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PURPOSE-DRIVEN COMPANIES AND THE REGULATION OF THE FOURTH SECTOR IN IBERO-AMERICA

CANADA JURISDICTIONAL REPORT

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Purpose-driven companies and the regulation of the fourth sector in Iberoamerica
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• PRESENTATION •

The research project "**Purpose-driven companies and the regulation of the Fourth Sector in Ibero-America**" is part of an inter-institutional effort involving the Ibero-American General Secretariat (SEGIB), the United Nations Development Program (UNDP) and the International Development Research Centre (IDRC).

The project has its origin in the results of a previous research developed by SEGIB (*Fourth Sector companies and the SDGs in Ibero-America, 2020*), through which we analyzed the impact that purpose-driven companies have on the 2030 Agenda. In that study we were able to determine that one of the conditioning factors for the development of these companies is precisely the accompaniment of legal frameworks appropriate to the dual business objective that they present: that on the one hand they seek to be financially profitable, but at the same time they seek to attack and solve social and environmental problems.

Indeed, the evidence gathered in this study showed that there are companies in the region that have owed their creation and development to new regulations that have served to support the purpose, but at the same time, many others have not had this legal and regulatory support and have been constrained by regulations that have been created for traditional companies that only aim to maximize profits in the short term.

In short, what this finding tells us is that it will be difficult to see a true entrepreneurial ecosystem flourish for these companies if there is no public impetus through appropriate policies for this type of corporate model. In the same way, we will hardly reach 2030 with the Sustainable Development Goals (SDGs) fulfilled, since the contribution and commitment of public administrations and the multilateral system is not enough.

Fortunately, this research project sheds light on how to aim for adequate regulation and allows us to propose concrete measures to Ibero-American governments aimed at creating a fairer, more resilient and sustainable business sector. To this end, we have developed an extensive body of documentation that includes the **United States** report to find learnings of such jurisdiction. Finally, it includes the study of 4 key transversal axes for the development of purpose-driven enterprises (certification models, fiscal frameworks, sustainable public procurement and gender perspective).

Some Ibero-American countries have already taken significant steps in the regulation of purpose-driven enterprises; others are currently debating in legislative and executive bodies how to promote their development; while there are still several countries that have not yet initiated these processes of reflection on corporate purpose.

The idea of this paper and the research project in which it is framed, is to accompany this process and demonstrate that companies that pursue a triple economic, social and environmental impact in the Ibero-American region, do not find their obstacles in the ability of entrepreneurs to create companies with a different DNA, but in the lack of appropriate regulation for them.

Luis Fernando Pizarro García
Fourth Sector Project Director
Ibero-American General Secretariat

• ACADEMIC COORDINATOR •

Juan Diego Mujica Filippi

Juan Diego is a Peruvian legal scholar interested in studying purpose-driven companies and designing legal frameworks for them to thrive and contribute to the SDGs. He holds and LL.M. from Harvard Law School where he specialized in for-benefit organizations and corporate responsibility.

Juan Diego serves as the academic coordinator of the international research project "Purpose-driven companies and the regulation of the fourth sector in Ibero-America", sponsored by the Ibero-American General Secretariat (SEGIB), the United Nations Development Program (UNDP) and the International Research Development Centre (IDRC). He is also the academic lead of the "Legal Innovation for Sustainable Development" project at Universidad de Lima's Sustainability Center, where he also teaches Corporate Law.

• DISCLAIMER •

The views, information and opinions expressed in this report belong solely to the authors, and do not necessarily reflect the official policy or position of any other agency, organization, employer or company. These views are subject to change, revision and rethinking at any time.

The authors have created this guide purely to inform and to assist its readers in learning more about purpose-driven companies in the United States and provide an overview only. This report does not provide legal information on all corporate forms available and is current as of April 2020 only. The authors neither verify the accuracy of, nor assume liability for, the information within the report.

This report does not constitute legal advice and should not be relied on as such. Readers seeking to act upon any of the information contained in this report are urged to seek individual advice from legal counsel in relation to their specific circumstances.

• AUTHOR •

Malcolm Rogge

Dr Malcolm Rogge (SJD Harvard Law School) is a Lecturer (Assistant Professor) in Business & Human Rights and Corporate Law, Corporate Governance & Sustainability at the University of Exeter Law School. Previously, he was a Research Fellow of the Corporate Responsibility Initiative of the Mossavar-Rahmani Center for Business and Government at the Harvard Kennedy School. He is a recognized expert in the field of Business and Human Rights Law and an international award-winning documentary filmmaker. His feature documentary film Under Rich Earth (2008), about a mining conflict in Ecuador, is regarded as a "classic example for companies on how not to handle community relations." His articles and essays have been published in a wide range of sources, including the Harvard Law School Forum on Corporate Governance, the Notre Dame Journal of Law, Ethics and Public Policy, the Fordham Journal of Corporate and Financial Law, the Canadian Journal of Development Studies, and the Texas International Law Journal. Dr Rogge is a Barrister and Solicitor of the Bar of Ontario, Canada.

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INTRODUCTION

This Canada jurisdictional case study is part of a series of reports which aim to support the development of "purposeful business models" and "fourth sector" entities in the Americas and around the world. The intent is to drive change in the private sector and, ultimately, to enhance the private sector's contribution toward the realization of the United Nations Sustainable Development Goals (United Nations, 2015). These reports aim to contribute to wider discussions about the role of "purpose-driven" companies and "dual purpose" entities in efforts to address urgent problems of people and planet (see, for example, Mayer, 2018; British Academy, 2021). Broadly speaking, "fourth sector" entities pursue dual objectives of making a profit and directly contributing a benefit to society (Ibero-American General Secretariat [SEGIB], 2021). This jurisdictional case study provides an overview and contextual analysis of the diverse range of fourth sector companies and "purpose driven" entities that exist in Canada, including novel "hybrids," such as community interest companies and community contribution companies. In hybrid business entities, primacy in decision making is not given to increasing value for investors; rather, the decision makers strive to contribute to a social benefit or to a community cause as an end in itself. Whereas the "enlightened shareholder" approach to decision making in for-profit corporations aims to draw instrumentally on the insights of stakeholder theory for the long-term benefit of shareholders (Jensen, 2010), the decision makers of hybrid companies consider the interests of non-shareholder stakeholders in their own right.

A key finding of this report is that there exists a lively debate within Canada about whether the introduction of benefit companies and hybrids into the Canadian legal landscape helps to drive the private sector toward social and environmental sustainability, or whether they potentially distract from ongoing progressive efforts to reform Canada's "traditional" corporate law. The report also finds that there is a debate among scholars, practitioners, and policy makers about whether the introduction of fourth sector entities meets a genuine need in the Canadian populace and whether such initiatives ought to be expanded. The report finds that the future role of fourth sector entities in Canada is, in fact, highly contested; indeed, the debate is quite polarized. This divide arises, in part, because of ambiguities in Canadian corporate fiduciary law. Therefore, this report includes some detailed discussion of the nuances of Canadian fiduciary law and recent developments in the law that are directly relevant to the role of fourth sector entities and social enterprise.

The report adopts a broad definition of the terms "fourth sector" and "purpose-driven companies," as

well as the concept of "social enterprise." Generally speaking, the idea of social enterprise is loosely defined. It has no fixed legal structure and has developed organically, in a variety of forms, over several decades. In this report, social enterprise is considered to include a wide range of economic and business activities, including those carried out by not-for-profit organizations, charities, cooperatives, and for-profit companies, including First Nation economic development corporations. Social enterprise also includes novel hybrid entities that have been introduced into the landscape over the last decade, such as community interest corporations (CICs), community contribution companies (C3s), and benefit corporations. The breadth of what may be considered a social enterprise is reflected in a definition coined by the Canadian Task Force on Social Finance (2010). The Task Force defined social enterprise as "any organization or business that uses the market-oriented production and sale of goods and/or services to pursue a public benefit mission" (p. 32).

From a conceptual standpoint, this report draws on the notion that purpose-driven companies, social enterprises, hybrids, and fourth sector entities operate within what is regarded as the "social economy" (Markey et al., 2011, p. 8). The social economy is comprised of "the myriad not-for-profit activities and enterprises that harness civic and entrepreneurial energies for community benefit right across Canada" (Clarkson, 2004). Generally, it is thought that "the primary concern of social enterprises is not the monetary profit that their commercial activities generate, but rather the underlying social and/or environmental mission which propels their operations and gives their raison d'être. Without this mission they would not be a social enterprise" (Gheorghe, 2021, p. 13). In Canada, there is a wide spectrum of "dual-purpose" and "purpose-driven" social enterprises. Some of these are dedicated solely to achieving a social purpose (such as charitable organizations) while others seek to balance profit making with contributing to a defined community benefit (such as benefit companies).

Ultimately, the report concludes that there is no single purposive business model or fourth sector entity form that will, on its own, drive private investment and enterprise toward more socially and environmentally sustainable outcomes. As with all complex and systemic problems in the world, there is no "silver bullet" waiting to be found. In Canada, many fourth sector entities are experimental in nature. This report concludes that such experimentation is valid and positive, if imperfect. While there is indeed the risk that the introduction of novel entity forms could distract from larger progressive corporate reform efforts, there are also countervailing, positive aspects of this experimentation. The design and implementation of benefit companies and hybrid entities contributes to a much-needed process of democratic deliberation over the role of the private sector in addressing urgent local, national, and global challenges with regard to people and planet. As an example of how this deliberative process occurs, Markey et al. (2011) observe that the introduction of hybrid and other structures such as benefit corporations have "provided useful comparative platforms from which to identify possible characteristics and implications associated with regulatory change in Canada" (p. 20). Imperfect though they may be, the creation of fourth sector entities, including benefit companies, plays a useful

role within the iterative and discursive political process of aligning economic law with visions for sustainable development and a healthy planetary environment.

In one key respect, this report differs from other jurisdictional reports in this series inasmuch as it takes the time to address specific issues that concern First Nation Indigenous communities in Canada. Due to unique features in Canadian law, including the ongoing impact of Canada's colonial-era *Indian Act* (which remains in force today), the usefulness for First Nations of purpose-driven entities, such as community interest companies and benefit corporations, is not always clear. For First Nation communities and individuals, deliberations over whether to use these entities involves an additional layer of legal analysis related to the unique position of First Nations within Canada's constitutional framework. For instance, the complex interaction of Canada's colonial-era *Indian Act* and the country's tax laws give rise to legal questions and dilemmas that First Nations (as well as their clients and business partners) must contend with. While a full treatment of these special considerations is beyond the scope of this report, some issues will be introduced and discussed briefly. One of the key recommendations of the report is that further research ought to be conducted in the Ibero-American context to examine how fourth sector enterprises, including benefit companies and hybrids, may address the socioeconomic needs and unique legal position of First Nations and other Indigenous communities in the Americas. Further, such research must include the direct involvement and participation of the affected groups.

In terms of methodology, this report takes the view that the role and efficacy of purpose-driven companies and fourth sector entities in Canada must be examined according to how they fit within the larger existing ecosystem of organizational law in Canada. In other words, to assess the potential contribution of these organizations to sustainable development, it is necessary to assess carefully how they compare to, and complement, Canada's "traditional" for-profit business organizations, cooperatives, and not-for-profit organizations.

The following organizational forms are considered both in terms of federal and provincial jurisdiction:

- For-profit business corporations
- Benefit companies
- Hybrid enterprises
  - Community interest companies
  - Community contribution companies
- Cooperatives
- Not-for-profit corporations
  - Ontario Public Benefit Corporation
- First Nation economic development corporations

02.

PURPOSE-DRIVEN ENTITIES AND CANADA'S CONTESTED STAKEHOLDER APPROACH

The relatively recent introduction of hybrid entities and benefit companies into Canada's legal landscape comes at a pivotal time in the historical development of Canadian organizational law. For over a century, the pendulum has shifted between shareholder primacy and the stakeholder-oriented approach to business associations and corporate governance (see: Rogge, 2021). These shifts are reflected in contemporary ambiguities in Canadian corporate law, especially in Supreme Court of Canada (SCC) jurisprudence since 2004 as well as recent statutory amendments to the *Canada Business Corporations Act* (*CBCA*). This report will discuss how contrasting interpretations of the SCC's post-2004 jurisprudence and statutory framework give rise to contested views on the usefulness and desirability of "dual-purpose" and hybrid entities in Canada, especially benefit companies. To understand the role of dual-purpose entities and social enterprise in Canada today, it is paramount to consider how the interests of non-shareholder stakeholders, communities, and the environment have been and are currently treated in Canadian corporate fiduciary law.

Within Canada's federal constitutional structure, which includes overlapping federal and provincial jurisdiction over business associations, a diverse range of for-profit and not-for-profit organizational forms have developed over the last century. These entities take their places along a spectrum that ranges from "traditional" publicly traded for-profit business corporations to not-for-profit charitable corporations and not-for-profit cooperatives. All of the organizational forms positioned along this spectrum have some potential to make greater contributions to social and environmental benefits for the wider society. That said, in the case of for-profit corporations, the ethos of maximizing shareholder value has tended to dominate in corporate culture and high-level decision making over the last four decades (Rogge, 2021). This is not to say that shareholder value maximization is legally mandated in Canada—it is not. Social enterprises, on the other hand, are dedicated to the pursuit of community and social benefits rather than maximal shareholder value. Located in the middle of this spectrum, hybrid organizations are intended to serve a dual purpose: to provide both community benefits and shareholder/investor benefits.

This report considers whether fourth sector and hybrid entities, such as benefit companies and community interest corporations, add something new and necessary to the landscape of organizational law in Canada. In considering the potential contributions of these novel entities, we must first consider what role "traditional" business

corporations are *able* to play and *ought* to play in advancing environmental and social sustainability efforts. On this issue, there is a longstanding debate over whether the dominant shareholder primacy orientation of corporate governance over the last forty years supports, undermines, or negates the potential for business corporations to contribute to non-shareholder wellbeing (Mayer, 2020).

Since the early 1970s, shareholder value maximization has been regarded, in the Anglo-American context, as the unassailable lodestone of corporate governance. As recently as 2016, the *Economist* magazine declared that "shareholder value rules business" (31 March 2016). Prior to 2004, Canada's corporate fiduciary law was generally in line with the shareholder primacy approach. Yet, developments in Canada's fiduciary law that took shape in 2004 have led some to contend that Canadian corporate law reflects a stakeholder approach rather than a shareholder primacy approach. Such assertions are contested. Liao (2014) concludes that even with the ostensibly stakeholder-friendly approach that has gained much ground in Canada since 2004, "it is somewhat unclear from a legal stance how the consideration of non-shareholder stakeholders fits in the decision-making equation for Canadian directors" (p. 582). Waitzer and Jaswal (2009) have concluded that "the questions of whether directors may consider, should consider, or are obligated to consider stakeholder interests, and, if so, at what point" have not been addressed clearly by Canada's highest court (p. 461). This ambiguity regarding fiduciary obligations in for-profit business associations has significant implications for understanding the role of "dual purpose" social enterprise, including fourth sector and hybrid entities in Canada.

2.1 CANADA'S CORPORATE LAW HAS A "PERMISSIVE" APPROACH TO STAKEHOLDER INTERESTS

Today, Canada's corporate directors and officers are not legally obligated to maximize shareholder value, even when their company is up for sale (BCE Inc. v. 1976 *Debentureholders* ([BCE], 2008). As a matter of law, Canada's for-profit corporations are explicitly permitted to build pro-social and pro-environmental approaches into their daily operations and long-term strategy; deciding how exactly to do this is up to management and shareholders. In this respect, Canada's corporate fiduciary law is permissive. As a practical matter, however, business decision makers in Canada, just as everywhere else in the world, are significantly constrained by market pressures. The empirical evidence suggests that when conflict exists between shareholder and stakeholder value, for-profit corporate decision makers will put profit before purpose, even when they claim to adopt a stakeholder approach (see, for example, Bebchuk, 2020). This economic reality is reflected in the development of the law—even in Canada. Lin observes that "case law in both the UK and Canada to date has made little development in how to apply the stakeholder consideration in decision making as aspired in the landmark statutes or decisions. In both jurisdictions, most of the cases remain focused on shareholders' interests" (Lin, 2021, p. 569). In considering what drives economic decision making, it is important to distinguish clearly between what the law permits and what economic pressures are believed to require. This report takes the view that the pressures that for-profit corporate decision makers contend with in markets, including the "market for corporate control" (Manne,1965),

have a profound constraining effect on corporate decision makers who might otherwise seek to contribute to public benefits. These pressures dampen significantly the practical effect of Canada's otherwise permissive stakeholder-oriented fiduciary law.

Much of the discussion about how to address the gap between what is possible under Canada's permissive fiduciary law and what economic reality demands (or is believed to demand) revolves around whether positive change in corporate behaviour will be driven by *law* or by *culture* (see, for example, Puri, 2010, p. 429). This report takes the view that change in both domains must occur simultaneously: transformation in the legal domain should reinforce shifts in the cultural domain, and vice versa. It is fair to say that change, both cultural and legal, in the direction of sustainability has been too slow. Even with legal reforms that permit socially responsible corporate decision making, the shareholder value maximization ethos continues to dominate the culture of corporate governance, as it has for the last forty years (Ruggie, 2020; Rogge, 2021). Nonetheless, efforts in both the cultural and legal domains to reorient the private sector toward greater sustainability must accelerate rapidly to address the urgent problems of people and planet that we face today. Major shifts in how business is conducted on the ground, as well as shifts in the overarching legal norms that govern business, are urgently needed to prevent and mitigate system-wide harms stemming from accelerating climate change, ocean pollution, deforestation, loss of biodiversity, growing inequality, and the rise of populist nationalism. This report takes the view that some of the required changes can be introduced, in part, through changes in organizational law, including the creation of dual-purpose organizational entities. In this respect, the development of experimental "fourth sector" purpose-driven entities plays an important role within the overall transformation of the regulatory ecosystem.

2.2 THE INTRODUCTION OF "PURPOSE-DRIVEN" AND "HYBRID" ENTITIES IN CANADA

In Canada, a variety of traditional not-for-profit associations (such cultural and educational institutions) as well as cooperative organizations (such as credit unions) engage in substantial volumes of commerce. At the national level, these economic associations generate significant household income while also pursuing a wide range of social purposes and community benefits. Historically, many of these organizations, such as agricultural producer cooperatives, were developed at the grassroots level by groups of producers who pooled their resources and talents for the benefit of the community as a whole. The cooperative business form has also been adopted by Indigenous communities across Canada (Wuttunee, 2010, p. 191). These more "traditional" forms of social enterprise can be fairly described as purpose-driven entities.

Over the last decade, three distinct dual-purpose business forms have been introduced into the Canadian organizational landscape: i) the benefit company, ii) the community contribution company (C3), and iii) the community interest company (CIC). These entities are often referred to as "hybrids" and engage in market-oriented, profit-seeking activity

with a view to advancing a broader social purpose or a specific community benefit. To date, hybrids have been introduced in two Canadian provinces: British Columbia and Nova Scotia. Canada's most populous province, Ontario (population >14 million) has considered the introduction of hybrid and/ or benefit corporation models for several years (Ontario, Ministry of Economic Development, Trade and Employment, 2013, p. 3) but ultimately decided not to go forward with legislation. In 2021, draft legislation to introduce a Quebec benefit company was tabled in the Quebec National Assembly; at the time of writing, the fate of this legislative proposal is unclear (Bill 797, *An Act to amend the Business Corporations Act to include benefit corporations*). It is fair to say that in Canada, hybrid entity forms are still in their experimental stage; in contrast, the more traditional cooperative and not-for-profit association are well-established "purpose-driven" entity forms.

The push to introduce benefit companies and hybrids in Canada, as well as in other countries, is driven by an international advocacy movement, which views the "fourth sector" as playing an important role in advancing sustainable development (SEGIB, 2021). This movement proposes that purpose-driven entity forms should be adopted to counter the dominance of the shareholder primacy approach in for-profit enterprises. This report seeks to draw attention to a common misconception. There is a pervasive belief, largely an erroneous one, that corporate directors and officers *must always* seek to maximize shareholder value, even when this may lead to adverse outcomes for stakeholders and/or the environment. Hybrids and benefit companies, it is thought, provide an alternative that circumvents the (perceived) obligation of corporate directors to maximize shareholder value. In the Canadian context, the soundness of this motivational reasoning for introducing benefit companies into law has been challenged, and rightly so. Liao (2020) argues that such reasoning is based on an erroneous understanding of corporate fiduciary law (e.g., pp. 17–18). Critics of benefit companies, including Liao, argue generally that there is no need in Canada to create an entity form that neutralizes the "obligation" to maximize shareholder value, because no such legal obligation exists. As this report shows, there is validity in this critique; however, the report also argues that there are other, countervailing reasons (including legal ones) for introducing benefit companies and hybrid entities into the Canadian economic landscape.

For the proponents of dual-purpose entities such as the benefit company, the practical problem remains that, even with Canada's permissive corporate fiduciary laws, voluntary corporate social responsibility efforts have fallen short in addressing urgent problems of people and planet. From a legal standpoint, it is true that Canada's corporate laws do not prevent for-profit corporations from doing a better job in balancing profit-seeking with pro-social and pro-environmental outcomes. Yet, in Canada, a chasm exists between what is possible under the law and what has actually been achieved. Imperfect though they may be, the benefit corporation and other hybrid enterprise forms are proposed as one way to try to fill this gap. This report takes the view that democratic experimentation with new economic organizational forms should be encouraged rather than closed off.

03.

NON-SHAREHOLDER INTERESTS IN CANADIAN FIDUCIARY LAW

Some additional detail will help to put Canada's unique position vis-à-vis hybrid entities and benefit companies into context. In the groundbreaking decision *Peoples Department Stores Inc. (Trustee of) v. Wise* ([*Peoples*], 2004), the SCC stated that it may be legitimate for a corporate board "acting with a view to the best interests of the corporation" to consider the interests of a range of stakeholders, including shareholders, employees, suppliers, creditors, consumers, governments, and the environment (*Peoples*, para. 42). The court stated explicitly that the "best interests of the corporation" are not necessarily synonymous with the "best interests of the shareholders" (*Peoples*, para. 42). In coming to this conclusion, the SCC cited *Teck Corp. v Millar* (1972), a decision of the British Columbia Supreme Court which stated 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" (p. 314).

Just a few years later, in *BCE* (2008), the SCC took a further step in the direction of stakeholder theory when it made clear that the proper concerns of corporate directors are "not confined to short-term profit or share value," but, "where the corporation is an ongoing concern, it looks to the long-term interests of the corporation" (para. 38). With *BCE*, Canada's corporate fiduciary law required directors and officers to act in the "best interests of the corporation, viewed as a good corporate citizen" (para. 66). The SCC stated explicitly that, "in considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests" (para. 40). While some ambiguities about the direction taken by the court remained (we consider these further below), it was commonly thought that the SCC had set the groundwork for a more stakeholder-friendly corporate fiduciary law. Nonetheless, today there is concern that corporate decision making in Canadian firms has not changed very much in response to these developments in fiduciary law (see, for example, Liao, 2017, p. 694). The issue of whether *Peoples* and *BCE* have had a significant impact on the actual behaviour of Canadian firms is much debated; this controversy underlies one of the positive arguments for the

introduction of benefit corporations and hybrid entities. While the SCC has taken a *permissive* approach to considering stakeholder interests, the proponents of fourth sector and hybrid entities believe that a *binding* approach is needed. In this respect, it is believed that the benefit company form and hybrid entities provide greater certainty that decision makers for such entities will take into account non-shareholder interests (e.g., Tobin & Dalton, 2015, p. 3; Weaver, 2020).

Another concern that belies the view that Canada's corporate law reflects a stakeholder approach is that non-shareholder stakeholders, such as employees, creditors, and community members, do not, as a practical matter, have access to the same corporate law remedies as do shareholders when their interests are adversely impacted (Allaire & Rousseau, 2015, p. 5). The paucity of case law in Canada dealing with non-shareholder remedies (creditors, consumers, communities, etc.) has led some academics to conclude that the "stakeholder orientation" of Canada's corporate law is overstated. As recently as 2021, Lin (2021) observed that there have been no legal cases in Canadian courts which have required judges to resolve "conflicts between shareholders and other stakeholder groups or between economic value and social or environmental goals" (p. 565). Indeed, Lin argues that "the oft-acclaimed corporate governance paradigm shift since *BCE* seems more symbolic than substantive in judicial practices" (p. 553).

3.1 RECENT STATUTORY CHANGES TO THE CANADA BUSINESS CORPORATIONS ACT

For-profit business associations in Canada have the option of incorporating under the federal *Canada Business Corporations Act (CBCA)* or under a provincial act such as the *Manitoba Business Corporations Act (MBCA)*. In 2019, the *CBCA* was amended to explicitly permit corporate officers and directors to take stakeholder interests into consideration. The legislation states: "When acting with a view to the best interests of the corporation … 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" (*Canada Business Corporations Act* [*CBCA*], 1985, c. C-44, s. 122[1][a]).

The 2019 amendments were intended to codify certain aspects of the *BCE* and *Peoples* decisions. However, some scholars argue that the amendments amount to a downgrading of the law from a permissive, stakeholder-oriented approach to a form of enlightened shareholder value (Lin, 2021, p. 566; further discussion on this point below). Thus, even with the 2019 statutory amendments, there continues to be ambiguity in the law over whether corporate directors may, should, or must take into consideration non-shareholder interests.

3.2 THE TREATMENT OF SHORT-TERM VERSUS LONG-TERM INTERESTS

Another reason often cited internationally for creating the benefit company form is to accord company directors with explicit permission to focus on long-term stakeholder interests rather than maximize short-term shareholder value (see, for example, SEGIB, 2021). While this reasoning may be sound in other national jurisdictions, it is fair to say that it is not directly compelling in the Canadian context. Canada's corporate decision makers are expressly permitted to take into account the long-term interests of the corporation, "viewed as a good corporate citizen" (*BCE*, paras. 38 and 66). Moreover, the 2019 amendments to the *CBCA* expressly permit directors to take into consideration "long-term interests" in assessing the corporation's best interests (short-term interests are not mentioned specifically). The "permissive" aspects of Canada's fiduciary law apply even in change-of-control situations (Bradley, 2010, p. 328). In other words, even when a corporation is put up for sale, Canada's corporate directors may consider stakeholder interests with a view to the long-term interests of the corporation, "viewed as a good corporate citizen" (*BCE*, para. 66). This means that in Canada, there is nothing like Delaware's "Revlon rule," which requires corporate directors to get the best price for the shareholders in a change-of-control transaction (see: *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* ([Revlon],1986). Nonetheless, although Delaware's *Revlon* is not the law in Canada, the shareholder-centred ethos that underlies it exerts significant cultural and normative force (if not legal force) that transcends political borders (Rogge, 2021). In this context, it is arguable that the creation of legal entities that specifically *require* decision makers to focus on long-term community interests plays an important, norm-shifting role in the ongoing evolution of organizational law.

3.3 ADDRESSING CONCERNS THAT THE BENEFIT COMPANY IS REDUNDANT IN CANADA

One of the most contentious issues in the debate within Canada over the introduction of hybrids and benefit companies is whether they are actually needed, given Canada's permissive fiduciary law. Some argue that the benefit corporation form that has been introduced in the United States is redundant in Canada (Liao, 2017, p. 708; Ortved, 2019). Liao argues that "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 [corporate] governance" (p. 686). Liao's position is that the beneficial aspects of the US benefit corporation model legislation do not go beyond what is already permitted in Canadian fiduciary law, as reflected in the *CBCA*'s "best interests of the corporation" rule, the oppression remedy, and the SCC's decisions in *Peoples and BCE* (p. 708). In Liao's view, the Canadian stakeholder-friendly model of corporate governance is "already more stringent" that what the benefit corporation model requires (p. 708). Liao is concerned that the introduction of the benefit company into Canada perpetuates misunderstandings about Canadian corporate law, arguing that "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" (p. 686). While there is merit to Liao's arguments, this report takes the view that, on balance, the introduction of experimental fourth sector entities in Canada contributes positively to healthy public deliberation about appropriate legal and policy reforms.

In contrast to Liao, some practitioners and scholars argue that the introduction of the benefit corporation helps to bring clarity to the issue of whether or not directors may, should, or must take into account stakeholder interests. Tobin and Dalton (2015) argue that "some would say that the benefit corporation model is not necessary [to introduce] in Ontario as the common law enables for-profit corporations to consider stakeholders other than shareholders without further legislative changes. We prefer the approach that expressly gives entrepreneurs and corporations clarity, security of purpose and a level playing field" (p. 3). In other words, Tobin and Dalton support the introduction of the benefit corporation model because it explicitly and unambiguously requires decision makers to consider non-shareholder stakeholder interests (i.e., such consideration is not optional or recommended).

...on balance, the introduction of experimental fourth sector entities in Canada contributes positively to healthy public deliberation about appropriate legal and policy reforms.

04.

HYBRID ENTITIES IN CANADA TODAY

At the provincial level, three different kinds of 'for benefit' corporation models have been adopted in the provinces of British Columbia (BC) and Nova Scotia (NS): the benefit company, the community contribution company (C3), and the community interest company (CIC). In 2011, Mulholland et al. (2011) noted general concerns that "charities and non-profits struggle with a confusing and onerous patchwork of different provincial rules and regulations across the country" (p. 2). According to Mulholland et al., such organizations faced "increasingly restrictive federal regulatory constraints on their ability to generate new sources of revenue through social enterprise" (p. 2). Hybrid entity forms and the benefit corporation were introduced to address these and other concerns.

4.1 BRITISH COLUMBIA'S BENEFIT COMPANY

In 2020, the *British Columbia Business Corporations Act* ([*BCBCA*], 2002, c. 57) was amended to allow for the creation of a benefit company (Part 2.3 of the Act, enabling benefit companies, was enacted by order-in-council on June 20, 2020). Benefit companies must commit to operating in a socially responsible and environmentally sustainable manner, and must promote public benefits. Thus, for decision makers of benefit companies, there is no ambiguity about whether or not they may, should, or ought to take into account non-shareholder interests—they *must*. Under the legislation, "directors must act honestly and in good faith to pursue public benefits and consider the interests of the persons affected by the company's conduct" (*BCBCA*, s. 51.993[1][a]).

In a BC benefit company, directors have a *duty* to promote the public benefit that is specified in the articles:

> 51.993 (1) A director or officer of a benefit company, when exercising the powers and performing the functions of a director or officer of the company, must
>
> (a) act honestly and in good faith with a view to
>
> (i) conducting the business in a responsible and sustainable manner, and
>
> (ii) promoting the public benefits specified in the company's articles, and
>
> (b) balance the duty under section 142 (1) (a) with the duty under paragraph (a) of this subsection.

The directors and officers of a BC benefit corporation must "balance" the dual duties to promote the public benefits specified in the company's articles (*BCBCA*, s. 51.993[1][a]) and the duty to act in the best interests of the company (s. 142[1][a]). Such dual duties of this nature *do not exist* in the "traditional" for-profit corporation under the federal CBCA or provincial corporate law statutes. To date, it does not appear that the British Columbia government has published model articles for benefit companies.

The BC legislation defines a public benefit as "a positive effect, including of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature, for the benefit of (a) a class of persons, other than shareholders of the company in their capacity as shareholders, or a class of communities or organizations, or (b) the environment, including air, land, water, flora and fauna, and animal, fish and plant habitats" (*BCBCA*, s. 51.991).

Unlike Liao (2017), who argues that the introduction of the benefit corporation form in Canada is redundant (p. 708), Weaver (2020) believes that it was needed to fill a policy "gap" and to clarify existing ambiguities in the law. Weaver argues that, in contrast to the ambiguity of Canadian corporate fiduciary law (as discussed above), the BC benefit corporation provides "certainty for impact investors of the nature and mandate of the company" and enables companies "to attract capital while being true to their mission as they grow" (para. 5). In Weaver's view, BC's benefit company legislation was needed to "protect the vision of the founders of benefit companies from shareholder challenges" and to "provide a simple framework for companies to adhere to that is legally and commercially recognized" (para. 5).

Benefit companies must commit to operating in a socially responsible and environmentally sustainable manner, and must promote public benefits.

4.1.1 IMPACT MEASUREMENT

It can be debated whether the levers of accountability for benefit companies contained within the enabling legislation are adequate. BC's benefit companies are required to issue public reports that consider the company's achievements and conduct against a third-party standard that is chosen by the company itself. The legislation contains some requirements about the nature of the third-party standard and specifies how information about the standard chosen must be reported by the company (*BCBCA*, s. 51.994). However, the accountability mechanisms for BC benefit companies are largely reflexive; the benefit company is, in effect, a self-regulating entity.

BC's benefit companies must prepare and publish an annual "benefit report" that explains how the company demonstrates its commitment to responsible and sustainable business practices. The company must show how it promotes the public benefits that are stated in its articles of incorporation; and must also include the director's assessment of the company's performance as measured against a third-party standard (*BCBCA*, s. 51.994). Currently, the legislation does not provide specific guidelines about what third-party standards should be used, and there is no formal government role in monitoring compliance. If they choose to do so, shareholders, customers, and civil society can draw on the company's annual report for the purpose of monitoring.

When it comes to measuring impact, it is arguable that the existing accountability mechanisms for benefit companies are quite loose and susceptible to greenwashing. Future empirical research should be undertaken to determine whether or not the existing mandatory reporting and accountability mechanisms for BC benefit companies are adequate and whether or not they should be strengthened.

4.1.2 ACCOUNTABILITY OF DIRECTORS AND OFFICERS

Under the enabling legislation, the directors and officers of benefit companies do not owe a fiduciary duty directly to persons affected in the course of pursuing a public benefit. The legislation provides that the directors and officers of a benefit company have no corporate fiduciary duty to i) a person whose well-being may be affected by the company's conduct (s. 51.993[2][a][i]), or ii) a person who has an interest in a public benefit specified in the company's articles (s. 51.993[2][a][ii]). Moreover, the legislation provides that no legal proceeding may be brought by a person against a director or officer of a benefit company in relation to their duty to pursue public benefits (s. 51.993[2][b]). In other words, as a matter of fiduciary law, there is no director liability to specific persons who may be adversely affected in the pursuit of a public benefit. Nonetheless, already existing legal remedies, such as the shareholder derivative suit and actions in tort are not affected by this provision. If the benefit company form grows more popular, the legal and practical effects of these provisions have potential to develop over time through litigation.

BOX 1: CASE STUDY: WHY THE ROYAL BANK OF CANADA BOARD OF DIRECTORS RECOMMENDED AGAINST A RESOLUTION ON BECOMING A BENEFIT COMPANY

The Royal Bank of Canada ([RBC], 2022) is one of Canada's largest banks, which the Financial Stability Board (2021) includes in its list of thirty global systemically important banks. At the RBC annual shareholder meeting in 2022, a group of shareholders submitted a proposal on "becoming a 'benefit' company" (RBC, 2022, p. 99). The proposal noted that banks in Canada are already required to include information about their social and environmental performance in their annual reports; however, the proposal stated that "banks must deepen their commitment towards an inclusive, ecological and sustainable prosperity by analyzing the possibility of becoming a benefit company." The proposal also noted that the Business Development Bank of Canada, owned by the Government of Canada, had already amended its by-laws to become a benefit company.

In response to the proposal, RBC's board of directors recommended that shareholders vote against the proposal and, indeed, against all eight socially and environmentally oriented shareholder proposals. In the reasoning given for its recommendations, the board stated that RBC is "driven by its purpose of helping clients thrive and communities prosper, which aligns with the public benefit corporation's objectives outlined in the [shareholder] proposal" (RBC, 2022, p. 100). The board asserted that, "creating a positive social impact is integral to how we do business" and that "our success as a company is defined by the long-term well-being of our clients, employees, shareholders, the communities in which we operate, and the planet that we leave to future generations" (p. 100). In noting that the bank's purpose already "aligns with the public benefit corporation's objectives" (p. 100), the board was stating, in essence, that becoming a benefit company would have been redundant. The reasoning given by the board aligns with the opinion that Canadian corporate law already permits corporations to act with a public benefit in mind, as long as they act with a view to the best interests of the corporation, acting as a good "corporate citizen." Nonetheless, there is no escaping the reality that RBC is a publicly traded for-profit corporation whose shareholders, in the aggregate, are most likely to measure its success by the health of its stock price.

This report takes the view that the RBC board, in the reasoning given, commingled the broadly *permissive* aspect of Canada's fiduciary law with the specifically *mandatory* pursuit of public benefits that the benefit company form requires. In so doing, the board implied that there is no need to introduce the benefit company form into the Canadian legal landscape because for-profit corporations such as RBC (one of the world's largest banks) are already *analogous to* benefit companies under Canada's existing corporate fiduciary framework. The board's reasoning leads to the untenable conclusion that *all* business corporations in Canada are analogous to benefit companies (and it should be clear, even

to a person who accepts this view, that some corporations may pursue public benefits much more vigorously than others). However, this argument is flawed. This report takes the position that Canada's business corporations are not analogous to benefit companies simply by virtue of Canada's permissive corporate fiduciary law. If one were to accept RBC board's position, and one should not, any corporation in Canada, including any large, publicly traded for-profit firm, could claim to be a de facto benefit company while choosing at the same time to deliver de *minimis* public benefit. By this interpretation, a benefit company would be no different from any company that claims to practice corporate social responsibility. However, this result misses the very point of the benefit company concept, which, without any doubt, makes it mandatory for company decision makers to pursue a public benefit that extends beyond the interests of shareholders.

Nonetheless, the ambiguity in Canada's corporate fiduciary law adds a layer of complexity to this debate. Due to the contested nature of Canada's fiduciary law, the usefulness and relevance of the benefit company entity form in Canada is also contested. Each of the contrasting positions taken in the debate over the benefit company is justified by contrasting and distinct interpretations of the current state of Canada's fiduciary law. In their negative response to the proposal to become a benefit company, RBC advanced the legal position that "Canadian corporate law generally aligns with the objectives of a benefit corporation [as] described in the proposal and establishes that the directors of a corporation must act honestly and in good faith with a view to the corporation's best interests, which not only include shareholders' interests, but also those of other stakeholders such as employees, creditors, customers, governments and the environment, *none of which takes precedence over the others* [emphasis added]" (RBC, 2022, p. 100). This is, without question, a plausible interpretation of Canada's existing corporate fiduciary law; however, the fact remains that such interpretations are contested with equal vigour. Indeed, many scholars argue that Canada's fiduciary law is manifestly unclear about whether corporate directors and officers may, should, or must take into account the interests of non-shareholder stakeholders (Liao, 2014, p. 582; Waitzer & Jaswal, 2009, p. 461; Iacobucci, 2009, p. 248). Existing ambiguities in the finer points of Canada's corporate fiduciary law create a situation where reasonable people may disagree on whether the benefit company concept is redundant in Canada or not. And so, as long as this ambiguity exists in Canada's corporate fiduciary law, the clearly stated mandatory approach to the pursuit of public benefits should be regarded as a distinct feature of the benefit company.

BOX 2: CASE STUDY: LEADING LAW FIRM EXPRESSES SKEPTICISM ON THE NEED FOR BENEFIT COMPANIES IN CANADA

In 2021, one of Canada's leading business law firms, Gowling WLG, published a brief stating that there is "no compelling legal reason or need for [benefit corporations] in Canada" (Gowling WLG, 2021, p. 1). The brief contends that when the British Columbia benefit company was introduced, "the common law in Canada already allowed directors to take various interests into account in making corporate decisions. Whether benefit companies are something wanted by the marketplace and will be attractive to investors remains to be seen" (p.1). The Gowling WLG brief is based on the notion that Canada's corporate fiduciary duty is already broadly permissive. While there can be no doubt that directors and officers *may take* non-shareholder interests into account, the more difficult-to-resolve legal question is whether Canada's fiduciary law *requires* company directors and officers to take into account non-shareholder interests. The Gowling WLG brief does not distinguish the generally *permissive* aspects of Canada's fiduciary law from the explicitly *mandatory* rules that are contained in benefit company legislation. In BC, benefit company directors "*must* [emphasis added] act honestly and in good faith to pursue public benefits and consider the interests of the persons affected by the company's conduct" (*BCBCA*, s. 51.993[1][a]); moreover, decision makers are *required* to take into account "the well-being of the persons affected by the operations of the benefit company" (s. 51.991). Additionally, benefit companies must issue public reports against a third-party standard chosen by the company (s. 51.994). It is interesting to note that although it states that there is "no compelling legal reason" for benefit companies in Canada, the Gowling WLG brief also states that the BC benefit company creates a "required standard in relation to the company's chosen public benefit" (p. 3). In other words, Gowling WLG recognizes that in a BC benefit company, decision makers *must* choose a public benefit and *must* pursue that chosen public benefit. Arguably, this explicit and unambiguous requirement makes benefit companies distinct from "traditional" for-profit companies; nonetheless, the fact remains that reasonable people disagree on this point.

4.2 BRITISH COLUMBIA'S COMMUNITY CONTRIBUTION COMPANY (C3)

In July 2013, British Columbia introduced the community contribution company (C3) (*BCBCA*, S.B.C. 2002, c. 57). The C3 was introduced to facilitate the financing of social enterprise and to provide a vehicle for social impact investors (Henderson, 2018, p. 272). Around the time that the law was introduced, the question of whether there was adequate interest in the new entity form was a matter of debate. Liao (2015) observed that "the creation of the C3 … assumes there is a pool of investors willing to limit the upside of their investments for the sake of the wider good … presumably legislators would not have pursued hybrid legislation without some assurances of a means to support it, but one can only surmise" (p. 298).

Similar to community interest companies in the United Kingdom, British Columbia's C3 puts specific limits on distributions to shareholders and includes a community purpose "asset lock." A C3 company must state a "public benefit" in its articles of incorporation. The legislation states: "One or more of the primary purposes of a community contribution company must be community purposes and those community purposes must be set out in its articles" (*BCBCA*, s. 51.92). The legislation defines a community purpose as:

> a purpose beneficial to (a) society at large, or (b) a segment of society that is broader than the group of persons who are related to the community contribution company, and includes, without limitation, a purpose of providing health, social, environmental, cultural, educational or other services, but does not include any prescribed purpose. (s. 51.91[1])

The C3 corporate form can be adopted by unanimous shareholder approval (s. 51.97[2]). This rule ensures that minority shareholders are protected in the event that they do not wish to adopt the more restrictive provisions of the C3, such as the asset lock and limits on dividends.

A director or officer of a C3 must "act with a view to the community purposes of the company set out in its articles" (*BCBCA*, s. 51.93[2]). The legislation also limits the sale of and transfer of assets to transactions that are "in furtherance of the company's community purposes" (s. 51.931[1][c]).

In research conducted in 2017, only sixty-two active C3s were registered in British Columbia (Henderson, 2018, p. 272).

As set out in the *BCBCA* Community Contribution Company Regulation (2016), the maximum distribution to shareholders of a C3 by dividends declared is 40% of residual (s. 4). On the dissolution of a C3, the prescribed percentage is 60% (s. 8).

C3 companies in Canada are largely self-regulating with respect to community benefits.

4.2.1 IMPACT MEASUREMENT

C3 companies in Canada are largely self-regulating with respect to community benefits. A C3's published community contribution report must provide "a fair and accurate description of the manner in which the company's activities during that financial year benefited society" (*BCBCA*, s. 51.96[2][a]). The report must list the value of assets that have been transferred from the company in fulfilling the community purpose, including an explanation of what the assets were used for and the value of dividends declared (s. 51.96[2]). As with benefit corporations, the government plays no role in monitoring public benefit impacts.

4.2.2 MANDATORY C3 DISCLOSURES

The BC Ministry of Finance states that "accountability for C3s will be achieved through an annual public report, and by monitoring by the company's shareholders and customers" (see: Henderson, 2018, p. 224). Per the above, a C3 is required to publish an annual "community contribution report." No government monitoring procedures are prescribed and no penalties for non-compliance are stipulated in the legislation. Whether shareholders and the public will have the capacity (or interest) in monitoring C3s remains to be seen. Empirical research should be conducted to examine to what extent stakeholders and the wider public have taken on the role of monitoring the public benefit of C3 companies and whether the community contribution report is an adequate monitoring tool. The results of this research should inform future discussions about possible amendments to the C3 legislation and regulations.

4.2.3 TAX TREATMENT

Canada's federal government has not extended tax benefits to C3s (Tobin & Dalton, 2015), which receive the same tax treatment as any other corporation. Note that Canada's *Income Tax Act* does not define "social enterprise." According to Liao et al. (2019), "a recurrent, critical question in the development of social enterprise laws is how to address taxation.... At least fourteen jurisdictions [including Canada] offer no specific tax benefits to social enterprises" (p. 104).

4.3 NOVA SCOTIA'S COMMUNITY INTEREST COMPANY (CIC)

The Nova Scotia CIC was created to support the creation and development of social enterprise organizations in that province. In 2016, Nova Scotia finalized the adoption of the community interest company under the *Nova Scotia Community Interest Companies Act* ([*NSCICA*], 2012). Directors of a CIC must act "in accordance with" the corporation's community purpose as stated in the company's memorandum of association (s. 9). CICs are also subject to a community purpose "asset lock" (ss. 15–20 and Community Interest Companies Regulations [CICR], 2016, ss. 4–9).

The Nova Scotia legislation defines a community purpose as: "a purpose beneficial to i) society at large, or ii) a segment of society that is broader than the group of persons who are related to the community interest company, and includes … a purpose of providing health, social, environmental, cultural, educational or other services" (*NSCICA*, s. 2[1][c]). The community purpose cannot be a

political purpose (s. 2[1][c]). The memorandum of association of a CIC must state the company's chosen community purpose (s. 9[2]).

Like British Columbia's community contribution company (C3), the Nova Scotia community interest company is modelled after the British CIC inasmuch as the Nova Scotia rules include annual reporting requirements, a cap on dividends, and a community purpose "asset lock." Yet, there is one critical difference between the Nova Scotia CIC and the British CIC: whereas the British CIC is monitored by a government CIC regulator, the Nova Scotia legislation leaves monitoring to shareholders and the public (Henderson, 2018, pp. 223–224).

A Nova Scotia company wishing to be designated as a community interest company must apply to the Registrar of Community Interest Companies (NSCICA, ss. 5–6). The Registrar determines whether the company to be incorporated is eligible to be designated a CIC (ss. 3–5). As part of this process, an existing business must file a unanimous shareholder resolution to become a CIC (s. 6[2]).

The memorandum of association of a Nova Scotia CIC must state: "This company is a community interest company, and as such, has a community purpose. This company is restricted, in accordance with the *Community Interest Companies Act*, in its ability to pay dividends and to distribute its assets on dissolution or otherwise" (*NSCICA*, s. 9[1]).

4.3.1 RESTRICTIONS ON DISTRIBUTIONS

The maximum distribution to shareholders by dividends declared is 40% of residual. This limit also applies to distributions on the dissolution of a CIC (CICR, 2016, s. 5[4]). The regulations include criteria that an entity must satisfy in order to receive distributable assets on dissolution (s. 9[1–2]).

4.3.2 MANDATORY CIC DISCLOSURES

A Nova Scotia community interest company is required to prepare an annual Community Interest Report. The report must provide a "fair and accurate description of the manner in which the community interest company's activities during that financial year benefited society or advanced the community purpose of the community interest company" (*NSCICA*, s. 21[1][a]). The report must also list the value of assets that have been transferred from the company in fulfilling the company's community purpose, with an explanation of what the assets were used for and the value of dividends declared (s. 21). The report must be approved by the CIC's board of directors (s. 21[3]) and must be presented at the company's annual general meeting (s. 21[2]). The report must be endorsed by two of the company's directors and filed with the Registrar of Community Interest Corporations within ninety days of the annual general meeting (s. 21[1–4]).

In terms of accountability mechanisms, the Nova Scotia CIC is broadly in line with other experimental "fourth sector" entities that have been introduced in Canada. The Nova Scotia CIC is largely self-regulated

with regard to meeting its community purpose. Whether shareholders, consumers, and civil society will choose to exercise their monitoring function, and to what degree, remains to be seen. This is an area where empirical research has the potential to be very illuminating.

Research conducted in 2017 by Henderson (2018) showed that the initial uptake of the Nova Scotia CIC structure had been very slow. Citing an email of August 4, 2017, received from the Registry of Joint Stock Companies, Henderson noted at that time that only four CICs had been incorporated (p. 272).

4.3.3 TAX TREATMENT

Nova Scotia's CICs do not receive special tax treatment. CIC business income is taxable at the same rate as any other business corporation in the province, and the CIC must file T2 income tax returns with the Canada Revenue Agency.

4.4 FIRST NATIONS AND TAX TREATMENT OF HYBRIDS IN CANADA

First Nation communities and their political organizations have a unique position in relation to the Canadian constitutional order. This relationship gives rise to specific legal issues under Canadian law for First Nation communities who wish to use hybrid entities. The key concern is that for First Nation hybrids, there are potentially negative tax implications that arise from the taxation provisions in Canada's colonial-era *Indian Act*. Henderson (2018) has identified that "the main impediment to individual Indigenous entrepreneurs taking advantage of a C3 or CIC structure is the differential tax treatment of business income earned by a corporation versus an individual situated on a reserve" (p. 276). For individually owned Indigenous businesses, the usefulness of a C3 or CIC organizational form may be reduced insofar as C3s and CICs will be treated the same as individually owned corporations, rather than as sole proprietorships, which enjoy certain tax advantages. Individually owned C3s and CICs in First Nation communities will not benefit from the tax exemption in section 87 of the *Indian Act* for "personal property of an Indian or band situated on a reserve" (Henderson, 2018, p. 273). That said, businesses that are owned by a First Nation band do maintain tax-exempt status under the exemption given in the *Indian Act* for businesses owned by municipal governments (p. 273). The controversy over these rules involves constitutional law issues, including alleged violations of Aboriginal and treaty rights. Further examination of these and other potential tax implications are beyond the scope of this report. Nonetheless, it is important to recognize, in general, that novel hybrid and other "social enterprise" alternative entity forms must be designed in a manner so as not to create disadvantages under Canada's colonial-era *Indian Act*.

05.

COOPERATIVES

Cooperatives are employment-generating entities that combine dual economic and social purposes. As explicitly pro-social business entities, cooperatives have existed and thrived in Canada for many decades.

In Canada, cooperative organizations can be set up under federal or provincial legislation. Like corporations, cooperatives can be designated as for-profit or not-for-profit entities. A number of distinct varieties of cooperative entity forms are well-established in Canada, including consumer cooperatives, worker-owned cooperatives, producer cooperatives, and financial cooperatives. Together, these organizations generated 3.4% of Canada's GDP between 2010 and 2015, and employed 3.6% of the workforce (Duguid, 2019, p. 14) Between 2010 and 2015, cooperatives contributed $61.2 billion in economic value added (GDP) (p. 11). During this period, cooperatives across Canada generated $34.3 billion in household income (p. 11). Although in some sectors, such as agriculture (Fulton, 2009), there has been a decline in the use of cooperative organizations, overall the sector has shown steady growth (p. 15).

According to Statistics Canada, in 2020, there were 5,531 active non-financial cooperatives in Canada, employing over 100,000 people. 63.9% of those cooperatives were non-profits, such as housing co-ops and social advocacy organizations. In aggregate, non-financial cooperatives in Canada generated $48.6 billion in total revenues and held $44.3 billion in assets. In spite of the success of many cooperatives, one of their drawbacks is that they have difficulty raising capital (Reimer & Bernas, 2013, p. 4).

5.1 COOPERATIVES AS SOCIAL ENTERPRISES

Cooperatives, by their historical grassroots origins, are "social enterprises" and purpose-driven entities with long-term potential to deepen their particular social missions. Cooperatives are democratically controlled by their members in a one-member, one-vote system; members are free to incorporate issues such as sustainability and the pursuit of community benefits into their cooperative's strategy and long-term vision. In some jurisdictions, especially in Europe, certain cooperatives are designated as "social cooperatives" (Liao et al., 2019, p. 87).

Like for-profit corporations, cooperative organizations are part of an international network of organizations that have a shared history. The internationally recognized cooperative model explicitly includes concern for the community; it also values cooperation—rather than competition—

among cooperatives. In this respect, the cooperative business model and organizational culture is quite amenable to initiatives being brought by cooperative members regarding social responsibility and sustainability. That said, to embed community purposes into the organization's business model and strategy, members must commit to those purposes and vote in favour of them.

One of the hallmarks of the cooperative entity model is the one-member, one-vote system of democratic governance.

One of the hallmarks of the cooperative entity model is the one-member, one-vote system of democratic governance. The right to vote is exercised by members at the organization's annual general meeting (AGM). Members vote directly to elect the board of directors. The democratic structure is embedded in the cooperative's by-laws and in the federal or provincial legislation under which the cooperative is incorporated.

Although the details vary across jurisdictions (federal and provincial), the elected directors of cooperatives have a duty to exercise their powers and discharge their duties honestly and in good faith, "with a view to the best interests of the cooperative" (*Canada Cooperatives Act*, S.C. 1998, c. 1, s. 80[1][a]). Directors are further required to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances" (s. 80[1][b]). The language of the "best interests of the cooperative" is essentially identical to the "best interests of the corporation" in corporate law; however, the context is very different. Cooperative organizations, historically and in their contemporary form, are explicitly purpose-driven social enterprise organizations. This is reflected in the "cooperative identity, values and principles" recognized by the International Cooperative Alliance (founded in 1895) which states that "cooperative members believe in the ethical values of honesty, openness, social responsibility and caring for others" (International Cooperative Alliance [ICA], n.d.[a], ii).

The one-member, one-vote democratic structure of cooperatives makes them fundamentally distinct from share corporations. In for-profit share corporations, the number of votes that each shareholder may cast corresponds to the number of shares that they hold; in this respect, they can be regarded as "plutocratic" organizations. In contrast, cooperatives are governed strictly by the one-member, one-vote principle. It is a curious fact that today's cooperative organizations have a democratic governance structure that is similar to the historic "traditional" corporations of the eighteenth and nineteenth centuries, in which the one-person, one-vote principle usually prevailed regardless of the number of shares held by each individual shareholder (Dunlavy, 2004;

Dunlavy, 2006). Times have changed, however: today it is the cooperative organizations that are democratic, while their for-profit, share corporation counterparts can be regarded as plutocratic.

Cooperatives are jointly held by the members as a whole, who typically rely on the organization's services or products. Some cooperatives permit "support members": investor members who do not use the products or services generated, but support the existence of the organization for philanthropic reasons. Any surplus value produced by the cooperative is held collectively by its members; how to allocate it is decided by the members at an annual general meeting. Surplus value may be distributed in a number of ways: it can be reinvested in the cooperative's business activities; distributed among the membership as patronage dividends (see: *Canada Cooperatives Act*, S.C. 1998, c.1, s. 153–154); or donated to charity.

Another feature that makes cooperative entity governance distinct from for-profit share corporations is that proxy voting is not permitted in cooperatives. Large cooperatives with geographically dispersed memberships tend to use delegate structures in the voting process. In this respect, cooperatives also have fundamentally different governance cultures as compared to share corporations. Markey et al. (2011) describe cooperatives as "well-established hybrids that successfully combine commercial and community mechanisms and interests…. While primarily driven to achieve member benefit, co-operatives can make community benefit their first priority, or they can combine member and community benefit as they choose" (p. 18). These researchers argue that "cooperatives provide a legal structure ideal for communities wishing to regain control of local economies and achieve economic self-determination. Examples are the purchase of a sawmill or manufacturing facility closed by a distant corporate head office" (p. 18).

5.2 FORMS OF COOPERATIVES IN CANADA

A great variety of cooperative organizations exist in Canada, including several very large financial services coops that are referred to as credit unions or *caisses populaires*. The legal forms that are available for cooperatives include consumer cooperatives, producer cooperatives (e.g., farmer cooperatives), and worker-owned cooperatives. All of these cooperative forms may carry on business for public benefit as determined by the cooperative's voting members. Various cooperative forms are established by federal and provincial legislation:

- *Consumer cooperatives* provide services or products for the direct benefit of members. Many of Canada's largest cooperative organizations are retail consumer cooperatives. Consumer cooperatives also include financial co-ops (or "credit unions"), housing co-ops, and childcare cooperatives.

- *Producer cooperatives* are formed by members who pool their resources to process and market goods and services produced by the members themselves. Such cooperatives also include organizations that supply products or services that support their members' professional

activities (e.g., agricultural cooperatives, artists' cooperatives).

- *In worker-owned cooperatives*, the employees are both members and shareholders of the business organization. These include organizations such as the Mondragón network of cooperatives in Spain and its international affiliates, including those in North America.

- *Multi-stakeholder cooperatives* provide a service to a broad range of stakeholders, including clients, employees, and related organizations. Many of these co-ops are in the health and homecare sectors, such as community clinics.

The vast range of types and purposes of cooperatives are a testament to the enduring value of cooperative organizations as social enterprises in Canada. Just a few examples include: ethno-cultural and immigrant cooperatives in Canada (CCA, 2011); electricity cooperatives (MacArthur, 2016), and First Nation economic development cooperatives (Sengupta, 2015a; 2015b).

5.3 PURPOSE-DRIVEN COOPERATIVE ENTITIES

Cooperatives are purpose-driven entities. In a statement issued in 1995, the General Assembly of the International Cooperative Alliance set out the economic, social, and cultural role of cooperative organizations:

> A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.
>
> Co-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity, and solidarity. (ICA, 1995)

Additionally, one of the main principles of cooperative organizations is "concern for community" (ICA, n.d.[a], 85). To that end, the policies that are approved by a cooperative's members often include working for "the sustainable development of their communities" (ICA, n.d.[a], 85). In a fact sheet published by Co-operatives and Mutuals Canada, the association asserts that cooperatives strive to benefit society as a whole:

> Cooperatives are sustainable businesses that put social responsibility, community development and sustainable development goals at the heart of their day-to-day concerns, in order to improve the quality of life of all Canadians. (Co-operatives and Mutuals Canada, [n.d.])

5.4 IMPACT MEASUREMENT

The social and environmental performance of a given cooperative is monitored by its members, who are able to vote at annual general meetings and stand for election to the board of directors. The issue of whether or not the cooperative is living up to its principles and operating in alignment with its social purpose may be taken up and debated by the organization's members and decided via the one-member, one-vote democratic governance framework.

Just as for-profit corporations have had to reckon, over the last decade, with their role in contributing to sustainability, so too have cooperative entities. By no means have Canadian cooperatives achieved their full potential in this regard. To this end, the cooperative movement in Canada is taking important steps, similar to for-profit corporations, toward "mainstreaming" sustainability within cooperative organizations across Canada. Research suggests that Canadian cooperatives have made some progress, but could do much better on issues of sustainability performance and reporting (Duguid, 2016).

5.5 TAXATION OF COOPERATIVES

Cooperatives are taxed at corporate tax rates, unless they qualify for the not-for-profit exemptions provided by the *Income Tax Act*.

5.6 FIRST NATION COOPERATIVES

As with hybrid entities in Canada (C3s and CICs), a number of special issues arise for cooperative organizations whose members are First Nation Indigenous communities (see: Sengupta, 2015a; 2015b). First Nation organizations and bands have used the cooperative form in a variety of ways, but in some circumstances, they have preferred to adopt for-profit, corporate development models. Further discussion of these issues is included below in a section on First Nations.

06.

NON-PROFIT ORGANIZATIONS

As with cooperatives, the positive economic impact of non-profit organizations should not be underestimated; in any study of purpose-driven business organizations, it is important that non-profits be recognized. In carrying out their activities, many non-profit sector organizations engage directly in what can be regarded as "business" activities, such as retail sales (e.g., charity shops) and services (e.g., recreation facilities, educational institutions). In aggregate, these activities amount to very significant economic activity while also achieving a social purpose. A 2019 study concluded that the non-profit sector generates 8.5% of Canada's GDP and employs 2.4 million people (Imagine Canada, 2019). In combination, cooperatives and non-profit organizations account for approximately 12% of Canada's GDP.

Non-profit organizations and cooperatives can be set up under the federal *Canada Not-for-profit Corporations Act* or the equivalent legislation at the provincial level. It is not uncommon for non-profit corporations to be parented by a charity organization.

6.1 CLARIFICATION: ONTARIO'S "PUBLIC BENEFIT CORPORATION" IS NOT A "BENEFIT COMPANY"

Ontario's "public benefit corporation" is a form of non-profit corporation established under the *Ontario Not-for-Profit Corporations Act* (2010, S.O. 2010, c. 15). This entity form should not be confused with the benefit company (which currently is only available in British Columbia). A "public benefit corporation" must: i) be a registered charity; or ii) have received more than $10,000 in government financial assistance in one financial year, or donations from individuals who are neither employees of the corporation (or individuals closely related to employees) nor members of the organization (s. 1).

> *In combination, cooperatives and non-profit organizations account for approximately 12% of Canada's GDP.*

07.

ACCESS TO PUBLIC PROCUREMENT

At all levels of government—federal, provincial, municipal, and First Nation—there has been only a small amount of experimentation with social procurement strategies and policies. Socially responsible procurement in Canada is a very organic process in which a patchwork of tailored approaches have been developed to address issues such as diversity in the workforce and supporting economic opportunities for Indigenous communities. However, there appears to be no systematic approach to public procurement specifically directed at benefit companies or hybrid organizations in Canada. That said, social enterprises are free to compete for public procurement contracts along with for-profit businesses. One of the challenges of introducing public procurement policies that favour social enterprise is that they must not be seen to disadvantage any particular type of organization, including for-profit share corporations.

The Government of Canada's Integrity Regime for public procurement "ensures that we do business with ethical suppliers in Canada and abroad" (Canada, Business and Industry, 2020). The regime is geared toward ethical business practices, but does not relate directly to sustainability or social responsibility except insofar as ethical business practices are a subset of responsible business conduct. A supplier might be ineligible if, for instance, they have been convicted under the *Corruption of Foreign Officials Act or the Income Tax Act*.

None of the entity forms discussed in this paper have specific advantages with respect to public procurement. That said, some First Nation communities have a de facto regime of public procurement inasmuch as they prioritize First Nation cooperatives and economic development corporations. For further discussion on issues related to First Nation Indigenous communities, see the next section of this report.

Although progress has been slow, there have been moves across Canada to develop procurement policies that incorporate social enterprise factors. For instance, in 2008, a Sustainable Procurement Strategy was proposed as part of the Government of Ontario's Poverty Reduction Strategy. The intention was to create a procurement strategy that would "include social procurement factors, including social enterprise" (Ontario, Ministry of Children and Youth Services, 2008, p. 32). British Columbia released a procurement strategy in 2018, which, according to the cross-Canada network Municipal Collaboration for Sustainable Procurement ([MCSP], 2018), "prioritizes environmental and

social impact through procurement" (p. 5). MCSP reports that various levels of government in Canada are developing approaches to incorporating social and community benefit requirements into public sector infrastructure development, including public transit projects (MCSP, 2018). However, these projects do not specifically favour any particular type of entity.

Although progress has been slow, there have been moves across Canada to develop procurement policies that incorporate social enterprise factors.

In its Fall Economic Statement for 2018, the Government of Canada announced that it intended to develop a "Social Finance Fund for Canada" to support social enterprises (Canada, 2018) and that the program would be rolled out in 2021; however, at the time of writing, it appears that the program has not been launched. According to the government, the Finance Fund will be used to make loans available to social enterprises and to provide other, more specific forms of support, including a $50 million investment readiness fund.

B CORPS (THIRD-PARTY CERTIFICATION AND MONITORING)

B Corp certification is a social responsibility certification scheme that was initiated in the United States in 2006 (B Lab, n.d.[a]) and is operated by B Lab, a non-profit organization (B Lab, n.d. [b]). Today, there are certified "B Corps" in more than 70 countries. The first Canadian B Corp was certified in 2009. At the time of writing, there were about 230 companies in Canada with B Corp certification, including the Business Development Bank of Canada, Danone Canada, the Optel Group, Beau's Brewery, and Bullfrog Power. Liao (2013) observes that "B Lab has … indicated that the obligation to consider stakeholder interests must be 100% affirmed under Canadian law before [B Lab] will allow Canadian companies to forego their article amendment process" (p. 715). In other words, B Lab is not satisfied with Canada's permissive corporate fiduciary laws, which, as noted earlier, merely give decision makers the *option* to consider stakeholder interests. B Lab favours a mandatory regime that would explicitly *require* company decision makers in Canada to take into account non-shareholder stakeholder interests.

09.

FIRST NATION COMMUNITIES AND SOCIAL ENTERPRISE

Several issues arise for First Nation Indigenous communities with regard to the use of "purpose driven entities" in Canada (including hybrids and cooperatives). When considering what it means to be a "purpose driven" entity, it should be noted that many First Nations have chosen to set up *for-profit* "economic development corporations" for the primary purpose of creating employment and training opportunities for their members. In other words, many First Nations are using the for-profit share corporation entity form to pursue community benefits. Some First Nations have also adopted the cooperative entity form for the purposes of community economic development.

9.1 FIRST NATION ECONOMIC DEVELOPMENT CORPORATIONS

Although they are generally structured as for-profit share corporations, the primary goal of First Nation economic development corporations is to provide community benefits. To realize this goal, development corporations must earn revenue (to pay employees) and profits (to reinvest in the business and in community programs) (Curry et al., 2016, p. 109). As vehicles for community economic development, job creation, and the training of community members, First Nation economic development corporations may be categorized as a form of purpose-driven "social enterprise." Curry et al. show that "community-owned development corporations on First Nation reserves match closely with the concepts and mission of social entrepreneurship" (p. 109). That said, the corporate governance structure of for-profit economic development corporations is distinct from the one-member, one-vote democratic governance structure of cooperatives. Though it is beyond the scope of this report to go into detail, it should be noted that, for First Nations, there are distinct advantages and disadvantages in the various governance features of both for-profit share corporations and cooperatives. Similarly, the introduction of hybrid entities also entails potential advantages and disadvantages.

Young (2021) argues that, historically, First Nation communities seeking "to merge both fiscal and social considerations have typically had to be creative in developing business structures" (p. 165). Under Canada's *Indian Act*, First Nation bands do not have legal personality. This constraint has led many First Nation communities to turn to economic development corporations (which do have legal

> British Columbia's C3 legislation defines "community purpose" simply as a benefit to the wider society.

personality) for purposes of creating projects to benefit the wider community (Henderson, 2018, p. 250). Curry et al. (2016) observe that in addition to the pursuit of economic objectives, "indigenous values are embedded in the mission of community development corporations" (p. 109). They argue, further, that "the commitment to community well-being differentiates [First Nation] development corporations from conventional corporations" (p. 110). As an example, Curry et al. cite the Osoyoos Indian Band's development corporation, which operates a wide range of enterprises, including a commercial winery, a daycare, cultural centres, recreational businesses, and construction companies (p. 110; see also: Louie, 2021). Their empirical study demonstrates that purpose-driven corporations that "embrace social and community goals" generate economic benefits for First Nations communities; and that the social and community mission of First Nations economic development corporations correlates with the economic success of those entities (Curry et al., 2016, p. 111). "A successful First Nations business," they conclude, "will strive for profit; however, they will also move towards the revitalization of traditional beliefs and philosophies" (p. 114).

9.2 POTENTIAL CONCERNS FOR FIRST NATIONS OF CICS AND OTHER HYBRID ENTITIES

Although First Nations may choose hybrid entities for the purpose of structuring community development organizations, there can be disadvantages in doing so. In incorporating First Nation band-owned businesses as C3s and CICs, one potential concern lies in the restrictions on what is regarded to be an eligible "community purpose" under the enabling legislation for these entities (Henderson, 2018, p. 276). Nova Scotia's CIC legislation states that a "'community purpose' means a purpose beneficial to (i) society at large, or (ii) a segment of society that is broader than the group of persons who are related to the community interest company" (*CICA*, s. 2[1][c]). British Columbia's C3 legislation defines "community purpose" simply as a benefit to the wider society. In both provinces, the community benefit must extend to parties beyond those related directly to the C3 and CIC. However, for many band-incorporated businesses, the community purpose is limited to benefitting that First Nation's members. The intent of First Nation development corporations is not to provide benefits to the wider society, although they might also have this result (Henderson, 2018, p. 274). As Henderson notes, "the difficulty that arises for band-owned businesses is that the shareholders and the wider community are one and the same" (p. 275). Legally, the shareholders of a C3 or a CIC are considered to be related parties. Under the legislation, the required community benefit should extend not to related parties but to others beyond them. On this matter, Henderson notes that, "for band-owned businesses, the definition of 'community purpose' may be too restrictive" (p.

276). Nonetheless, Henderson points to guidance from the UK's Office of the Regulator, which stipulates that, "a company that engages in business activity for the purpose of investing its surplus for the benefit of the community would qualify" (Henderson, 2018, pp. 274–275, citing United Kingdom, Office of the Regulator of Community Interest Companies, 2016, p. 7). This guidance may be persuasive when interpreting the "community purpose" requirement of Canadian CICs and C3s. Further research is needed to determine whether the specific community benefit requirements of hybrid organizations in Canada pose obstacles for First Nation communities that may consider adopting these novel entity forms.

The issues arising from the application of such rules to First Nation organizations will need to be worked out over time; however, to provide greater clarity, and as a way to encourage adoption of these novel organizational forms, it may be that a set of "carve out" rules for both band-owned and individually owned First Nation businesses seeking to incorporate as C3s or CICs should be promulgated through legislative amendments.

9.3 OTHER IMPLICATIONS FOR FIRST NATIONS OF HYBRID STRUCTURES

There is some debate over whether the novel hybrid entity structures that have been introduced in Canada truly meet the needs of First Nation communities. As Henderson (2018) points out, for First Nation organizations, "one risk of new corporate forms, and their accompanying mandatory and default structure, is that they will encourage homogeneity rather than diversity" (p. 278). Henderson takes the view that the CIC and C3 structures do not formally embed stakeholder engagement into the decision-making structure and that their "exclusive decision-making structure … appears to be antithetical to Indigenous ways of doing business" (p. 276). However, on a positive note, Henderson believes that the C3 and CIC cap on shareholder distributions could help to alleviate possible pressure on directors of First Nation economic development corporations to distribute profits to those entities' shareholders rather than reinvest them into the community (p. 275). Another potential problem, as noted by Young (2021), is that the additional reporting requirements of CICs could be burdensome for smaller organizations, such as First Nation bands (p. 172). To address some of the concerns about the usefulness of hybrid entity forms for First Nation communities, Young recommends that Canada establish its own "unique Indigenous-centric model" (p. 151) that is able to "effectively promote the unique complexities of Indigenous business ventures (p. 156)". Just how to do this is a matter for First Nations communities to determine, and goes beyond the scope of this paper.

10.

CONCLUSION

10.1 A BALANCED POLICY FRAMEWORK FOR FOURTH SECTOR ENTITIES IN CANADA

In designing and introducing purpose-driven fourth sector entities in Canada, policy makers must strike a balance in seeking to achieve two distinct goals: i) addressing the genuine needs of individuals and groups; and ii) carrying out a rapid transition of all types of business activities—including those of "traditional" for-profit share corporations—toward addressing critical problems of people and planet. One risk that policy makers must consider carefully is that novel fourth sector entities may remain "niche" entities and that their impact may, as such, remain disproportionally small in view of the effort required to introduce them. Policy makers must keep in focus the wider policy goal of shifting economic behaviour, in the mainstream, toward sustainability. In balancing these policy goals, it should be recognized that the economic activities of non-profit corporations and cooperatives comprise a significant proportion of Canada's overall economy, whereas currently the impacts of fourth sector entities are very small in comparison. It remains to be seen whether these experimental entity forms gain in popularity over time. In the meantime, there remains an urgent need to shift the regulatory ecosystem of "traditional" for-profit companies toward greater positive impacts in social and environmental terms. In this respect, *all* types of business entities—including (especially) large publicly traded, for-profit firms—should become purpose-driven.

From the issue of introducing benefit corporations as a distinct legal entity form in provincial jurisdictions, or federally across Canada, a national policy debate has emerged. This debate concerns whether the introduction of fourth sector entities amounts merely to a distraction, or if it might complement moves toward a socially and environmentally sustainable stakeholder approach to corporate governance. Liao et al. (2019) warn that the introduction of benefit corporations may detract from the broader policy goal of making *all* for-profit corporations more socially and environmentally responsible (p. 114). The fourth sector can be expected to grow if the "conditioning factors" (SEGIB, 2021), such as appropriate legal entity forms, are in place. Yet, policy makers must take care that the design and introduction of hybrid fourth sector entities does not impede or distract from efforts—vital and urgent—to transform the regulatory ecosystem for *all* for-profit enterprise toward more environmentally and socially sustainable outcomes. Liao et al. argue that "the challenge for legislators, should they choose to

develop alternative legal structures or certifications for social enterprise, will be in creating effective and meaningful options that do not harm broader reform efforts but are legitimate, accountable, and work in favour of societal flourishing rather than against it" (114).

In Canada as around the world, the development of fourth sector legal entities is occurring in parallel with the development of myriad "soft law" and "hard law" regulatory frameworks aimed at shifting for-profit economic activity toward more sustainable outcomes. Such developments include the adoption of the concept of "double materiality" (as opposed to the "single materiality" focus on shareholder value), the ESG (environmental, social, and governance) framework, practices of mandatory climate-related disclosure, and other non-financial reporting requirements. Very significant efforts in this regard include the EU directive on corporate human rights and environmental due diligence (European Commission 2022) and the United Nations Guiding Principles on Business and Human Rights (Ruggie, 2011). In addition to these publicly driven initiatives, privately ordered efforts include the introduction of sectoral voluntary codes of conduct, the establishment of global, multi-stakeholder initiatives (such as the Voluntary Principles on Security and Human Rights), and the work of private standard-setting bodies, such as the newly formed International Sustainability Standards Board (ISSB) and the much-longer-standing International Standards Organization (ISO).

10.2 RISK OF REMAINING A NICHE SECTOR RATHER THAN DRIVING SYSTEMIC CHANGE

Based on empirical evidence available at the time of writing, there has been limited uptake of new hybrid entity forms in Canada (Henderson, 2018). Across sectors, the number of actors who choose to use hybrid entity and benefit company forms is very low compared to those who opt for "traditional" for-profit share corporations (Liao et al., 2019, p. 90). In the Canadian context, there is a risk that the fourth sector will remain a niche sector and will not contribute in a significant way to a broad-based transformation of the private sector. This concern is articulated best by Liao, who states that "it is questionable how hybrids would infiltrate global multinational enterprises and similar well-

> *No single organizational form should dominate our thinking when it comes to mainstreaming social and environmental sustainability in today's domestic and global economy.*

established forms of industry. Instead, it is likely that hybrids will become a niche sector of the market, operating more as a small supplement relative to the mainstream corporate model rather than as one that may overtake it" (p. 310).

Currently, there is no proposal to create a benefit company at the national level and efforts to create them at the provincial level have stalled. If federal benefit corporation legislation is to be proposed, it must be carefully calibrated to the Canadian context—that is to say, its community benefit requirement must go beyond the minimum floor already established by Canada's permissive corporate fiduciary laws. Liao (2013) is cautious about the introduction of "benefit corporations" in Canada, noting that, "if the benefit corporation is designed mainly to address American corporate governance needs for social progress, then, before Canada elects to adopt similar laws, there must first be an accurate depiction and understanding of Canada's own governance position" (p. 57). In that regard, this report aims to shed light on the unique legal and institutional ecosystem that existing and proposed fourth sector entities in Canada must inhabit.

10.3 PURPOSE-DRIVEN ENTITIES AND AMBIGUITY IN CANADA'S CORPORATE FIDUCIARY LAW

Against the claims of some detractors of benefit companies and hybrid entities in Canada, who argue that they may be redundant under Canada's permissive fiduciary laws, evidence exists that Canada's permissive approach has not lived up to its promise. Indeed, the move toward a stakeholder approach, which gained ground with the *BCE* decision, may have already peaked. Lin (2021) raises concerns that the codification of *BCE*, in the 2019 amendments to the *CBCA*, "arguably downgrade[s] the consideration of stakeholder interests from an obligation to an option" (p. 566). In any event, scholars and practitioners are split over whether *BCE* has made it mandatory for directors to consider stakeholder interests (p. 566). This report concludes that the *BCE* decision was ambiguous in this respect (see also: Iacobucci, 2009; Puri, 2010; Lupa, 2011) and that the 2019 amendments to Canada's federal corporate fiduciary law (namely the *CBCA*) did not succeed in clearing up the ambiguity. As long as this ambiguity remains, there remains a place for experimentation with regard to the benefit company and hybrid entity forms in Canadian law. Given the evident shortcomings in Canada's much-vaunted stakeholder model of corporate governance, the introduction of alternative fourth sector entity forms is certainly a justified, if imperfect, experiment.

10.4 THERE IS A ROLE FOR EXPERIMENTATION, BUT SYSTEMIC CHANGE IS URGENT

The widely held, though mostly erroneous, notion that corporate decision makers are obligated to maximize shareholder value to the exclusion of all other considerations has ideological as well as historically contingent origins. Over the past forty years, individual corporations, and even entire corporate groupings, have become commodities in their own right—and so, as commodities, they may be put up for auction in the cutthroat

“market for corporate control” (Manne, 1965). In this respect, corporate entities have become financialized (Ireland, 2009). The financialization of the corporation within global capital markets leads to substantial pressures on corporate decision makers to focus their efforts upon increasing their company’s stock price. In Canada, corporate decision makers are compelled to focus on stock price despite the fact that Canada’s fiduciary laws do not *require* corporate directors and officers to pursue maximal shareholder value. To the contrary, Canada’s fiduciary laws require directors and officers to act in the “best interests of the corporation, viewed as a good corporate citizen” (*BCE*, para. 66).

This report has demonstrated that there is currently a debate among academics, practitioners, and business leaders about whether benefit companies and other fourth sector entity forms are needed in Canada. All things considered, this report concludes that there remains a role for benefit companies and hybrid entities, sometimes an experimental one, as part of the broader effort to shift the regulatory ecosystem toward achieving greater social and environmental sustainability. The development of fourth sector entities that explicitly require the pursuit of community benefits are worthy experiments inasmuch as they contribute to a deliberative, iterative process of reimagining more sustainable forms of economic activity and the supporting system of organizational law. No single organizational form should dominate our thinking when it comes to mainstreaming social and environmental sustainability in today’s domestic and global economy. We must engage all the tools in the toolbox and creatively forge new, precision tools to meet the urgent needs of the day.

RECOMMENDATIONS

RECOMMENDATION – To use systems-level thinking when designing new hybrid or purpose-driven entity forms. Markey et al. (2011) conclude that, "in the case of social economy reform … the desired legal outcomes can often only be accomplished by a whole system approach that combines social, political, and legal reforms" (p. 10). The challenge for policy makers is to design and introduce legal structures that meet people's needs and also have high potential to thrive within the existing organizational ecosystem.

RECOMMENDATION – To promote greater awareness of purpose-driven companies, including hybrids and benefit corporations. To this end, university- and college-level introductory business courses should include sections on subjects such as the social economy, social enterprise, purpose-driven entities, and fourth sector entity forms. Markey et al. (2011) found that, "social enterprise operators are not generally well-informed about the dynamics of social enterprise legal structure. This includes knowledge of their own structure (and the rationale for having chosen it), and knowledge of other structures and possibilities/limitations associated with potential reforms" (p. 4).

RECOMMENDATION – To provide opportunities, at colleges and universities, for continuing education for workers and decision makers in the social economy, social enterprises, purpose-driven entities, and fourth sector entity forms.

RECOMMENDATION – To avoid off-loading publicly funded and government-run programs to fourth sector enterprises, except in cases where there is a clear strategy for monitoring the progress of such entities; and only as long as the government's capacity to deliver needed programs is not undermined. Policy makers should take care not to fall into the trap of off-loading public services that governments took on in the past, and may have been operating for many years; in such cases, off-loading to market-oriented entities will probably be counterproductive due to market failure.

RECOMMENDATION – To develop accountability mechanisms to prevent greenwashing by groups or individuals who misuse fourth sector entity forms for branding and other purposes. Such accountability mechanisms should include appropriate disclosure requirements and, where appropriate, auditing requirements. The challenge for policy makers is to design and implement accountability mechanisms that are not overly burdensome, especially as most social enterprises are small- and medium-sized entities with limited resources and capacity.

RECOMMENDATION – To initiate consultations with Canada's cooperative sector (at the national and provincial levels), including financial services cooperatives, to develop and propose amendments to Canada's cooperative legislation that would better enable cooperative businesses to pursue social responsibility and environmental sustainability. The need for consultations is underscored by a survey of social enterprises in Canada conducted by Markey et al. (2011), which found that respondents believed that "more work needs to be done on understanding the [social enterprise] sector first before rushing into regulatory reform" (p. 23). At the same time, the respondents of the study "understood that the legal structure [for social enterprise] would very likely evolve, through a period of adaptation" (p. 24).

RECOMMENDATION – To expand the "oppression remedy" in Canadian corporate law to include specific remedies for non-contractual stakeholder/creditors, and for adverse human rights and environmental impacts.

RECOMMENDATION – To initiate broad consultations for developing "social procurement" strategies to support social enterprises, fourth sector business entities, First Nations economic development corporations, and cooperatives across Canada.

RECOMMENDATION – To increase financing and capacity-building support for social enterprises, including hybrid entities, and to increase capacity-building support for the social enterprise movement more broadly. If it has not already done so by the time of writing, the federal government should move immediately to implement its long-overdue Social Finance Fund for Canada (Canada, 2018).

RECOMMENDATION – To begin meaningful collaboration with First Nations organizations to explore whether or not new, purpose-driven entity forms should be introduced to meet the needs of First Nation communities. If consultations determine that such entities are needed, these entities should be designed in ways that are not constrained by the colonial legacy of the *Indian Act*. In conceiving and designing these entities, models of Indigenous social enterprise and entity forms from other jurisdictions—such as the United States, New Zealand, and Australia—should be examined. For example, policy makers acting in collaboration with First Nations should assess the merits of the Australian *Corporations* (*Aboriginal and Torres Strait Islander*) *Act* (CATSI Act), currently under review in Australia, which would establish a for-profit business entity intended to support economic development for Aboriginal and Torres Strait islanders (see, generally, Young, 2021, p. 177). Such efforts ought only to be pursued in a manner that includes the direct engagement of First Nations community members, including elders, practitioners, scholars, and others.

RECOMMENDATION – To track lessons learned from the experience of balancing revenue generation with the social objectives of First Nation communities. The movement to develop social enterprise and purpose-driven entities should draw from the experience of First Nation communities in Canada. Young (2021) recommends that "social

enterprise discourse could take guidance from how Indigenous communities have sought to balance mission and profit over the years. That is, strategically aligning Indigenous community values (traditional and cultural) with market-based values is not a recent notion for many Indigenous communities that have tried to balance both objectives in economic development corporations" (p. 153).

RECOMMENDATION – To create a set of "carve out" rules for band-owned and individually owned First Nation businesses that seek to incorporate as C3s or CICs, in the aim of providing greater clarity and encouraging the adoption of these new organizational forms,

RECOMMENDATION – To conduct empirical research to determine whether or not the existing mandatory reporting and accountability mechanisms for BC benefit companies are adequate and whether or not they should be strengthened.

RECOMMENDATION – To conduct empirical research to examine to what extent stakeholders and the wider public have taken on the role of monitoring the public benefit of C3 companies and whether the community contribution report is an adequate monitoring tool. The results of this research should inform future discussions about possible amendments to C3 legislation and regulations.

RECOMMENDATION – To avoid, in all future social enterprise legislative efforts, a one-size-fits-all approach. Policy makers should take care to avoid creating structures that inhibit innovation. In this respect, the findings of a survey of social enterprises conducted by Markey et al. (2011) are instructive. The respondents expressed concern that the imposition of fixed legal structures on social enterprises could "inhibit or prevent possible future innovations" (p. 24). Their research found concern among some respondents about "whether a specific legal structure will produce negative outcomes associated with limiting social enterprise diversity and activity" (p. 22). At the same time, some respondents also noted that "a discreet legal structure would help to create a common language for social enterprise in Canada" (p. 23).

12.

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