other types of socially responsible enterprise models have been introduced in Canada such as British Columbia's Community Contribution Companies (CCC) and Nova Scotia's Community Interest Companies (CIC). While CIC legislation in Nova Scotia is proclaimed, it is not yet in force.[19] British Columbia's CCCs have elements of for-profit share capital companies and the social benefit purposes of a traditional non-profit entities. The CCC model was initiated in response to an "emerging demand for socially focused investment options."[20] As of February 2016, 33 CCCs had been incorporated in British Columbia.[21]

In addition, the UK has "CICs", a legal form of company, which are regarded as social enterprises. At its core, a CIC is a company that fulfills a community purpose.

B Corps were launched officially in the UK in September 2015, where 62 companies "changed their legal DNA" so their social purpose would rank alongside shareholders in decision-making processes.[22] The UK B Corps have combined revenues of close to half a billion pounds and represent 13 industries.[23]

It seems that up to now the B Corp certification and the incorporation as a benefit corporation have been best suited to private, closely held corporations. Systemic, institutional, legal and practical hurdles make it difficult for publicly held corporations to commit to B Corp certification and the prospects of changing the articles of a public company are daunting. Mandatory language in the articles that says a corporation "shall" take into account certain public benefit purposes as opposed to a more permissive "may" leads to further reflection and resistance.

### What can public companies do?

B Labs has established a Multinationals and Public Markets Advisory Council (MPMAC),[24] an advisory group to assist multinational and publicly traded companies in their aim to becoming B Corps and pursuing official social missions.

The pressure of meeting short-term profit estimates is a big hurdle for public companies seeking to advance a long-term strategy that may include one or more public benefit purposes aligned with robust CSR initiatives. Laureate's founder and CEO, Doug Becker believes in a principle that has a lot of supporters and reflects a popular view. He has stated that "[w]ith the benefit of a long-term view, we will balance the needs of stockholders with the needs of students, employees and communities in which we operate, and we believe that this approach will deliver the best results for our investors."[25]

Environmental, social and governance rankings and ratings (ESG) for public companies are not new. These rankings are tools for investors and advisors who are looking for credible, socially responsible companies that earn profits. Investors and companies are taking further steps to promote the consideration of both long term and short-term interests of corporations. A recent example is the launch of the S&P Long-Term Value Creation (LTVC) Global Index. The S&P LTVC Global Index is intended to measure stocks ranking highly in global equity markets, using both proprietary sustainability and financial quality criteria. The S&P LTVC Global Index combines qualitative and quantitative measures that assess the potential for long-term value addition.[26] The S&P LTVC Global Index is aimed at identifying companies having both "sustainability and quality" which leads to above average odds of long-term value creation.[27] The S&P LTVC Global Index chooses from stocks ranking in the top 50 per cent of both their respective current RobescoSAM[28] economic dimension score and their S&P Quality score[29] (which is averaged over the last three to five years).[30] This should result in increased awareness and competition among companies to qualify as tops in both sustainability and financial quality.

## Conclusion:

Companies that are in tune with their communities, employees and shareholders will reap the benefits of the increasing opportunity found in pursuing a Triple P bottom line. Formalizing CSR initiatives and committing them to the company DNA by taking further legal steps is the next challenge for private and public companies. As you can see, there are a number of alternatives for companies to consider allowing them to develop and promote CSR initiatives.

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[1] See, Dennis Tobin and Lauren Dalton, “The Rise of the For-Profit, Socially-Responsible Corporation in Canada” *Blaney McMurtry LLP* (29 May 2015), online: <http://www.blaney.com/articles/rise-profit-socially-responsible-corporation-canada>.

[2] Verizon matches employee financial donations to qualified organizations, Deloitte allows employees to lead conferences that provide training on volunteerism, and Dell’s Social Innovation Challenge provides funding and mentorship to college students to further projects that solve social problems, to name a few. See, Lexie Forman-Ortiz, “Top 10 Corporate Social Responsibility Initiatives” *Smart Recruiters* (8 February 2013) online: <http://www.smartrecruiters.com/blog/top-10-corporate-social-responsibility-initiatives/>.

[3] Jo Confino, “Paul Polman: 'The power is in the hands of the consumers'” *The Guardian* (21 November 2011), online: < http://www.theguardian.com/sustainable-business/unilever-ceo-paul-polman-interview>.

[4] Jen Friedman, “The Benefit Corporation: A Tool For Building a Sustainable Brand” *CMO Insider* (22 April 2015), online: <http://www.cmo.com/articles/2015/4/20/the-benefit-corporation-a-tool-for-building-a-sustainable-brand.html>.

[5] See for definitions, Dennis Tobin and Lauren Dalton, *supra* note 1.

[6] See B Corporations, *What are B-Corps?*, online: B Corporations <https://www.bcorporation.net/what-are-b-corps>; See generally, *B Impact Assessment*, online: <http://bimpactassessment.net/>.

[7] including giving  all employees 40 hours of paid volunteer time every year, paying employees more than 40 percent above the local living wage, and covering 80 percent of workers' health insurance premiums. See, Alex Barinka, “Etsy's IPO Is a Direct Challenge to Wall Street's Beliefs” *Bloomberg Business* (2 April 2015), online: Bloomberg <http://www.bloomberg.com/news/articles/2015-04-02/etsy-s-ipo-is-a-direct-challenge-to-wall-street-s-beliefs?cmpid=BBD040215>.

[8] Bradley Dale, “Over Etsy’s B-Corp status, who will bend: B Lab or Etsy?” *Technically - Brooklyn* (16 March 2015), online: Technically <http://technical.ly/brooklyn/2015/03/16/etsy-ipo-b-corp-status/>.

[9] *Supra* note 1.

[10] Dennis Tobin, “The Evolution of the Corporation: The Public Benefit Corporation” *Blaney's on Business* (August  2013), online: Blaney McMurtry LLP.

[11] *Supra* note 1.

[12] Benefit Corporation, *State by State Status of Legislation*, online: B Lab <http://benefitcorp.net/policymakers/state-by-state-status>.

[13] B Corporations, *supra* note 6.

[14] See State of Delaware, *Division of Corporations: About Agency*, online: State of Delaware <https://corp.delaware.gov/aboutagency.shtml>. See also, Christopher Wink, "64% of Fortune 500 firms are Delaware incorporations: here's why" *Technically Delaware* (23 September 2014), online: <http://technical.ly/delaware/2014/09/23/why-delaware-incorporation/>.

[15] Strickler Y., Chen P. and Adler C., "Kickstarter is now a Benefit Corporation" *Kickstarter* (21 September 2015), online: <https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation>.

[16] B Corporations, *Plum Organics*, online: B Corporations <https://www.bcorporation.net/community/plum-organics>; See also, Alicia E. Plerhoples, "Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?" (2014) 14 UC Davis Bus L J 247 at 265-266.

[17] Brad Edmondson, "The First Benefit Corporation IPO Is Coming, And That's A Big Deal" *Triple Pundit* (4 February 2016), online: <http://www.triplepundit.com/2016/02/first-benefit-corporation-ipo-coming-thats-big-deal/>.

[18] Benefit Corporation, *Corporation Legal Roadmap*, online: B Lab.

[19] Nova Scotia passed Bill 153, *An Act Respecting Community Interest Companies*, 4th Sess, 61st Gen Ass, Nova Scotia, 2012 (assented to 6 December 2012), SNS 2012, c 38, allowing for a share capital company known as a CIC in December 2012.

[20] Ministry of Finance, *Community Contribution Companies*, online: British Columbia <http://www.fin.gov.bc.ca/prs/ccc/>.

[21] Confirmed via e-mail from the BC Registry Services, 2 February 2016.

[22] Corps in the UK, "What does this look like in the UK?" *B Corporations*, online: <http://bcorporation.uk/b-corps-in-the-uk>.

[23] *Ibid*.

[24] E Freeburg, "Unilever, Multinationals and the B Corp Movement" *The Blog* (29 September 2015), online: B Corporations <http://www.bcorporation.net/blog/unilever-multinationals-and-the-b-corp-movement>.

[25] *Supra* note 17.

[26] *S&P LTVC Global Index*, "Factsheet" (January 2016), online: S&P Dow Jones Indices <http://us.spindices.com/indices/strategy/sp-ltvc-global-index> (see fact sheet).

[27] "Methodology", *ibid* at 3.

[28] The RobescoSAM Corporate Sustainability Assessment consists of an in-depth analysis featuring around 80-120 questions on economic, environmental and social factors relevant to the respective company's financial success.

[29] Derived from the stock's return-on-equity, accruals ratio and financial leverage ratio.

[30] *Supra* note 28.