

# Privately-Owned Companies in Canada Currently Best For Public Benefit Missions

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*Over the last decade, there has been considerable discussion of the idea of benefit corporations, which aim to generate social benefit as well as financial profit, and which embed these aims in their articles of incorporation. Enabling legislation to allow for-profit corporations to have such articles has been enacted in the United States, but not in Canada. In this review article, Laina Smith of Blaney McMurtry's corporate/commercial practice group identifies a number of legal and practical impediments to public companies becoming benefit corporations. The story with privately-owned enterprises, Ms. Smith indicates, is different, and she sees them as a "good place to gain traction."*

For-benefit corporations may, some day, offer Canadian for-profit corporations a formal vehicle for pursuing the next stage in their corporate social responsibility programs. In the last decade, for-benefit corporations have emerged in the USA and other jurisdictions (generally under the name "benefit corporations") as corporations whose purpose is to pursue a profit in a more sustainable and responsible way.

For-benefit corporations are a modification of for-profit corporations committed to a "triple P bottom line" -- people, profit and the planet. When people think about for-profit corporations, maximizing profit is top of mind. At the other end of the spectrum are charities or not-for-profit corporations, which are focused on a social benefit. For-benefit corporations occupy the space on the spectrum between share capital, for-profit corporations and non-share capital, not-for-profit corporations and charities.

In Canada, forms of for-benefit corporations have been enabled by new legislation in British Columbia and Nova Scotia.<sup>[1]</sup> Nova Scotia's legislation came into force in June, 2016 and allows for the incorporation of a Community Interest Company (CIC). British Columbia enacted

legislation in 2014, enabling the incorporation of a Community Contribution Company (C3). To date, there have been five CICs incorporated in Nova Scotia and 70 C3s incorporated in BC.

Both BC and Nova Scotia enacted new legislation, rather than amend existing corporate legislation, to provide for a hybrid, for-profit form of corporation which has some elements of a not-for-profit, much like the legislation for Community Interest Companies in the UK. They require that a corporation have a community purpose set out in its articles that is beneficial to either society at large or a segment of society.<sup>[2]</sup>

However, both provinces restrict the ability of a corporation to distribute profits to shareholders and include an asset lock. These types of restrictions make for-benefit corporations in these jurisdictions more akin to not-for-profits than to for-profit corporations. They do not allow for established for-profit corporations to modify their mission and maintain their existing corporate identity and businesses.

Allowing for-profit corporations to amend their articles and continue as for-benefit corporations is key to benefit corporation legislation in the USA. It is also the practical reason why thousands of companies have taken up the social purpose mantle in the USA and continued as benefit corporations, while fewer than 80 companies have taken advantage of the BC and Nova Scotia legislation and formed new corporations.

So where do we stand legally in Canada now? There is no for-benefit, corporate legislation in Canada that expressly allows for existing, for-profit corporations to adopt a particular or general social mission. While we wait for that legislation, there is nothing but uncertainty preventing a for-profit corporation that wants to also be known for its social mission to amend its articles by adding a social mission.

A corporation can do a couple of things while we wait for Canada and the provinces to adopt true for-benefit legislation. They can apply to B Lab for B Corp certification. This certification is conferred by B Lab, a non-profit, and requires a corporation to pass a rating system as well as eventually amend its articles.<sup>[3]</sup> Certification is key to transparency which, together with performance and accountability, is one of the key foundational principles of the benefit corporation movement.

Amending a corporation's articles under the *Business Corporations Act* (Ontario) and the *Canadian Business Corporations Act* to add or remove a social purpose requires a special resolution of the corporation's shareholders passed by at least two-thirds of the votes cast at a special shareholder meeting.<sup>[4]</sup>

As of December 2015, of the million or more businesses that employ people, small businesses made up 97.9 per cent, medium-sized businesses made up 1.8 per cent and large businesses made up 0.3per cent.<sup>[5]</sup> For-benefit corporations are well-suited to private companies compared to public companies which may have thousands of investors holding a minority stake, many of whom may not understand or support changing the articles to reflect the corporation's social mission.

Since the Canadian marketplace is largely composed of private companies, this is a good place to gain traction while some of the bigger issues are worked out in the public company forum.

Also, the difficulty of doing things in the public, for-profit forum can lead to half measures which can have predictable consequences.

Two recent examples come to mind of public companies that were publicly committed to making a profit and having a social mission but had not worked out amending their articles with their shareholders to reflect their social benefit mission.

One example is Etsy, an online retailer that describes itself as "the global marketplace for unique and creative goods... from handcrafted pieces to vintage treasures." Although Etsy became a certified B Corp in 2012, it never amended its articles to reflect its social benefit mission. It was reported that, in 2017, a small hedge fund owning shares in Etsy criticized the corporation for its sales growth deceleration and requested that Etsy explore strategic alternatives.<sup>[6]</sup> The New York Times reported that some major changes subsequently occurred at Etsy including replacing the CEO, laying off employees, dismantling the team which oversaw Etsy's social and environmental efforts and changing the corporation's mission statement.<sup>[7]</sup>

In November 2017, Etsy announced that it would not be changing its corporate structure "because converting is a complicated and untested process for existing public companies."<sup>[8]</sup> Etsy subsequently gave up its B Corp certification.

If Etsy had found a way to convince its shareholders and investors of the financial logic of its mission and amended its articles to become a benefit corporation, this story may have ended differently. If that had happened, a vote of the shareholders would have been needed to change Etsy's status as a benefit corporation. Perhaps the shareholders would have refused the original request by management to amend the articles to add the social mission or, if they had approved it, perhaps the new management would not have been able to easily remove the social mission.

Similarly, in the spring of 2017 it was reported that a hedge fund holding shares in Whole Foods announced it was going to pressure the corporation to speed up a turnaround and consider a sale.<sup>[9]</sup> Amazon ultimately acquired Whole Foods in what seemed to be a friendly deal. At B Lab's B Corp Champions Retreat in Toronto this past October, Whole Foods Market CEO John Mackey wondered what would have happened if Whole Foods was a benefit corporation when shareholder activists wanted to force the corporation into a sale.<sup>[10]</sup> He pointed out that none of the other values of Whole Foods mattered to the activist shareholders other than money, profits and how to get a few more dollars out of the stock price.<sup>[11]</sup> He believed that the shareholder activists would do whatever it took to get this, even if the corporation was destroyed in the process.<sup>[12]</sup>

Legislation in Canada that permits for-profit companies to adopt a social mission while continuing their business and for-profit model will go a long way to solving some of the uncertainty for companies that want to take further steps in their commitment to corporate

sustainability and responsibility. However, this article discusses only a few of the issues and directors and management of companies considering adding a social mission to their articles in Canada should seek legal advice.<sup>[13]</sup>

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[1] *Business Corporations Act, [SBC 2002], c 57, Part 2.2 [BCA]; Community Contribution Company Regulation, BC Reg 63/2013 [CCC]; Community Interest Companies Act, SNS 2012, c 38; Community Interest Companies Regulations, NS Reg 121/2016 [CIC].*

[2] *Ibid; BCA, supra, note 1; CCC, supra, note 1.*

[3] *D. Tobin and L. Dalton, The Evolution of the Corporation: The Public Benefit Corporation (28 August 2013) online: Blaneys on Business <<http://www.blaney.com/articles/the-evolution-of-the-corporation-the-public-benefit-corporation>>.*

[4] *Canadian Business Corporations Act, RSC 1985, c 44, ss 2(1); Business Corporations Act (Ontario), RSO 1990, c B 16, ss 1(1).*

[5] *Innovation, Science and Economic Development Canada, "Key Small Business Statistics" (June 2016) online: Innovation, Science and Economic Development Canada <<https://www.ic.gc.ca/>>.*

[6] *Gelles, David, "Inside the Revolution at Etsy" (25 November 2017) online: The New York Times <<https://nyti.ms/2i4GjKE>>.*

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] *Coen Gilbert, Jay, "Panera Bread CEO and Cofounder Ron Shaich Resigns To Join the Conscious Capitalism Movement" (13 December 2017) online: Forbes <<https://forbes.com>>.*

[11] *Ibid.*

[12] *Ibid.*

[13] *D. Tobin, L. Dalton and D. Jaswal, "Corporate Social Responsibility Initiatives Becoming Common for Profit-Seeking Business" (2 March 2016) online: Blaneys on Business*

<http://www.blaney.com/articles/corporate-social-responsibility-initiatives-becoming-common-for-profit-seeking-businesses>.