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The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise

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# The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise

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Carol Liao\*

*The period when corporate social responsibility (“CSR”) only referred to corporate philanthropic donations has passed. Contemporary CSR is intimately intertwined with sustainable development, and its growth in the last several decades has been evident in Canada. The recent appearance of “hybrid” corporate legal structures on the international stage marks a growing trend toward enabling the dual pursuit of economic and social mandates for businesses. This suggests that the next significant stage in the CSR movement will be in the reformation and creation of corporate legal models that not only enable, but require, CSR concepts to be embodied within corporate governance practices.*

*This article borrows the term “transformational” from the business sector to help identify a tangible goal for corporate governance reform in*

*Canada. Highlights include having a sustainable purpose, long term vision, and multi-stakeholder collaboration. While the US shareholder primacy model is often presumed to be the model that is dominant in modern Canadian corporations, this presumption is flawed. This article identifies some of the fundamental legal features that set Canada apart from US shareholder primacy, and attempts to demarcate a path for Canada to attain transformational corporate governance through its laws. Canada is poised to become a leader in corporate governance reform on two fronts: (1) the reformation of its existing laws regulating mainstream corporate governance practices, and (2) the creation of hybrid laws that can meet growing demands to legally house and govern social enterprises.*

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*There has been much fanfare surrounding the possible implementation of a hybrid model similar to the US benefit corporation in Canada in order to address the for-profit sector's growing needs to pursue social value in addition to profit-making. However, some of the fundamental legal characteristics within the benefit corporation actually parallel existing common laws in Canada regarding mainstream corporate governance practices. Canada does not need to adopt American solutions to American problems.*

*During these formative years of Canada's corporate legal development, the nation's progressive legal stance must be properly understood and taken into account when establishing hybrid laws so as not to confuse and/or jeopardize that stance. An ongoing stream of thoughtful and intelligent commentary is needed to address and advance Canadian corporate legal needs for social progress, as well as the establishment of innovative new hybrid laws that can bridge the gap between for-profit and non-profit sectors.*

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*L'époque où la responsabilité sociétale des entreprises ("RSE") se manifestait uniquement au travers de dons philanthropiques des entreprises est révolue. La RSE moderne est maintenant intimement liée au développement durable, et sa croissance au Canada au cours des dernières décennies est évidente. L'apparition récente de structures juridiques 'hybrides' des entreprises sur la scène internationale vient marquer le développement d'une tendance visant à permettre pour les entreprises la double poursuite de mandats à la fois économiques et sociaux. Désormais, le chemin à emprunter semble clair. L'évolution de ce mouvement se fera dans le domaine de la réforme et la création de nouveaux modèles juridiques pour les entreprises qui non seulement permettront, mais surtout nécessiteront, l'adoption et l'incorporation des concepts de RSE dans leurs pratiques de gouvernance.*

*Cet article emprunte le terme 'transformationnel' du domaine des affaires afin d'aider à identifier l'objectif à atteindre pour réformer la gouvernance d'entreprise. Les faits saillants sont multiples : l'adoption d'une raison d'être durable, une vision à long terme, et une collaboration active de toutes les parties prenantes. Même si le modèle américain de la primauté des actionnaires est souvent présumé être le modèle dominant au sein des entreprises Canadiennes, cette présomption est en fait erronée. Cet article identifie les caractéristiques juridiques fondamentales qui séparent le Canada et ce modèle américain, et tente de délimiter un chemin pour que le Canada puisse atteindre, à travers*

*ses propres lois, une gouvernance des entreprises 'transformationnelle'. Le Canada est parfaitement placé pour devenir le chef de file des réformes de la gouvernance des entreprises sur deux fronts: d'une part grâce à la réforme de ses lois actuelles qui réglementent les pratiques de gouvernance des entreprises, et d'une autre avec la création de lois hybrides qui pourront héberger et gouverner les entreprises à vocation sociale.*

*La possibilité récente d'une mise en oeuvre d'un modèle hybride qui ressemblerait à la 'benefit corporation' américaine au Canada, afin d'adresser le besoin croissant du secteur à but lucratif de poursuivre une valeur sociale ajoutée, a provoqué beaucoup d'excitation. Cependant, certaines caractéristiques juridiques présentes aux sein de la 'benefit corporation' rappelle déjà les lois qui réglementent la gouvernance des entreprises au Canada. Le Canada n'a donc pas besoin d'adopter des solutions américaines inventées pour répondre à des problèmes américains. A présent, lorsque nous nous apprêtons à développer ces nouvelles lois des affaires, il est important de saisir la position juridique progressive de ce pays et de la prendre en compte quand nous tentons d'établir nos propres lois hybrides. Sinon, nous risquons de la compromettre. Pour que les structures juridiques des entreprises puissent répondre aux demandes du progrès social, ainsi que pour établir des lois hybrides novatrices capables de combler le fossé entre le secteur à but lucratif et le secteur à but non lucratif, une analyse intelligente et réfléchie est requise.*

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To qualify as “transformational,” a company must both transform its own business model toward sustainability and the larger economic ecosystem in which it exists.

*Coro Strandberg*<sup>1</sup>

There is a general understanding among corporate legal scholars that the concept of shareholder primacy is deeply ingrained within the modern corporation—pursuing anything other than shareholder wealth is tantamount to bad governance.<sup>2</sup> Social gains resulting from corporate actions are considered ancillary, subordinate, and/or supporting of the singular objective of profit making.<sup>3</sup> However, within the last decade, innovative new alternative legal structures have appeared on the international stage. These “hybrid” corporate structures blend for-profit and non-profit legal characteristics into their governance models, enabling businesses with infrastructure to pursue both economic and social mandates. Some alternative models available to social entrepreneurs include the low profit limited liability company and the benefit corporation in the United States and the community interest company in the United Kingdom. Restrictions on dividends, obligations on directors to consider community interests, and community-purpose asset locks are some examples of the unique governing features found within these models.

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<sup>1</sup> Coro Strandberg, “Transformational companies tackle the double whammy” (25 September 2012), online: Coro Strandberg – Sustainability Consultant <<http://corostrandberg.com/blog/sustainability/transformational-companies>>.

<sup>2</sup> Adolf A Berle Jr & Gardiner C Means, *The Modern Corporation and Private Property* (New York: MacMillan, 1932).

<sup>3</sup> Michael Jensen, “Value Maximization, Stakeholder Theory, and the Corporate Objective Function” (2001) 14 *Journal of Applied Corporate Finance* 8.

Canada is beginning to contemplate the adoption of hybrid corporate models into its laws, and the process has already begun in a few provinces. The growth of the “social enterprise”—a term with no legal import that commonly refers to either a for-profit trying to do social good or an enterprising non-profit—is beginning to generate a legislative response. In March 2012, the British Columbia government announced the creation of a new hybrid model, the community contribution company.<sup>4</sup> Nova Scotia has since followed suit, announcing the adoption of a similar hybrid in November 2012.<sup>5</sup> These provincial hybrids are each modeled after the British community interest company, which is designed to allow traditional non-profits the ability to make a profit and raise capital while keeping the social mission intact through stringent limitations on their distribution of capital.<sup>6</sup>

There is now much fanfare surrounding the possible implementation of a hybrid similar to the US benefit corporation to address traditional for-profit sector needs for social progress.<sup>7</sup> However, some of the fundamental legal characteristics within the benefit corporation that differentiate that model from traditional US corporate laws seem to parallel the existing common law in Canada. As Canada begins to move toward the active implementation of hybrids, a pressing and important question arises: What *is* Canada’s actual legal model to govern its corporations? The answer to that question dictates how Canada should proceed in the adoption of hybrid corporate legal structures. 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. This will ensure that Canada does not simply adopt an American solution to an American problem that is not reflective of Canada’s current progressive legal stance and potentially confuse or jeopardize that stance.

Corporate governance itself is a complicated matter, deriving from various laws, customs, and processes—with significant normative underpinnings—and these continue to be formative years in development of Canada’s governance standards. Landmark judgments by the Supreme Court of Canada (“SCC”) have indicated that corporate directors are not confined to decision-making focused solely on shareholders’ interests, short-term profit, or share value. The SCC recognized that community and environmental interests, among other stakeholder interests, may also be taken into account. The court has found that directors are required “to

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<sup>4</sup> British Columbia Ministry of Finance, “BC introduces act allowing social enterprise companies” (5 March 2012), online: Government of British Columbia <[http://www2.news.gov.bc.ca/news\\_releases\\_2009-2013/2012FIN0011-000240.htm](http://www2.news.gov.bc.ca/news_releases_2009-2013/2012FIN0011-000240.htm)>.

<sup>5</sup> Service Nova Scotia and Municipal Relations, “New Opportunities for Social Entrepreneurs” (28 November 2012), online: Province of Nova Scotia <<http://novascotia.ca/news/release/?id=20121128010>>.

<sup>6</sup> *Companies (Audit, Investigations and Community Enterprise) Act 2004* (UK), c 27 [*UK Companies Act*]; *The Community Interest Company Regulations 2005* (UK), SI 2005/1788 [*CIC Regulations*].

<sup>7</sup> See e.g. Stacey Corriveau et al, “Benefit Corporations in Canada: A tool to support blended enterprise in Canada” (2011) MaRS Centre for Impact Investing [draft with author] [*MaRS White Paper*]; BC Social Innovation Council, “Action Plan Recommendations to Maximize Social Innovations in British Columbia” (March 2012), online: Government of British Columbia <[http://innovationbc2011.crowdvine.com/attachments/0002/7179/Social\\_InnovationBC\\_C.pdf](http://innovationbc2011.crowdvine.com/attachments/0002/7179/Social_InnovationBC_C.pdf)> at 11; Adam Spence, “In search of the benefit corporation” (25 November 2010), online: MaRS Centre for Impact Investing <<http://www.marsdd.com/2010/11/25/in-search-of-the-benefit-corporation/>>; “Beneficial Corporations” (October 2012), online: Sustainable Prosperity <<http://www.sustainableprosperity.ca/dl894&display>>.

act in the best interests of the corporation, viewed as a good corporate citizen”<sup>8</sup> and “commensurate with the corporation’s duties as a responsible corporate citizen.”<sup>9</sup> These findings by the SCC suggest that Canada is shifting away from the US shareholder primacy model. However, conflicts in corporate law have meant that Canadian directors face a variety of legal interpretations with respect to evolving director duties and liabilities. In addition to tensions in the law, the growth of social enterprises in the business sector, the frequent appearance of CSR in codes of conduct, and a wealth of asymmetrical information from American neighbours have left Canadian directors with minimal concrete guidance on how to balance competing interests in their corporate decision-making. Significant questions arise as to the value of sustainable performance when it is pitted directly against increasing shareholder value.

This article will attempt to demarcate a path for Canada to attain transformational corporate governance for its corporations. The term “transformational” is borrowed from the business sector to help identify a tangible goal for corporate governance reform in Canada. The non-profit organization Canadian Business for Social Responsibility (“CBSR”) partnered with Coro Strandberg to describe 19 qualities of transformational companies, in particular describing what these companies do, how they do it, and with whom they interact.<sup>10</sup> Highlights from this list include having a sustainable purpose, long-term vision, and multi-stakeholder collaboration. Methods for achieving this form of transformational governance are multifaceted and may be dependent on the particular industry in which a corporation is involved. While CSR has become a dominant force in recent decades within academic scholarship, the role of corporate law in eliciting CSR practices has been a limited one, particularly in a Canadian context. This article focuses on the corporate legal elements that form the skeleton for transformational corporate governance to take hold and the particular forces that are trending Canada away from old methods of governance. The emergence of international corporate structures that have embedded non-profit legal characteristics into their governance models suggests that a new breed of reform has entered the CSR movement. These hybrid models have only been examined by a handful of scholars to date,<sup>11</sup> and none of these models have been examined from a Canadian standpoint.

Section One of this article begins by outlining the mainstream shareholder primacy model of corporate governance and the specific legal problem to be addressed: the role of stakeholder interests in corporate decision-making under that model. This problem is briefly situated within

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<sup>8</sup> *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 66, 3 SCR 560 [BCE].

<sup>9</sup> *Ibid* at para 82.

<sup>10</sup> “19 Qualities of Transformational Companies”, online: Canadian Business for Social Responsibility <<http://www.cbsr.ca/qualities-of-transformational-companies>> (What transformational companies do: (1) sustainable purpose; (2) sustainable customer offerings; (3) solutions-oriented; (4) restorative. How they do it: (5) long term vision; (6) sustainability governance and culture; (7) leadership; (8) employee engagement; (9) inclusive business; (10) closed-looped; (11) resource productivity; (12) value-chain influence; (13) stakeholder accountability and transparency. Who they interact with: (14) customer engagement; (15) industry standards; (16) multi-stakeholder collaboration; (17) finance community; (18) public engagement; and (19) public policy advocacy).

<sup>11</sup> Of the few articles available, see e.g. Julie Battiliana et al, “In Search of the Hybrid Ideal” (2012) 10 *Stanford Social Innovation Review* 51; Dana Brakman Reiser, “Governing and Financing Blended Enterprise” (2010) 85 *Chicago-Kent L Rev* 619 [Brakman Reiser, “Governing”]; Dana Brakman Reiser, “Blended Enterprise and the Dual Mission Dilemma” (2010) 35 *Vermont L Rev* 105.

longstanding debates in corporate legal history and then brought into present day discussions by considering the important linkage between law, self-governance, and external pressures that may pre-empt and/or inform the law. Section Two identifies how Canada stands apart from the US shareholder primacy model and provides doctrinal as well as theoretical analysis of Canada's path to transformational corporate governance reform through Canadian common law. Section Three considers the possibility that Canada may be primed to attain a mainstream model that integrates CSR practices into its governance framework. This section examines the ability of the for-profit corporation to achieve transformational change and points to corporate hybridity as a new wave of reform to which Canada should turn its focus. Three high-level action items are outlined to promote the development of hybrid corporate models in Canada. In particular, Canada should be wary of adopting US-stylized hybrids that do not account for Canada's existing progressive corporate legal stance. Section Four offers concluding thoughts.

## 2. THE PROBLEM TO BE ADDRESSED

The shareholder primacy model of corporate governance can be understood as adhering to the following principles: (1) "ultimate control over the corporation should rest with the shareholder class;"<sup>12</sup> (2) "the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders;"<sup>13</sup> (3) "noncontrolling shareholders should receive strong protection from exploitation at the hands of controlling shareholders;"<sup>14</sup> (4) "the market value of the publicly traded corporation's shares is the principal measure of its shareholders' interests;"<sup>15</sup> and (5) other stakeholders, such as "employees, suppliers, creditors, consumers, governments and the environment"<sup>16</sup> should have their interests protected "by contractual and regulatory means rather than through participation in corporate governance."<sup>17</sup> While all these principles are touched upon in this article, the last principle will receive the most discussion. The difference of having the protection of stakeholder interests addressed only through contractual or regulatory means rather than through internal self-governance may seem slight. However, there is a worthwhile distinction between having the law as the only enforcement mechanism to police social and environmental harms and having the added layer of protection from corporate self-governance, which should translate to greater improvements in corporate sustainability practices. The frequent point of tension rests on the role of law to curtail social and environmental harms at the expense of commerce. For mean-

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<sup>12</sup> Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89 *Geo LJ* 439 at 440.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* at 441.

<sup>15</sup> *Ibid.*

<sup>16</sup> As defined in *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at para 42, 3 SCR 461 [*Peoples*] and affirmed in *BCE*, *supra* note 8 at para 39.

<sup>17</sup> Hansmann & Kraakman, *supra* note 12 at 441. There is generally little contention in legal scholarship regarding the definition of shareholder primacy. See e.g. Jill E Fisch, "Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy" (2006) 31 *J Corp L* 637 at 637 (shareholder primacy "defines the objective of the corporation as maximization of shareholder wealth"); Ian B Lee, "Efficiency and Ethics in the Debate about Shareholder Primacy" (2006) 31 *Del J Corp L* 533 at 535 (defining shareholder primacy as "the view that managers' fiduciary duties require them to maximize the shareholders' wealth and preclude them from giving independent consideration to the interests of other constituencies").

ingful change to occur, sustainable business models will need to be integrated into corporate strategies for the long term.

In corporate legal history, the classic shareholder versus stakeholder debate has been an extended one. The fundamental question has been whether shareholder primacy should be invoked in all circumstances: “Does the firm exist only to increase shareholder wealth ...? Or, should managers also seek to serve the interests of employees, creditors, customers, and the broader society ...?”<sup>18</sup> The importance of proper governance and, in particular, the problematic separation of ownership and control within the corporate institution, was most notably identified in the 1932 book entitled *The Modern Corporation and Private Property* by the American authors Adolf Berle and Gardiner Means.<sup>19</sup> Berle and Means described how public corporations were beginning to be comprised of two factions: controlling managers, considered the new “princes” of the social institution, and passive shareholders, the only residual claimants to the company’s net assets.<sup>20</sup> In a later article, Berle outlined how management’s authority was to be exercised for the benefit of the corporation’s shareholders. According to Berle, “all powers granted to a corporation or to the management of a corporation, or to any group within the corporation . . . [are] at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.”<sup>21</sup>

Following Berle’s article, an active exchange arose between Berle and E Merrick Dodd that is generally regarded as originating current debates between advocates of shareholder primacy and CSR. In response to Berle, Dodd argued for “a view of the business corporation as an economic institution which has a social service as well as a profit-making function,” claiming to identify an emerging public consensus that corporations should operate as “good citizens.”<sup>22</sup> Berle replied in a subsequent note that discarding a specific duty to shareholders, without substituting a reasonably clear alternative mandate, would impart too much discretion to management. In light of the separation between ownership and control, Berle believed the result would be vast, uncontrolled managerial power with no means to ensure its responsible exercise.<sup>23</sup>

A few decades later, Berle conceded that Dodd’s position had at least temporarily prevailed, as he observed that actual corporate practice and common law decisions had, over time, adopted Dodd’s general viewpoint against a stricter fiduciary duty.<sup>24</sup> As Archie Carroll and Kareem M Shabana describe, “the foundation for CSR was being developed by a quickly changing social environment and pressures from others, especially activists, to adopt CSR per-

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<sup>18</sup> Lynn A Stout, “Bad and Not-So-Bad Arguments for Shareholder Primacy” (2002) 75 S Cal L Rev 1189 at 1190.

<sup>19</sup> Berle & Means, *supra* note 2.

<sup>20</sup> *Ibid* at 116.

<sup>21</sup> Adolf A Berle Jr, “Corporate Powers as Powers in Trust” (1931) 44 Harv L Rev 1049 at 1049.

<sup>22</sup> E Merrick Dodd Jr, “For Whom are Corporate Managers Trustees?” (1932) 45 Harv L Rev 1145 at 1148.

<sup>23</sup> Adolf A Berle Jr, “For Whom Corporate Managers Are Trustees: A Note” (1932) 45 Harv L Rev 1365 at 1372.

<sup>24</sup> Adolf A Berle Jr, *The 20th Century Capitalist Revolution* (New York: Harcourt, Brace and Co, 1954) at 169.

spectives, attitudes, practices and policies.”<sup>25</sup> Nevertheless, historical events frequently created a push-and-pull over the dichotomy between the two sides.

Since the Berle-Dodd exchange, the shareholder versus stakeholder debate in corporate law “has proven most fundamental and enduring.”<sup>26</sup> American corporate legal scholarship has grappled with the issue of how to incorporate stakeholder interests in corporate governance for decades. Business models specifically addressing stakeholder interests in for-profit corporations became prominent in the mid-1980s.<sup>27</sup> The motivation behind stakeholder management was to build a framework that would respond to the concerns of managers experiencing a business environment “buffeted by unprecedented levels of environmental turbulence and change.”<sup>28</sup> The term stakeholder referred to “any group or individual who is affected by or can affect the achievement of an organization’s objectives,” and thus included any person or entity that simply could assist in or benefit from a corporation’s success.<sup>29</sup> Stakeholder theory encouraged management to develop business strategies that invest in all stakeholder relationships that will help to ensure its long-term success. The theory places critical importance on developing an understanding of the actual stakeholders specific to the institution in question as, through this level of understanding, management can create strategies supported by all stakeholders to ensure the long-term survival of the institution.

Stakeholder theory has received a general level of acceptance by corporate legal scholars on both sides of the classic Berle-Dodd debate. For those who argue that corporations should have the singular objective of shareholder wealth maximization, the theory supports this position by its claim that incorporating stakeholder interests simply furthers that cause.<sup>30</sup> In the case where other stakeholder interests conflict with that of shareholders, shareholder interests prevail. For those claiming that managers should seek to serve the interests of other stakeholders—including by ensuring sustainable practices within a corporation—stakeholder theory may also appease them, though with notable limitations. It is necessary, however, not to prematurely equate shareholder primacy to unfriendly social and environmental practices. Some scholars, for example, have supported increased shareholder democracy, pointing to examples where shareholders have advocated for sustainable reporting and other measures that have improved

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<sup>25</sup> Archie B Carroll and Kareem M Shabana, “The Business Case for Corporate Social Responsibility: A Review of Concepts, Research, and Practice” (2010) 12(1) *International Journal of Management Reviews* 85 at 87.

<sup>26</sup> Lynn A Stout, “New Thinking on ‘Shareholder Primacy’” (2012) 2 *Journal of Accounting, Economics, and Law – A Convivium (AEL)* 1 at 2.

<sup>27</sup> R Edward Freeman & John McVea, “A Stakeholder Approach to Strategic Management” in Michael A Hitt, R Edward Freeman & Jeffrey S Harrison, eds, *The Blackwell Handbook for Strategic Management* (Oxford: Blackwell Publishers Ltd, 2006) 188 at 189 (describing how its origins may have come from the Stanford Research Institute, now SRI International, in the 1960s). While the notion of stakeholder interests may have roots in a number of academic fields, much of the theoretical development behind stakeholder theory has been credited to work from R Edward Freeman and others at The Wharton School of Business at the University of Pennsylvania (*ibid*).

<sup>28</sup> *Ibid* at 188.

<sup>29</sup> R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge: Cambridge University Press, 2010) at 46.

<sup>30</sup> See Jensen, *supra* note 3.

corporate actions.<sup>31</sup> Sustainable practices are not the antithesis of shareholder primacy; they simply generate from financial motivations that at times overlap with sustainability and at other times do not. The issue, then, is whether it is sufficient to have shareholders act as the centrepiece of corporate interests with sustainability as a potential by-product.

This article examines the legal elements that are trending Canada towards a stakeholder-supported model of governance—particularly the fortification of CSR<sup>32</sup> within Canada's modern corporations and the development of new hybrid legal structures. While the main focus of this article is on Canadian corporate law and governance and its potential contributions to sustainable development, this analysis does not negate the existence of external motivations that may pre-empt and/or inform the law. Several notable studies have considered corporate behaviour and factors that contribute to altering that behaviour beyond the direct implementation of hard laws. These works are important in the study of corporate self-governance, but there are always challenges in addressing an issue that spans across several disciplines (business, finance, economics, law, political science, sociology, environmental studies, among several others), and is broached in several theories and approaches within those disciplines (such as institutionalism, organizational behaviour, law and economics, law and society, to name a very few). In sum, additional forces at play tend to operate with more subtlety than legal rules in influencing corporate behaviour.<sup>33</sup> Regulation itself cannot adequately explain the differences in environmental performance across organizations. Empirical research has shown how “social license” pressures—particularly from local communities and environmental activists—have been found to compel some organizations to move toward higher compliance standards than others.<sup>34</sup> But at the same time, economic counter-pressures tend to impose limits on “beyond compliance” investments.<sup>35</sup> Robert Kagan, Neil Gunningham, and Dorothy Thornton note that:

Regulation still matters greatly, but less as a system of hierarchically imposed, uniformly enforced rules than as *a coordinative mechanism, routinely interacting with*

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<sup>31</sup> See e.g. Janis Sarra, “Shareholders as Winners and Losers under the Amended Canada Business Corporations Act” (2003) 39 Can Bus LJ 52.

<sup>32</sup> The prospect of defining CSR is not an easy one, and this article refrains from delving into that debate. Dirk Matten and Jeremy Moon explain the difficulty in that “[f]irst...CSR is an ‘essentially contested concept,’ being ‘appraisive’ (or considered as valued), ‘internally complex,’ and having relatively open rules of application. Second, CSR is an umbrella term overlapping with some, and being synonymous with other, conceptions of business-society relations. Third, it has clearly been a dynamic phenomenon” (Dirk Matten & Jeremy Moon, “‘Implicit’ and ‘Explicit’ CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility” (2007) 33:2 *Academy of Management Review* 404 at 405). Ultimately, “[t]heories of corporate social responsibility cast a potentially broader net, emphasizing all of the social costs of corporate activity, and therefore embrace, for example, environmental or political concerns as well as stakeholder interests” (David Millon, “New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law” (2000) 86 *Va L Rev* 1001 at 1002).

<sup>33</sup> See e.g. Neil Gunningham, Robert A Kagan & Dorothy Thornton, “Social License and Environmental Protection: Why Businesses Go Beyond Compliance” (2004) 29 *Law & Soc Inquiry* 307 (corporations at times require a “social license” to perform above regulatory compliance standards).

<sup>34</sup> See Robert A Kagan, Neil Gunningham & Dorothy Thornton, “Explaining Corporate Environmental Performance: How Does Regulation Matter?” (2003) 37 *Law & Soc’y Rev* 51.

<sup>35</sup> *Ibid* at 84.

*market pressures, local and national environmental activists, and the culture of corporate management in generating environmental improvement while narrowing the spread between corporate leaders and laggards.*<sup>36</sup>

Thus, while this article explores how Canada's corporate governance laws and norms have shifted away from those of its southern neighbour, maintaining a sensible understanding of the limits and opportunities that hard and soft laws can play in influencing corporate behaviour is important. Scholars have pointed out that in the past several years, "an array of stakeholders have turned to firms, rather than governments, to address enduring environmental problems including forest degradation, fisheries depletion, mining destruction, and even climate change."<sup>37</sup> An underlying awareness must be maintained as to how corporate law is part of a larger coordinative mechanism that continuously interacts with other dynamic pressures on the road to transformational corporate governance reform.

That being said, regulatory requirements have undeniably brought about significant improvements in shaping corporate behaviour.<sup>38</sup> Put in a legal context, "rules or standards of corporate stewardship evolve in the context of the larger public policy and regulatory framework of corporate law, securities law, and a highly developed scheme of credit enforcement and bankruptcy law, which provide the normative 'muscle' to encourage particular kinds of governance behaviour."<sup>39</sup> Sensitivity to external pressures is important, but understanding the finer aspects of the law dealing with stakeholder interests, director accountability, and the broader corporate legal framework guiding a nation's corporations is fundamental and imperative for achieving greater sustainable development. Laws may be part of a larger, dynamic social phenomenon at play, but the power of ill-placed laws to limit opportunities and hinder growth is indisputable. Is it unnecessary for laws to acknowledge non-shareholder stakeholder interests in a board's corporate decision-making? What parameters should be used to determine the best interests of the corporation? The answers to these questions matter very much, not just in a legal context but in a social one as well, as corporations continue to wield their enormous power over the sustainable management of our environmental resources.

### 3. MARKING A PATH FOR CANADA

Despite the significant role that Canadian corporations play in national issues, corporate legal scholarship does not seem to be an expanding field of study in Canada. Edward Waitzer noted this, commenting on Canada's proximity to the United States and its relatively small gov-

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<sup>36</sup> *Ibid* [emphasis added].

<sup>37</sup> Graeme Auld, Steven Bernstein, & Benjamin Cashore, "The New Corporate Social Responsibility" (2008) 33 *Annual Review Environment and Resources* 413 at 414.

<sup>38</sup> See e.g. Kagan, Gunningham & Thornton, *supra* note 34 at 51 (the authors explore variations in regulatory compliance in select industries to better understand how and to what extent regulation matters in shaping corporate behavior. They found that "regulatory requirements and intensifying political pressures brought about large improvements and considerable convergence" in the facilities they studied which also resulted in several facilities going "beyond compliance" measures in their corporate actions).

<sup>39</sup> Janis Sarra, "Oversight, Hindsight, and Foresight: Canadian Corporate Governance through the Lens of Global Capital Markets" in Janis Sarra, ed, *Corporate Governance in Global Capital Markets* (Vancouver: UBC Press, 2003) at 42.

ernance community.<sup>40</sup> Analysis of Canadian corporate governance is often quietly lumped together with American legal scholarship, under the assumption that the fundamentals of Canadian governance simply mirror those in the United States. While there is some merit to this stance—Canada does have features that in many ways reflect and respond to those in the United States—just as there are cultural similarities between the two nations, there are also stark differences.<sup>41</sup> For example, when remarking on Canada’s relatively strong financial position following the global financial crisis in a speech to the Institute of Corporate Directors, Purdy Crawford stated:

How were we able to do this? ... Ultimately all this has been possible because of our culture. We are so very different from our great neighbour to the south where the rule seems to be if something is not prohibited, you can do it. For better or for worse, we are more accepting of regulation.<sup>42</sup>

Crawford went on to add that while the United States “is the greatest wealth-generating society in the world ... this great characteristic has also resulted in great excesses.”<sup>43</sup>

The following is a brief analysis of significant findings in two well-known cases that have set the potential course for Canadian corporate governance norms to transform into norms that embody stakeholder accountability and broader notions of CSR and sustainability. The analysis on the SCC’s findings in these cases will focus on the role of stakeholder interests in directorial decision-making when determining the “best interests of the corporation,” and the careful balance in maintaining appropriate levels of director accountability. While the cases are doctrinal by nature, this article will address the theoretical constructs and tensions underlying those decisions and how these constructs and tensions may inform the future trajectory of transformational Canadian corporate governance reform.

### 3.1 FOLLOWING *PEOPLES DEPARTMENT STORES INC (TRUSTEE OF) v. WISE* (2004)

Prior to 2004, a series of cases in Canada, particularly from Ontario, spoke to the existence of a fiduciary duty for directors to take reasonable steps to maximize shareholder value.<sup>44</sup> These cases generally fell in line with the seminal US Delaware Supreme Court case of *Revlon Inc. v. MacAndrews & Forbes Holdings*,<sup>45</sup> where the court held that directors were found to owe a fidu-

<sup>40</sup> Edward Waitzer, “Corporate Governance Reform – Discussion Paper” (26 October 2012) [draft with author].

<sup>41</sup> Ronald B Davis, “Fox in S-OX North, A Question of Fit: The Adoption of United States Market Solutions in Canada” (2004) 33 *Stetson L Rev* 955 at 981.

<sup>42</sup> Purdy Crawford, “Canada – The Great Recession and the Evolution of Corporate Governance” (Speech delivered at the Institute of Corporate Directors, 9 June 2011) [draft with author].

<sup>43</sup> *Ibid.*

<sup>44</sup> See e.g. *Casurina Limited Partnership v Rio Algom Ltd*, [2004] 40 BLR (3d) 112 at para 27, 181 OAC 19 (Ont CA); *Pacifica Papers Inc v Johnstone*, [2001] 15 BLR (3d) 249 at para 30 (BCSC) affirmed in *Pacifica Papers Inc v Johnstone*, [2001] 93 BCLR (3d) 20, 19 BLR (3d) 63 (BCCA); *Gazit (1997) Inc v Centrefund Realty Corp*, [2000] 8 BLR (3d) 81 at para 69, [2000] OJ No 3070 (Ont SCJ); *CW Shareholdings Inc v WIC Western International Communications Ltd*, [1998] 160 DLR (4th) 131, 39 OR (3d) 755 (Gen Div); *Benson v Third Canadian General Investment Trust Ltd*, [1993] 13 BLR (2d) 265, 14 OR (3d) 493 at 500 (Gen Div); *347883 Alberta Ltd v Producers Pipelines Inc*, [1991] 3 BLR (2d) 237, 80 DLR (4th) 359 at 399-402 (Sask CA).

<sup>45</sup> 506 A (2d) 173 (Del Sup Ct 1986) [*Revlon*].

ciary duty to maximizing shareholder value in takeover contexts, regardless of non-shareholder interests. Along with the prior US Delaware case of *Unocal v. Mesa Petroleum*<sup>46</sup> and the 1919 case of *Dodge v. Ford*,<sup>47</sup> *Revlon* is often cited (whether accurately or not)<sup>48</sup> as a case that exemplifies the existence of shareholder primacy in corporate America. Shareholder wealth maximization is frequently cited as a fundamental feature in American corporate governance (not excluding of course, criticisms against this norm that still continue to acknowledge its strong presence).<sup>49</sup> Canadian corporate legal scholars have also assumed the prevalence of shareholder primacy in modern day corporations, while often disregarding issues of differentiation between Canada and the United States.<sup>50</sup>

The *Peoples* decision<sup>51</sup> stimulated several responses from legal professionals and scholars on its significance to the future of Canadian governance.<sup>52</sup> In brief, following the bankruptcy of the Peoples Department Stores Inc., the trustee brought an action against the company's directors for breaching their fiduciary duties by, prior to the bankruptcy, implementing a credit scheme that favoured Peoples' parent company, Wise Stores Inc., over its creditors. Regarding the "best interests of the corporation," the SCC stated:

[I]t is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders." ... [I]n determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.<sup>53</sup>

The court cited with approval the 1972 case of *Teck Corp. v. Millar*, in which it was held that if directors "observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not... leave directors open to the charge that they have failed in their fiduciary duty to the company."<sup>54</sup> *Peoples* marks the first instance where the court specifically validated the business judgment rule, meaning the courts will defer to the

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<sup>46</sup> 493 A (2d) 946 (Del Sup Ct 1985) [*Unocal*].

<sup>47</sup> 170 NW 668 (Mich Sup Ct 1919).

<sup>48</sup> See e.g. Lynn A Stout, "Why We Should Stop Teaching *Dodge v. Ford*" (2008) 3:1 Virginia Law & Business Review at 163.

<sup>49</sup> See e.g. Fisch, *supra* note 17 at 637 (asserting that shareholder primacy "defines the objective of the corporation as maximization of shareholder wealth"); Stephen M Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 Nw U L Rev 547 at 573 (describing two principles of shareholder primacy: the shareholder wealth maximization norm and the principle of ultimate shareholder control); Berle & Means, *supra* note 2.

<sup>50</sup> See e.g. Janis Sarra, ed, *Corporate Governance in Global Capital Markets* (Vancouver: UBC Press, 2002).

<sup>51</sup> *Peoples*, *supra* note 16.

<sup>52</sup> Readers are encouraged to review the several summaries and analyses that are available. See e.g. Catherine Francis, "*Peoples Department Store Inc. v. Wise*: The Expanded Scope of Directors' and Officers' Fiduciary Duties and Duty of Care" (2005) 41 Can Bus LJ 175; Edward Iacobucci, "Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties" (2009) 48 Can Bus LJ 232; Darcy L MacPherson, "Supreme Court Restates Directors' Fiduciary Duty – A Comment on *Peoples Department Stores v. Wise*" (2005) 43 Alta L Rev 383.

<sup>53</sup> *Peoples*, *supra* note 16 at para 42.

<sup>54</sup> [1972] 33 DLR (3d) 288 at para 97, 2 W.W.R. 385 (BCSC).

directors' business judgment so long as those directors used an appropriate degree of prudence and diligence in reaching a reasonable business decision at the particular time the decision was made.<sup>55</sup>

The theoretical and practical implications of the SCC's findings were mixed. Catherine Francis noted that the court's findings were "significant and far-reaching," and as a result "directors and officers must be scrupulous in their decision-making process and, if they ignore the interests of significant stakeholders, they do so at their peril."<sup>56</sup> Ian Lee found the SCC decision "striking" in its clear rejection of shareholder primacy.<sup>57</sup> On the other hand, others in the business sector felt that the decision changed little in terms of the usual form of redress for creditors, known as the oppression remedy. While acknowledging that the decision broadened directors' duties, the business judgment rule easily counterbalanced this effect.<sup>58</sup>

In response to *Peoples*, Stephanie Ben-Ishai suggested that the Canadian corporate governance debate is operating on the false underlying assumption that the shareholder primacy model accurately describes Canadian corporate law's treatment of public corporations.<sup>59</sup> She noted that "[w]idespread current thinking among the Canadian legal community supports the view that *Peoples* is an unjustified departure from Canadian corporate law's principal-agent, shareholder primacy understanding of the board of directors' role in public corporations."<sup>60</sup> She makes the case that the Canadian legal understanding of public corporations in actuality reflects a director primacy norm rather than a shareholder primacy norm. She then applied "team production theory," a concept developed in 1999 by American corporate legal scholars Margaret Blair and Lynn Stout, to Canadian corporate law.<sup>61</sup>

Blair and Stout took issue with the shareholder primacy model's misleading view of ownership. They adopted their ideas of vesting allocational authority in an independent third party from Armen Alchian and Harold Demsetz's work on economic organization<sup>62</sup> as well as Raghuram Rajan and Luigi Zingales' work on team production.<sup>63</sup> Their theory offers a mediating hierarchy approach to corporate governance. Here, the perception is that "directors should be viewed as disinterested trustees charged with faithfully representing the interests not just of shareholders, but of all team members."<sup>64</sup> The public corporation is best viewed as a

<sup>55</sup> *Peoples*, *supra* note 16 at paras 64-65.

<sup>56</sup> Francis, *supra* note 52 at 183.

<sup>57</sup> Ian B Lee, "*Peoples Department Stores v. Wise* and the 'Best Interests of the Corporation'" (2005) 41 Can Bus LJ 212 at 213 [Lee, "Best Interests"].

<sup>58</sup> "Peoples v. Wise: Much Ado About Nothing?" (Spring 2005), online: McMillan LLP <<http://www.mcmillan.ca/Peoples-v-Wise-Much-Ado-About-Nothing>>.

<sup>59</sup> Stephanie Ben-Ishai, "A Team Production Theory of Canadian Corporate Law" (2006) 44:2 Alta L Rev 299 at 305-14.

<sup>60</sup> *Ibid* at 301.

<sup>61</sup> Margaret M Blair & Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85:2 Va L Rev 247.

<sup>62</sup> Armen A Alchian & Harold Demsetz, "Production, Information Costs, and Economic Organization" (1972) 62 The American Economic Review 777.

<sup>63</sup> Raghuram A Rajan & Luigi Zingales, "Power in a Theory of a Firm" (1998) 113 The Quarterly Journal of Economics 387.

<sup>64</sup> Blair & Stout, *supra* note 61 at 286.

team of “shareholders, managers, rank and file employees, and possibly other groups, such as creditors.”<sup>65</sup> Team members are required to forego significant rights to the legal entity created by incorporation, including property rights over the team’s mutual output and team inputs such as financial and human capital. In other words, corporate assets belong not to shareholders but to the corporation.<sup>66</sup> In this sense, directors of public corporations do not maximize shareholder value but instead resolve competing claims that various stakeholders may have to the collective residual product of the corporation’s activities.<sup>67</sup>

As Blair and Stout argue, the primary job of the board of directors of a public corporation is not to act as agents who “ruthlessly pursue shareholders’ interests at the expense of employees, creditors, or other team members.”<sup>68</sup> Rather, the directors are trustees for the corporation itself—mediating hierarchs whose job is to balance team members’ competing interests in a fashion that keeps everyone happy enough for the productive coalition stays together.<sup>69</sup> The corporate team gives up control rights to a third party board that makes no firm-specific investment itself and is composed of outsiders to the actual productive activity.<sup>70</sup> The board is, however, given control over the team’s assets, as well as the right to allocate output among team members, fire individual members or even break up the team. In return, the board is rewarded with a nominal share of the team’s output. As a result, the outsider directors have an incentive to choose an efficient and productive team and team members feel they can now safely invest in the corporation.<sup>71</sup>

While Canadian scholars have been somewhat silent in opining on the team production theory, American scholars have provided a variety of reactions. Kellye Testy has called the team production theory a “[s]uperior normative theory of what corporate governance should be once unyoked from slavish devotion to shareholder interests” which “holds promise.”<sup>72</sup> By removing the insistence on shareholder primacy, Blair and Stout leave the allocation of resources to the board, with the result that the costs of obtaining team-specific investments are lowered and the potential to maximize social wealth. They see the corporation as a collective enterprise and recast the duties that management might owe to those stakeholders affected by it.

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<sup>65</sup> *Ibid* at 253.

<sup>66</sup> *Ibid* at 250-251.

<sup>67</sup> Relying on Rajan and Zingales’ research, Blair and Stout give credence to the propositions that (1) team members will only want to be part of a team if by doing so they can share in the economic surplus generated by team production, and (2) team members intuitively understand that it will be difficult to convince others to invest firm-specific resources in team production if shirking and “rent-seeking” go uncontrolled (*ibid* at 274). Blair and Stout describe rent-seeking as “situations where individuals expend time, money, and other resources competing for a fixed amount of wealth, in effect squabbling with each other over the size of their individual pieces of a fixed group pie” (*ibid* at 249). Thus, team members realize that it is in their own self-interest to create a higher authority that can limit this behaviour among team members. The team forms because the members perceive that each will obtain more from the co-operative enterprise than from individual action (*ibid* at 264-271).

<sup>68</sup> *Ibid* at 280.

<sup>69</sup> *Ibid* at 280-81.

<sup>70</sup> *Ibid* at 274.

<sup>71</sup> *Ibid*.

<sup>72</sup> Kellye Y Testy, “Linking Progressive Corporate Law with Progressive Social Movements” (2002) 76 Tul L Rev 1227 at 1234.

Criticisms of the theory have come from both American supporters and detractors of the shareholder primacy model. David Millon has pointed out that decision-making regarding the allocation of resources then becomes “a matter of power rather than principle.”<sup>73</sup> Others comment that, by allowing directors to look beyond shareholder interests, “directors who are told to be loyal to many constituencies are too likely to prove loyal to none.”<sup>74</sup> The stakeholder excuse then can be used by directors to usurp control for ulterior motives.<sup>75</sup> Advocates of shareholder primacy have argued that directors would have free reign to serve their own interests without being held accountable to anyone.<sup>76</sup> Many have also asserted that shareholders require a privileged status, and the ability to challenge directors whenever they fail to maximize shareholder gain.<sup>77</sup>

In response to criticism of greater director control, some advocates of stakeholder interests downplay the risk that directors will inevitably run amok unless held to strict standards of accountability to shareholders. Lawrence Mitchell, for example, argues that, in general, it is appropriate to trust directors to act in good faith, taking all stakeholder interests into account.<sup>78</sup> Shareholders will still enjoy a positive return on their investment. Moreover, the obsession with holding managers strictly accountable to shareholders may actually be counterproductive. It treats managers as if they are “moral infants, incapable of living up to higher expectations” which ultimately encourages selfish, irresponsible behaviour on their part.<sup>79</sup> Giving boards discretionary power, on the other hand, “allows them to develop as morally mature decision-making bodies.”<sup>80</sup>

While the team production theory is a useful alternative model upon which Canadian scholars may draw reference, the theory is limited in other notable ways. Blair and Stout’s list of relevant team members conspicuously excludes key stakeholder groups, such as the broader community and the environment. Directors and managers are no less obliged to consider eco-friendly corporate practices under team production theory than under the shareholder primacy model. Nevertheless, whereas shareholder primacy relies on its single corporate objective function, the team production model aligns more favourably with sustainable practices by

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<sup>73</sup> Millon, *supra* note 32 at 1026.

<sup>74</sup> David A Skel Jr, “Icarus and American Corporate Regulation” (2005) 61 *Bus Law* 155 at 176.

<sup>75</sup> George W Dent Jr, “Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance” online: (2007) 7:21 *Case Research Paper Series in Legal Studies* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=995186](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995186)>.

<sup>76</sup> Nell Minow, “Shareholders, Stakeholders, and Boards of Directors” (1991) 21 *Stetson L Rev* 197; James J Hanks Jr, “Playing With Fire: Nonshareholder Constituency Statutes in the 1990s” (1991) 21 *Stetson L Rev* 97.

<sup>77</sup> See e.g. Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge: Harvard University Press, 1991); Michael C Jensen & William H Meckling, “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure” (1976) 3 *Journal of Financial Economics* 305.

<sup>78</sup> Lawrence E Mitchell, “Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality” (1995) 73 *Tex L Rev* 477.

<sup>79</sup> Lawrence E Mitchell, “The Board as a Path Toward Corporate Social Responsibility” in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007).

<sup>80</sup> *Ibid* at 537.

accounting for non-shareholder stakeholder interests and by recognizing corporate purposes beyond shareholder wealth maximization.

Ben-Ishai suggests that, because the director primacy norm accurately describes Canadian corporate law, further consideration needs to be given to corporate law's relative relevance in dictating how Canadian corporations currently operate. In particular, "[d]o directors of Canadian corporations really think of themselves as mediating hierarchs and corporations as teams? More importantly, can directors of Canadian corporations play a mediating hierarchy role given the current composition of corporate boards?"<sup>81</sup> She believes that the responses to these questions will help inform further inquiry into whether the director primacy norm is the ideal norm for Canadian corporate law.<sup>82</sup>

In *Peoples*, the SCC made no mention of US case law and did not expressly distinguish the *Revlon* and *Unocal* cases. But such references should not be expected, or seen as a missing element to the SCC's decision in *Peoples*—Canadian courts in general, and the SCC in particular, certainly do not have to account for US case law in their decision-making. The court was, however, vague in its formulation of its fiduciary duties, leaving "directors and courts little guidance as to the appropriate yardstick against which to measure the discharge by the directors of their duties in any particular fact situation."<sup>83</sup> Lee expressed his disappointment over the SCC's failure to address the normative aspects of shareholder primacy head-on, finding it unfortunate given "there are good reasons for questioning shareholder primacy."<sup>84</sup>

In the subsequent 2007 decision of *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*,<sup>85</sup> the Ontario Court of Appeal, while indicating that there is "no doubt" that the directors of a target corporation in a takeover context have fiduciary obligations "to take steps to maximize shareholder . . . value in the process," made no mention of *Peoples*.<sup>86</sup> Legal practitioners J. Alex Moore and William Ainley surmise that "the implicit conclusion in *Ventas* was that, whatever it meant to owe a duty exclusively to the corporation, it did not displace the fiduciary obligation of a board to maximize shareholder value when the corporation was being sold."<sup>87</sup>

### 3.2 FOLLOWING BCE INC. V. 1976 DEBENTUREHOLDERS (2008)

The findings in *Peoples* regarding stakeholder interests created a springboard for future decisions to build upon. In the highly anticipated 2008 decision in *BCE*,<sup>88</sup> the SCC affirmed

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<sup>81</sup> *Ibid* at 321.

<sup>82</sup> *Ibid*.

<sup>83</sup> J Alex Moore & William Ainley, "BCE v. 1976 Debentureholders: An Unexamined Question Considered", online: Davies <<http://www.dwpv.com>> at 5.

<sup>84</sup> Lee, "Best Interests", *supra* note 57 at 222.

<sup>85</sup> 2007 ONCA 205 at para 53, 85 OR (3d) 254, Blair JA [*Ventas*].

<sup>86</sup> *Ibid*.

<sup>87</sup> Moore & Ainley, *supra* note 83.

<sup>88</sup> *BCE*, *supra* note 8.

*Peoples* and appeared to further temper the shareholder primacy norm.<sup>89</sup> In brief, debentureholders of Bell Canada, a subsidiary of BCE Inc., used the oppression remedy to seek relief concerning the privatization of BCE by a consortium of private equity buyers under a plan of arrangement that had been determined by BCE's directors to be in the best interests of BCE and its shareholders. Upon the completion of the arrangement, the debentureholders stood to lose approximately 20 percent of the short-term trading value of their holdings.

Moore and Ainley noted that "in light of the questions raised following the *Peoples* decision, and the confusion the decision created at the Quebec Court of Appeal in *BCE*, the question of how *Peoples* could be reconciled with the perceived duty to maximize shareholder value was ripe for examination."<sup>90</sup> Edward Waitzer and Johnny Jaswal also commented that *BCE* gave the SCC "a rare opportunity to articulate and clarify its view with respect to proper corporate purpose and the responsibilities of directors."<sup>91</sup> In its decision, the SCC reiterated its holding in *Peoples* that directors were permitted to consider the interests of, among others, "shareholders, employees, creditors, consumers, governments and the environment."<sup>92</sup> As well, the court held that directors were "not confined to short-term profit or share value," but that when the corporation is of a going concern, directors were to look to the long-term interests of the company.<sup>93</sup> The court also reinforced its support for the business judgment rule.

Most interestingly, the court held that directors were required to act in the best interests of the company "viewed as a good corporate citizen"<sup>94</sup> and "commensurate with the corporation's duties as a responsible corporate citizen."<sup>95</sup> The court did not go further in their concept of corporate citizenry. Jeffrey Bone has pointed out that the court failed to create a test or legal framework on how to determine good corporate citizenry, and it is unclear whether this aspect of the decision was intentional, due perhaps to a reluctance to give the concept legal teeth.<sup>96</sup> The viability of good corporate citizenry as a legal concept remains to be seen.

Scholars weighing in following the *BCE* decision tended to express frustration over the lack of clarity in the law. Waitzer and Jaswal felt that *BCE* "add[ed] to the confusion surround-

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<sup>89</sup> Readers are again invited to review the summaries and analyses available for greater details on the case. See e.g. Mohammad Fadel, "BCE and the Long Shadow of American Corporate Law" (2009) 48 Can Bus LJ 190; Jeffrey Bone, "The Supreme Court Revisiting Corporate Accountability: BCE Inc. in search of a legal construct known as the 'Good Corporate Citizen,'" online: Alberta Law Review Online Supplement <<http://www.albertalawreview.com/index.php/alr/supplement/view/BCE-in-search-of-good-corporate-citizen>>; J Anthony VanDuzer, "BCE v. 1976 Debentureholders: The Supreme Court's Hits and Misses in its Most Important Corporate Law Decision Since *Peoples*" (2009) 43 UBC L Rev 205; Sarah P Bradley, "BCE Inc. v. 1976 Debentureholders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance, and Good Corporate Citizenship?" (2010) 41 Ottawa L Rev 325.

<sup>90</sup> Moore & Ainley, *supra* note 83 at 5.

<sup>91</sup> Edward Waitzer & Johnny Jaswal, "*Peoples*, *BCE*, and the Good Corporate 'Citizen'" (2009) 47 Osgoode Hall LJ 439 at 442.

<sup>92</sup> *BCE*, *supra* note 8 at para 39.

<sup>93</sup> *Ibid* at para 38. Regarding the oppression remedy, the court found there was no violation by the directors in their fiduciary duties.

<sup>94</sup> *Ibid* at para 66.

<sup>95</sup> *Ibid* at para 82.

<sup>96</sup> Bone, *supra* note 89.

ing directors' duties and the indeterminate nature and scope of their agency obligations."<sup>97</sup> They noted that:

Even the questions of whether directors may consider, should consider, or are obliged to consider stakeholder interests, and, if so, at what point, were not addressed clearly by the Court. Early in its reasons, it noted that, in *Peoples*, 'this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders.' Later, the Court stated that 'the duty of directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders... equitably and fairly.' Is this duty mandatory?<sup>98</sup>

In rendering its decision, the court seemed to reject the fiduciary duty to maximizing shareholder value in change of control transactions as applied by the Delaware court in *Revlon*. The SCC provided directors with considerable flexibility in considering the interests of other stakeholders in determining the best interests of the company. Nevertheless, the wording from the courts, both at trial and on appeal, was careful to sidestep any conflict between the US *Revlon* case and the Canadian cases *Peoples* and *BCE*. The trial judge in *BCE* found that "the ruling in *Peoples* is not necessarily incompatible with the application of the *Revlon* duty [in *BCE*]," but did not engage further on the matter and did not indicate that *Revlon* was even applicable to Canadian law.<sup>99</sup> The SCC's exploration of the topic was also limited to a brief discussion of *Revlon* that Moore and Ainsley felt did not fully engage the issue, noting:

Rather than explore whether there are any special duties placed on directors in the context of a potential change of control, the Court, in a cursory fashion, considered the "*Revlon* line" from Delaware merely to address whether *Revlon* stands for the proposition that the interests of shareholders prevail over those creditors. However, even on this narrow question the Court neither rejected nor endorsed Delaware law.<sup>100</sup>

The SCC, instead, relied on the former Delaware Supreme Court Chief Justice Veasey to leave open the possibility that *Peoples* and *Revlon* were not necessarily in conflict:

[It] is important to keep in mind the precise content of this 'best interests' concept—that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of the stockholders. But, in general, the directors owe fiduciary duties to the corporation, not to the stockholders.<sup>101</sup>

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<sup>97</sup> Waitzer & Jaswal, *supra* note 91 at 455.

<sup>98</sup> *Ibid* at 461 [emphasis in original].

<sup>99</sup> *BCE Inc, Re*, [2008] RJQ 1029, 43 BLR (4th) 39 at para 203.

<sup>100</sup> *Ibid*.

<sup>101</sup> *BCE*, *supra* note 8 at para 87, citing Norman E Veasey & Christine T Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments" (2005) 153 U Pa L Rev 1399 at 1431.

In particular, the SCC found that the “the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather *a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces*.”<sup>102</sup> Then little more regarding *Revlon* was said by the court.

Mohammed Fadel noted that, in the wake of the decision, “the Canadian corporate law of directors’ duties has become beset by uncertainty, incoherence and confused rhetoric with respect to one of the most basic issues of corporate law: how to reconcile the competing interests of shareholder and non-shareholder corporate stakeholders.”<sup>103</sup> Jeffrey MacIntosh expressed the view that, “only legislative intervention (in particular, declaring that directors duties’ are owed to shareholders alone) can adequately address the difficulties that [*Peoples* and *BCE*] have created.”<sup>104</sup> Others pointed to the possible inclusion of non-shareholder stakeholder interests as a potential diminution in directorial accountability, as was similarly argued by critics of team production theory.<sup>105</sup> Allowing directors to be accountable to many generally results in directors becoming accountable to no one.<sup>106</sup>

On the other hand, from a practical standpoint, Jeremy Fraiberg found that while directors did have a limited scope to forego maximizing shareholder value in change of control transactions under *BCE*, it was unlikely the scenario would ever occur.<sup>107</sup> The formidable business judgement rule applies, rendering the provision somewhat latent in practice. The need for balance between stakeholder interests and business judgment has meant that the inclusion of stakeholder interests in law has been unremarkable for those looking to reform the model through purely legal means. That may be why, on a theoretical level, almost all corporate governance reformists have agreed that the inclusion of stakeholders in the governance model is necessary, and the issue seems to have reached a plateau in scholarly discussions.

*BCE* seems to have left a significant question for Canadian legal scholars and practitioners. The gray area may be frustrating. Many scholars said as much following *Peoples*,<sup>108</sup> and Waitzer and Jaswal have identified legal gaps flowing from the decision in *BCE* (and alternative ways to achieve corporate citizenry through the law).<sup>109</sup> In these circumstances, it may be helpful

<sup>102</sup> *BCE*, *supra* note 8 at para 87 [emphasis added].

<sup>103</sup> Fadel, *supra* note 89 at 190.

<sup>104</sup> Jeffrey G MacIntosh, “BCE and the Peoples’ Corporate Law: Learning to Live on Quicksand” (2009) 48 Can Bus LJ 255.

<sup>105</sup> See e.g. VanDuzer, *supra* note 89.

<sup>106</sup> This may in fact already be an issue needing to be tackled in governance reform, as director accountability has expanded in many ways: directors are accountable to courts, regulators under public interest powers, and accountability through statutory means. This increase in director accountability and liability requires there to be acute awareness of what decisions are properly made at the board-level and what directors should be held accountable for. See e.g. Paul Cantor, “Oversight and Insight: Building Blocks for Enhanced Board Effectiveness” (2012) 163 Director Journal 3. Allowing stakeholder interests to be properly considered in board decision-making enables a team production model to take hold (Margaret M Blair & Lynn A Stout, “Director Accountability and the Mediating Role of the Corporate Board” (2001) 79 Wash ULQ 403).

<sup>107</sup> Jeremy D Fraiberg, “Fiduciary Outs and Maximizing Shareholder Value Following *BCE*” (2009) 48 Can Bus LJ 212.

<sup>108</sup> See e.g. Mohamed F Khimji, “*Peoples v. Wise* – Conflating Directors’ Duties, Oppression, and Stakeholder Protection” (2006) 39 UBC L Rev 209.

<sup>109</sup> Waitzer & Jaswal, *supra* note 91 at 463-493.

to consider Bone's take on the matter. Bone has painted *Peoples* and *BCE* as creating a potential future duty for directors to recognize environmental issues in their corporate decision-making.<sup>110</sup> He notes that "modern Canadian corporations may be wise to stay ahead of the curve and begin their transformation into a new era of corporate ethics in relation to corporate citizenship."<sup>111</sup> Bone contends that it is possible to conceive of future litigation exploring this language and attempting to attribute legal significance to the "good corporate citizen" concept. The *BCE* decision may indeed "represent a new standard that gives directors the authority to make decisions based on non-financial principles, as opposed to simply economic values as the solitary feature."<sup>112</sup> Future litigation may provide a much needed tipping point in Canadian corporate governance standards.

Thus, while legal scholars and practitioners continue to exhibit their frustration over what *Peoples* and *BCE* mean relative to US case law and how the singular objective of shareholder wealth maximization is now confused, confusion should be expected in these circumstances. Canada is shifting away from the well-established laws and norms in the United States. The indications from the SCC suggest that Canada is poised to transform its corporate law to embrace a stakeholder approach to governance that may permit, and one day even require some form of CSR. Stakeholder interests are clearly permitted—perhaps even required—to be considered in directorial decision-making. Where the corporation is of a going concern, directors are to consider the *long-term* interests of the company. Sustainability is becoming the emerging business megatrend that is starting to "force fundamental and persistent shifts in how companies compete."<sup>113</sup> These external dynamic pressures interacting with the coordinating mechanism of Canadian common law suggests that the road to transformational corporate governance reform in Canada is already being paved.

#### 4. ATTAINING TRANSFORMATIONAL CORPORATE GOVERNANCE

The current corporate landscape is particularly relevant in either diverting or strengthening Canada's position on shareholder primacy, and a progression towards transformational corporate governance has transpired for some time now. Douglas Branson has noted that the CSR movement is "converging with, rather than diverging from, broader trends in corporate governance."<sup>114</sup> The collaborative interplay between normative and legal constructs and the coordinative mechanism of regulation that continuously interacts with external pressures significantly contribute to the establishment of corporate laws that incorporate CSR fundamentals. The movement is now reforming and creating corporate legal structures that not only enable, but require, CSR concepts to be embodied within corporate governance practices.

While the common law continues to balance the needs of shareholders versus other stakeholders, innovative new corporate structures are forming on the sidelines that embed stakeholder interests and CSR into their governance structures, along with more aggressive social mandates. The emergence of hybrid corporate models that bridge the gap between for-profit and non-profit legal characteristics signals the growing demand for social change. Canada is

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<sup>110</sup> Jeffrey Bone, "Corporate Environmental Responsibility in the Wake of the Supreme Court Decision of *BCE Inc. and Bell Canada*" (2009) 27 Windsor Rev Legal Soc Issues 5.

<sup>111</sup> Bone, *supra* note 89 at para 47.

<sup>112</sup> *Ibid* at para 45.

<sup>113</sup> David A Lubin & Daniel C Etsy, "The Sustainability Imperative" (May 2010) Harv Bus Rev 42 at 44.

<sup>114</sup> Douglas M Branson, "Corporate Social Responsibility Redux" (2002) 76 Tul L Rev 1207 at 1225.

poised to become a leader of transformational corporate governance reform on two fronts: (1) through the reformation of its existing laws regulating mainstream corporate governance practices, and (2) in the creation of hybrid laws that can meet growing demands to legally house and govern social purpose businesses and enterprises. Below is a brief overview of how Canada may use the opportunities provided in the common law to attain transformational corporate governance reform in its existing for-profit corporations and in the development of hybrid corporate legal structures.

#### 4.1 FOR-PROFIT CORPORATIONS

Canadian legal scholars may disengage from the circular argument as to whether stakeholder interests and shareholder primacy can co-exist and whether stakeholders need to be recognized under the law. The *Peoples* and *BCE* decisions have made it clear that stakeholder interests are permissible considerations for any board to consider, not only with respect to how appealing stakeholder interests may increase shareholder wealth, but also because considering those interests furthers the best interests of the corporation, when viewed as a good corporate citizen. The codification of stakeholder interests into the Canadian legal governance framework has created the possibility of reforming Canadian corporate governance practices with respect to for-profit companies. Broad-based change to the shareholder primacy norm is necessary, and Canada seems to be moving in that direction.

From a soft law perspective, the Canadian government has actively endorsed practicing CSR, including publishing CSR policies on social and environmental sustainability. These policy guidelines provide an interesting look at CSR trends and how they may play an influential role in outlining Canada's governance model. The federal government has encouraged the practice of CSR at home and abroad by endorsing the International Organization for Standardization's 2010 report *ISO 26000:2010 Guidance on Social Responsibility*<sup>115</sup> and by publishing its own report, *Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector*,<sup>116</sup> which adopts international performance guidelines set by the International Finance Corporation's *Performance Standards on Social & Environmental Sustainability* (2006),<sup>117</sup> the US State Department's *Voluntary Principles on Security and Human Rights* (2000),<sup>118</sup> and the Global Reporting Initiative's *Sustainability Reporting Framework* (2011).<sup>119</sup> The Canadian government's establishment of a Centre for Excellence in CSR provides a repository of information on related policies and practices along with a forum to advance perti-

<sup>115</sup> International Organization for Standardization, *ISO 26000:2010 Guidance on Social Responsibility*, (2006) online: International Organization for Standardization <[http://www.iso.org/iso/catalogue\\_detail?csnumber=42546](http://www.iso.org/iso/catalogue_detail?csnumber=42546)>.

<sup>116</sup> Department of Foreign Affairs and International Trade Canada, *Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector* (March 2009), online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategie-strategie.aspx>>.

<sup>117</sup> International Financial Corporation, *Performance Standards on Environmental and Social Sustainability*, (effective 12 January 2012), online: IFC <<http://www.ifc.org>>

<sup>118</sup> US Department of State, *Voluntary Principles on Security and Human Rights*, (2000), online: US Department of State <<http://www.state.gov/documents/organization/202526.pdf>>.

<sup>119</sup> Global Reporting Initiative, *Sustainability Reporting Framework*, (2011), online: Global Reporting Initiative <<https://www.globalreporting.org/reporting/reporting-framework-overview/Pages/default.aspx>>.

ment CSR issues.<sup>120</sup> Together with Canadian common law, these guidelines create an effective outline for a Canadian transformational governance model.

Janis Sarra has noted that norms for effective corporate governance are underdeveloped in Canada.<sup>121</sup> As our global consciousness becomes increasingly aware of the environmental crisis at hand, the expectation that corporations will incorporate their own externalities into their business models does not seem unreasonable. *BCE* has left the law highly uncertain in a range of scenarios,<sup>122</sup> and this may work to favour broader community and environmental interests. Other reform efforts are worth noting. Significant improvements to curtail negative corporate externalities have been made within the CSR movement, although the strengths and motivations differ amongst its proponents. Green indices, socially responsible investing, and other innovations from the social sector have attempted to recalibrate markets to account for hidden costs associated with the shareholder primacy model.<sup>123</sup> These efforts do not change the structure of the corporation *per se*, but go a long way towards (1) lessening the negative consequences attributed from the shareholder wealth maximization norm inherent in the corporate model and (2) contributing to the external pressures that lend themselves to the coordinative mechanism in which our laws take part. In an era when CSR has never been more relevant, Canadian for-profit corporations may now begin to deviate from the shareholder wealth maximization norm that accompanies the shareholder primacy model under the direction and encouragement of Canadian common law.

#### 4.2 HYBRID MODELS

Hybridity is a new innovation in corporate law that has received little attention in academic scholarship. In the corporate context, a hybrid can be defined as a corporate legal structure that blends traditional for-profit and non-profit legal characteristics to enable the dual pursuit of economic and social interests.<sup>124</sup> The emergence and development of hybrid models on the global stage signifies a new wave in the CSR movement. These models are designed to integrate stakeholder interests and sustainable practices into their business models far beyond the capabilities of the traditional for-profit legal structure.

The role of corporate hybrids in Canada's path to transformational corporate governance is important but relatively unexplored terrain. Against the backdrop of an ongoing environmental crisis and an escalating demand for greater sustainability, there is a growing imperative to reap the benefits of sustainable governance from the private sector. The private sector requires quality legal tools to help grow and foster sustainable development and the emergence of hybrid corporate models should be seen as a critical component of attaining transformational corporate governance reform in Canada. While reforming the mainstream for-profit

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<sup>120</sup> "Centre for Excellence in Corporate Social Responsibility at the Canadian Institute of Mining, Metallurgy and Petroleum", online: CIM <<http://web.cim.org/csr/>>.

<sup>121</sup> Janis Sarra, "Corporate Governance in Global Capital Markets, Canadian and International Developments" (2002) 76 *Tul L Rev* 1691 at 1706.

<sup>122</sup> Waitzer & Jaswal, *supra* note 91 at 462.

<sup>123</sup> See e.g. "Ethical Funds", online: Ethical Funds <<http://www.ethicalfunds.com>> and the work of the Social Investment Organization, its members, and affiliates ("Social Investment Organization", online: SIO <<http://www.socialinvestment.ca/>>).

<sup>124</sup> Also known as a "blended enterprise" (Brakman Reiser, *supra* note 11).

corporation is imperative, and these efforts must continue, this reform should take place in combination with creating opportunities for social enterprises that are unable to reach their full potential under existing legal constructs.

Specifically, three actions are necessary to promote the use of hybrids in Canada: (1) continued growth for existing hybrids; (2) support for emerging hybrids that enable traditional non-profit and charitable organizations to use the market as an engine to disseminate products and services; and (3) the creation of new hybrids that link corporate economic interests with social output and will appeal to the relevant players in the for-profit sector. In addition, Canadian legislators need to be careful not to adopt American solutions to Canadian issues, and inadvertently disrupt Canada's own progressive common law developments. This point is elaborated upon using the state-level US benefit corporations as an example.

#### 4.2.1 SUPPORT EXISTING HYBRIDS: THE CO-OPERATIVE

The co-operative ownership model is a persuasive existing alternative structure that can support a vast number of social business ideas. As one of the oldest corporate structures in the world, the co-operative is a hybrid structure since it allows members to pursue both social and economic mandates. The International Cooperative Alliance ("ICA") defines the co-operative as "an autonomous association of people united voluntarily to meet their common economic, social and cultural needs through a jointly owned and democratically controlled enterprise."<sup>125</sup> Internationally, the United Nations has "recognized and reaffirmed the role of co-operatives in economic, social, and cultural development and in the achievement of social policy objectives."<sup>126</sup> Nevertheless, while for-profit, non-profit, and charitable organizations are commonly known and generally contemplated by social entrepreneurs, it seems that, beyond those in the agricultural and housing sectors, many entrepreneurs have been reluctant to adopt the co-operative form. Entrepreneurs may cite a lack of control, complicated decision-making process, or limited availability of additional capital as significant reasons why the co-operative model is not an ideal form for their business.<sup>127</sup> Equally so, mainstream corporate legal scholarship has paid comparatively little attention to co-operative ownership. Despite ICA's findings that co-operatives "provide over 100 million jobs around the world, 20% more than multinational enterprises,"<sup>128</sup> the co-operative structure is not pervasive in Canada, where there are

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<sup>125</sup> "Co-operative identity, values & principles", online: International Co-operative Alliance <<http://ica.coop/en/what-co-op/co-operative-identity-values-principles>>.

<sup>126</sup> "International Day of Co-operatives", online: United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Social Perspective on Development Branch <<http://social.un.org/index/Cooperatives/InternationalDayofCooperatives.aspx>> (the UN General Assembly declared 2012 to be the "International Year of Co-operatives" in order to highlight the importance of co-operatives to economic development and social innovation around the world).

<sup>127</sup> See e.g. Amanda Wilson, "Financing the Co-operative Movement: For Better or For Worse?" *The Dominion* (5 April 2010), online: The Dominion <<http://www.dominionpaper.ca/articles/3270>>.

<sup>128</sup> "Co-operatives Around the World", online: National Co-operative Business Association <<http://usa2012.coop/about-co-ops/cooperatives-around-world>>.

around 9,000 co-operatives, compared to over 2.4 million for-profit corporations, approximately 85,000 charitable organizations, and 65,000 non-profit organizations.<sup>129</sup>

The important governing feature of co-operative ownership is that the role of owner and stakeholder are closely connected. A member is an individual who both owns the co-operative and acts as a user of the co-operative in some way. In contrast, a shareholder of an investor-owned corporation owns the business by owning shares in the business, but the shareholder might never be a user of the business. Co-operatives, then, may be regarded as “associations of people” whereas standard for-profit corporations are “associations of capital.”<sup>130</sup> Joint ownership of a co-operative means that all members of a co-operative are equal decision makers, as co-operatives employ a democratic system of one-member, one-vote. All members share in the benefits of the co-operative, based on how much they use its services. By pooling their resources and working together, members can satisfy a common need through the co-operative. The Canadian Co-operative Association notes that, “since a co-operative is both a business and an association of people, the co-operative’s success will depend on how well these foundations are built within the enterprise.”<sup>131</sup>

The ICA has outlined the principles of co-operative ownership as follows: (1) voluntary and open membership; (2) democratic member control; (3) member economic participation; (4) autonomy and independence; (5) education, training, and information; (6) cooperation among co-operatives; and (7) concern for community.<sup>132</sup> These co-operative principles represent written verification of the morals and values suggested by progressive supporters of stakeholder theory. The preamble of the *Canadian Cooperatives Act* itself states how co-operatives “work for the social and economic development of their communities through policies approved by their members,” and s. 7 of the *Act* embodies many of the ICA co-operative principles.<sup>133</sup> The co-operative movement is a living example of stakeholder theory intertwined with social values, and significantly pre-dates the arrival of stakeholder theory to mainstream corporate legal scholarship and practice.

As corporate reformers desperately seek answers to the big sustainability question hanging over shareholder primacy, why is there such a great disconnect between them and advocates of the co-operative form, who claim to hold the answers? The ICA has directly addressed the missing link between the design of co-operatives and its widespread success. Despite the co-operative structure’s long history, the ICA contends that the model is being utilized well below its potential. The organization believes that “with appropriate support and greater understand-

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<sup>129</sup> “Key Small Business Statistics July 2012”, online: Industry Canada, Small Business and Tourism Branch <[http://www.ic.gc.ca/eic/site/061.nsf/eng/h\\_02689.html](http://www.ic.gc.ca/eic/site/061.nsf/eng/h_02689.html)>; “About Co-ops in Canada”, online: Government of Canada, Agriculture and Agri-Food Canada <<http://www5.agr.gc.ca/eng/?id=1232131333489>>.

<sup>130</sup> “The Co-op Advantage”, online: British Columbia Co-operative Association <<http://www.bcca.coop/content/advantage>>.

<sup>131</sup> “How to start a co-op”, online: Canadian Co-operative Association <<http://www.coopscanada.coop/en/coopdev/StartCoop>>.

<sup>132</sup> “Statement on the Co-operative Identity”, online: International Co-operative Alliance <<http://ica.coop/en/what-co-op/co-operative-identity-values-principles>>.

<sup>133</sup> *Canada Cooperatives Act*, RSC 1998, c 1.

ing and recognition, [co-operatives] could contribute much more.”<sup>134</sup> In early 2013, the ICA published a manifesto entitled *Blueprint for a Co-operative Decade* (the “*Blueprint*”) with the ambitious target of 2020 as the year when the co-operative form of business “is an acknowledged leader in economic, social and environmental sustainability, the model preferred by people, and the fastest growing form of enterprise.”<sup>135</sup> The ICA aims to elevate member participation and governance while positioning co-operatives as “builders of sustainability.”<sup>136</sup> It pinpoints a lack of clarity as to how co-operatives are defined and distinguished as a main stumbling block in the co-operative movement and cites a particular need to “establish an ‘irreducible core’ of what it means to be a co-operative.”<sup>137</sup> The *Blueprint* outlines a multi-faceted plan to secure the co-operative identity and increase its awareness, such as through co-operative education,<sup>138</sup> the engagement of young people,<sup>139</sup> and utilizing social media,<sup>140</sup> among other mechanisms. The *Blueprint* also hones in on “ensur[ing] there are supportive legal frameworks for co-operative growth” as a particular area in need of improvement.<sup>141</sup> High-level indicative actions proposed by the ICA that may benefit Canada include developing guidelines on how to apply the ICA co-operative principles and providing assistance to Canadian national parliamentarians, legislators, and policy-makers through a comparative study on the ways laws apply to co-operatives in different jurisdictions, among other things.<sup>142</sup> Possible improvements may stem from co-operative treatment under tax laws, competition and anti-trust laws, and other regulations.<sup>143</sup>

The co-operative ownership model has been given new impetus from the United Nations’ support and the ICA’s aggressive plans for growth. The fusion of owner and user roles in co-operative ownership enforces an unassailable stakeholder-based style of governance that cannot be replicated in for-profit companies. Furthermore, research indicates that the survival rate of

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<sup>134</sup> International Co-operative Alliance, *Blueprint for a Co-operative Decade* (January 2013), online: ICA <<http://ica.coop>> at 3 [*Blueprint*].

<sup>135</sup> *Ibid* at 39.

<sup>136</sup> *Ibid* at 15.

<sup>137</sup> *Ibid* at 30.

<sup>138</sup> *Ibid* at 42.

<sup>139</sup> *Ibid* at 11, 12, 23.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Ibid* at 6.

<sup>142</sup> *Ibid* at 30.

<sup>143</sup> *Ibid* at 29.

co-operatives is significantly higher than that of traditional businesses.<sup>144</sup> From a governance perspective (rather than simply a marketing perspective), the co-operative is far superior in providing adequate infrastructure to support stakeholder-based management as heralded by advocates of stakeholder theory and likely contributes to this higher survival rate. As international advocates mobilize in hopes of generating significant momentum behind the co-operative movement, much more may be seen from this model in Canada and its contributions to sustainability in the years to come.

#### 4.2.2 SUPPORT EMERGING HYBRIDS: THE BC COMMUNITY CONTRIBUTION COMPANY

Transformational corporate governance is not isolated to the for-profit sector. Unlocking the market potential from the non-profit sector is another way to combat the negative effects of shareholder primacy, infuse social value within communities, and foster greater sustainable development. Dan Pallotta has argued that society's "economic apartheid" of for-profit and non-profit sectors "undermines our ability to eradicate great problems and, ironically, puts charity at a severe disadvantage to the for-profit sector at every level."<sup>145</sup> Canada should explore the implementation of a hybrid specifically targeted to address this untapped non-profit sector resource, and indeed, two provinces—British Columbia and Nova Scotia—have already begun to do so. Canada also has the added benefit of observing how hybrid models have fared in the United Kingdom.

The community interest company ("CIC") was the very first of the new generation of hybrids implemented in the United Kingdom in 2005. CICs are established to trade goods or services for the community interest.<sup>146</sup> The particular novelty of CICs is that they are able to do what charitable and non-profit organizations cannot, which is raise equity capital in exchange for shares. As noted earlier, in March 2012, the BC government announced the creation of its hybrid, the community contribution company ("C3"), which is modeled after the UK CIC.

<sup>144</sup> Johnston Birchall & Lou Hammond Ketilson, *Resilience of the Cooperative Business Model in Times of Crisis* (19 June 2009), online: International Labour Organization <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/documents/publication/wcms\\_108416.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_108416.pdf)>. According to Co-operatives UK, between 2008 and 2011, while the UK economy as a whole shrank by 1.7 percent, the co-operative economy grew by 19.6 percent. In the same period, the number of co-operatives increased from 4,820 to 5,933 (Stephen Gardner, "Alternative Ownership Structures – Stronger Together" (5 February 2013), online: Ethical Corporation <<http://www.ethicalcorp.com/business-strategy/alternative-ownership-structures-%E2%80%93-stronger-together>>). See also "Co-op facts and figures", online: Canadian Co-operative Association <[http://www.coopscanada.coop/en/about\\_co-operative/Co-op-Facts-and-Figures](http://www.coopscanada.coop/en/about_co-operative/Co-op-Facts-and-Figures)> (a 2008 Quebec study found that 62 percent of new co-operatives were still operating after five years, compared with 35 percent for other new businesses; after 10 years, the figures were 44 percent and 20 percent respectively).

<sup>145</sup> Dan Pallotta, *Uncharitable: How Restraints on Non-Profits Undermines Our Potential* (London: Tufts University Press, 2010) at 9.

<sup>146</sup> *UK Companies Act, supra* note 6.

This hybrid was made available to the public on July 29, 2013.<sup>147</sup> Nova Scotia has since followed suit, announcing the adoption of a similar hybrid in November 2012.<sup>148</sup>

Like the UK CIC, the C3 is designed to enable and encourage the investment of private wealth into community projects. The most noteworthy features of the C3 include an asset lock and dividend cap. The asset lock feature restricts assets from being sold for less than their fair market value except in the pursuit of the social benefits the entity is designed to pursue or in a transfer to a non-profit organization, or another C3.<sup>149</sup> Dividends on C3 shares are capped to ensure that profits are either retained by the entity or used for a community benefit purpose.<sup>150</sup> The hybrid is taxed as a regular corporation.

Stakeholder interests are prominent in both CIC and C3 hybrids. Each hybrid has annual reporting requirements where the company is expected to account for how it has benefited the community and engaged stakeholders,<sup>151</sup> with the notable difference being that the CIC reports to a regulator who has a continuing monitoring and enforcement role over CICs.<sup>152</sup> There is no equivalent regulator in British Columbia, and the C3 is only required to publish its report in the same manner that companies are required to publish financial statements and auditor's reports under the *Business Corporations Act*.<sup>153</sup> In the United Kingdom, the stated community purpose becomes a primary focus for CIC directors, and CICs are recommended to form stakeholder advisory groups for the CIC's benefit.<sup>154</sup> Each CIC crafts its own individualized stakeholder process and is required to describe its stakeholder efforts in an annual report which the UK CIC Regulator reviews.

There is thus a question as to whether the lack of a regulator in BC to monitor C3 compliance will be problematic. The CIC Regulator has played a dedicated and important role in administering and maintaining CICs in the United Kingdom; this role is enabled by its power to investigate complaints, act if the CIC is found to be violating its community purpose or asset lock provisions, change the makeup of the board, or even terminate the CIC when necessary.<sup>155</sup> It remains to be seen how successful the BC and Nova Scotia versions will be in comparison to the UK CIC, and how each province's social sector will adapt despite having less regulatory infrastructure and governmental oversight, and no direct official to contact. In comparison, the CIC Regulator's office had three full-time and four part-time staff members

<sup>147</sup> British Columbia Ministry of Finance, "Legislative Changes Encourage Investment in Social Capital" (2 March 2013), online: British Columbia Newsroom <<http://www.newsroom.gov.bc.ca/2013/03/legislative-changes-encourage-investment-in-social-capital.html>>; "Community Contribution Companies are coming... BC Ministry of Finance initiative", online: BC Centre for Social Enterprise <[http://www.centreforsocialenterprise.com/C3\\_BC.html](http://www.centreforsocialenterprise.com/C3_BC.html)> [BC Centre for Social Enterprise].

<sup>148</sup> Service Nova Scotia and Municipal Relations, *supra* note 5.

<sup>149</sup> *Bill 23, Finance Statutes Amendment Act*, 4th Sess, 39th Parl, British Columbia, 2012 at ss 51.931, 51.95 [*C3 Bill*].

<sup>150</sup> *Ibid* at s 51.94 (unlike the UK CIC, interests on bonds are not capped in the C3).

<sup>151</sup> *UK Companies Act*, *supra* note 6 at s 34.

<sup>152</sup> "Community Interest Companies", online: Department for Business, Innovation & Skills <<http://www.bis.gov.uk/cicregulator>>.

<sup>153</sup> SBC 2002 c 57 at ss 1, 198-200; *C3 Bill*, *supra* note 149 at s 51.96.

<sup>154</sup> *UK Companies Act*, *supra* note 6.

<sup>155</sup> *Ibid*.

in 2012, and the CIC Regulator reported receiving over 7,000 emails and 3,000 phone calls to their office that year.<sup>156</sup> C3s will not have this support; administering and governing C3s will be entirely through self-regulation. On the other hand, some of the regulatory void could be filled by other sources. For example, in anticipation of the C3, the BC Centre for Social Enterprise provided a small number of free workshops to educate interested parties on the details of the C3 model.<sup>157</sup> Other non-profit organizations may also step up to fill this void.

The C3 may be attractive for those in the non-profit sector in need of raising capital—which may indeed be a significant number.<sup>158</sup> The C3 allows those in the non-profit sector to capitalize on the market to disseminate social goods and services while ensuring social mandates remain intact. The legal characteristics of the CIC, in contrast, may appear to be too limiting for many of those currently situated in the for-profit sector. The asset lock and dividend cap features disrupt the market for corporate control, and entrepreneurs who envision broader market dissemination by way of acquisition by larger corporations are unlikely to seek out this model. However, since the C3 structure allows capital to be raised through the issuance of shares, it creates economic opportunities that have traditionally been closed off to charitable and non-profit organizations. Moreover, a C3 structure may be more attractive to individuals or groups seeking to start community projects or programs but who have little interest in relationships based on membership (such as those found in the co-operative).

Research on the CIC model is limited. Dana Brakman Reiser has noted that the CIC “assumes [there is] a pool of investors with an appetite for wedding financial and social return and sufficient brand awareness and confidence to appeal to them.... [It also] however, requires these investors to be especially devoted to the blended enterprise concept by substantially limiting the upside of their investments.”<sup>159</sup> The growth of impact investing suggests there are social investors out there who can balance these economic and social interests in order to sustain the C3 model in Canada but one can only assume. In the United Kingdom, the number of CICs has doubled in the last two years. There are now over 6,000 CICs, with around 2,000 created in the last year alone.<sup>160</sup> Over 100 new CICs are registered every month,<sup>161</sup> and a considerable number of CICs have lasted past the three-year mark. If it is simply a numbers game, do 6,000 CICs spell success after eight years in existence? Compared to the number of UK co-operatives, the answer seems to be yes. Sources indicate that in the United Kingdom there are over 5,933 independent co-operatives comprising approximately 13.5 million members, with the

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<sup>156</sup> Regulator of Community Interest Companies, “Annual Report 2011/2012”, online: Department for Business, Innovation & Skills <<http://www.bis.gov.uk>> at 13.

<sup>157</sup> BC Centre for Social Enterprise, *supra* note 147.

<sup>158</sup> Josh Wingrove, “Marc and Craig Kielburger’s do-gooding social enterprise” *The Globe and Mail* (19 March 2010), online: The Globe and Mail <[www.theglobeandmail.com/news/national/marc-and-craig-kielburgers-do-gooding-social-enterprise/article1506256/page2/](http://www.theglobeandmail.com/news/national/marc-and-craig-kielburgers-do-gooding-social-enterprise/article1506256/page2/)> (Paul Martin, Canada’s former Prime Minister, commented, “Government policy hasn’t caught up...I think Canada is ready for it. I think Canada is looking for it”).

<sup>159</sup> Brakman Reiser, “Governing”, *supra* note 11 at 649.

<sup>160</sup> Regulator of Community Interest Companies, *supra* note 156 at 13 (590 CICs were also dissolved, with key reasons for dissolution being “lack of funding, no trading activity, and poor corporate governance”).

<sup>161</sup> CIC Association, “What is a CIC?” online: CIC Association <<http://www.cicassociation.org.uk/about/what-is-a-cic>>.

co-operative economy at £35.6 billion.<sup>162</sup> There are no equivalent statistics available on CICs' monetary contributions to the British economy or on the number of members. Nevertheless, based solely on the number of active CICs versus co-operatives, the CIC numbers are certainly impressive.

It is important to note, however, that the UK CIC movement had considerable marketing and promotion behind its initial rollout, as well as providing social entrepreneurs with access to social finance limited solely to CICs.<sup>163</sup> The BC government's failure to regulate, educate, and promote the C3 is a disappointing start for the hybrid, and there are legitimate fears that many entrepreneurs will not elect to adopt the model as a result—leading to a potentially erroneous assumption that hybrids are ineffective tools for eliciting social change. The several-year lead from CICs should be seen as a learning opportunity for Canadian legislators and regulators to gain from the United Kingdom's experience, but there is little to gain if lessons are not put to use. Adequate support and extensive follow-up research will be a necessary step to ensure the proper development of this Canadian hybrid in the future, and other provinces would be well-advised to carefully monitor how the BC and Nova Scotia models fare and build upon their experiences.

#### 4.2.3 ENACT MEANINGFUL NEW HYBRIDS

Canada can and should be an influential player in the development of hybrids, particularly those that will provide a realistic option for social enterprises that operate in the for-profit sector. Ideas regarding how to accomplish this objective are developing, and should continue to be explored.<sup>164</sup>

Several US innovations, such as the American B Corporation branding and state benefit corporations, display promise. Self-imposed and privately regulated, the B Corporation certification system is run by B Lab, a Philadelphia-based non-profit organization that evaluates companies on social, environmental and workplace criteria. B Lab is attempting to establish a new kind of company, one that “harnesses the power of business to solve social and environmental problems.”<sup>165</sup> At the time of this article, there were over 660 registered American B Corporations, and B Lab is actively marketing its branding internationally, including in Canada. There are in total 70 Canadian B Corporations to date.<sup>166</sup>

In order to become a B Corporation, a company is first required to take a B Impact Assessment, which asks the company to respond to socially minded questions relating to accountability, employees, consumers, community and the environment.<sup>167</sup> B Lab's gover-

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<sup>162</sup> “About Co-operatives”, online: Co-operatives UK <<http://www.uk.coop/co-operatives>>.

<sup>163</sup> See e.g. “Community Interest Companies Association”, online: CIC Association <<http://www.cicassociation.org.uk/>>. Thank you to Stacey Corriveau for this point.

<sup>164</sup> See e.g. Jason Dudek & Alex Zieba, “The Deliberate Corporation: Moving Beyond Social Business” online: Deliberate Economics <<http://deliberateeconomics.com/wp-content/uploads/2012/05/The-Deliberate-Corporation-by-Deliberate-Economics-May-2012.pdf>>.

<sup>165</sup> “B Corporation”, online: B Corporation <<http://www.bcorporation.net>>.

<sup>166</sup> *Ibid.*

<sup>167</sup> “Performance Requirements”, online: B Corporation <<http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements>>.

nance-related questions strongly imply support for greater stakeholder-based and board-controlled management. A corporation is certified once an acceptable score is obtained under B Lab's Rating System, and the company is required to submit supporting documents for a portion of the answers.<sup>168</sup> B Lab relies on this certification and a separate auditing system to ensure B Corporations are pursuing and achieving their social mandates. Given that B Lab is a private organization, it does not have the authority to manipulate existing legal structures. Nevertheless, the B Impact Assessment goes to the core of the business purpose and mission, and addresses both stakeholder and sustainability concerns. Corporations may choose to become B Corporations so they can align themselves with like-minded companies, and the B Corporation branding may "draw in directors committed to a blended mission and investors willing to enforce it."<sup>169</sup> This certification could foreseeably become popularly recognizable to consumers in the future. Within an allotted time following certification, B Corporations are required to amend their articles of incorporation to permit directors to consider more than just shareholder interests when carrying out their duties—an exercise that for Canadian corporations seems benign and redundant when compared to existing Canadian common law.<sup>170</sup>

Admittedly, B Corporations are loosely regulated, if at all. B Lab is a small organization that is not equipped to regulate numerous companies effectively, particularly given its additional involvement in legislative policymaking and sharp focus on marketing its brand. B Lab's motivation has tended to lean towards attracting mass participation, not ensuring proper regulation. B Lab's standards are considerably weaker in comparison to other CSR certifications that are available on the market.<sup>171</sup> It thus becomes a question of balance. There is some value to be had in generating a buzz and creating the impression of momentum, but the trade-off with mass inclusion is usually a lowering of standards. There may be a backlash from genuine 'good' companies that are reluctant to sign on due to low standards; one executive commented that joining the B Corporation movement would be like "sprinkling holy water on the process," as standards they have set for themselves and expect from their competitors are markedly higher than B Lab's offerings.<sup>172</sup> So the question is, is B Corporation a mass movement for change, or does it simply allow companies to market themselves better—and if so, is this sufficient? There is certainly value in garnering collective strength from numbers, and legitimized advertising. Perhaps the value of aligning businesses with common interests through the B Corporation branding outweighs the need for high quality standards and adequate regulation. While B Lab's focus has understandably been on establishing the B Corporation name, B Lab will have to be careful that its ongoing effort to gain mass participation does not dilute its branding to the point where it carries little meaning.

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<sup>168</sup> "Become a B Corporation", online: B Corporation <<http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp>>.

<sup>169</sup> Brakman Reiser, "Governing", *supra* note 11 at 643.

<sup>170</sup> *Ibid.*

<sup>171</sup> Some examples include the Global Initiative for Sustainable Ratings (GIRS), and standards provided by the Sustainable Accounting Standard Board and International Integrated Reporting Council.

<sup>172</sup> Comments made in a private interview by executives at Innate, an active gear company committed to clean design ("Innate Gear", online: Innate Gear <<http://www.innate-gear.com>>).

B Lab has also been pursuing the creation of benefit corporations in US state laws; 20 states to date have adopted this new structure.<sup>173</sup> There are interesting governing features in benefit corporations, which generally vary from state-to-state. Nonetheless, almost all state laws require that benefit corporations have a public benefit purpose and an annual benefit report. Furthermore, the significant value of the benefit corporation is identical to that of the B Corporation in that the companies must allow and, in some states, require directors to consider stakeholder interests such as those of employees, customers, the community, and the environment—again, similar to findings of the SCC in the *Peoples* and *BCE* decisions. MaRS Discovery District, a Canadian hub in social innovation, has partnered with B Corporation and has drafted a white paper pushing legislators to create an equivalent to the benefit corporation in Canada.<sup>174</sup>

Certain aspects of the *MaRS White Paper* may be problematic with respect to the adoption of benefit corporations in Canada. There are several reasons for this: (1) Canada's corporate laws are more progressive and are continuing to develop; (2) the main feature of the benefit corporation mirrors Canada's progressive laws, and its implementation may potentially confuse the normative understanding of these laws; (3) without this feature, the benefit corporation's offerings to Canadian law are minimal; (4) the benefit corporation has not had exponential success in the United States to date, so there is good reason for Canada to wait and see how it fares.

US case law has made it clear that directors have a duty to maximize shareholder value in takeover situations, and the creation of the state benefit corporation is a direct response to that case law. The American hybrid is designed to address American corporate governance needs for social progress. But a Canadian way of governance is important and should be regarded as distinct. The *MaRS White Paper* recognizes that a failure to educate the Canadian public on existing common law may have created the need for a benefit corporation in Canada. This failure is not sufficiently persuasive to merit creating a new kind of corporate entity with similar governing features to those detailed in Canada's developing corporate laws. More importantly, such a cross-border adoption might hinder the very development of more sustainable Canadian corporate laws and norms. Currently, the Canadian legal framework creates space for the possibility of all Canadian corporations to have a greater responsibility to consider environmental interests and to have sustainability baked into their corporate DNA. The common law may be at the cusp of this development, and the adoption of American-style innovations will not push this forward.

To be clear, B Corporations are a positive development in the American context. They may also make sense for Canadian companies that are eager to market themselves as social enterprises while the common law is in flux and provincial governments mull the possible expansion of hybrid models. Through its impact assessment process, the B Corporation certification itself accomplishes a great deal that other legal structures cannot. Nevertheless, one cannot help but wish a Canadian certification process would originate that could allow for a unique Canadian voice to take shape in this movement. While Canadian companies interested in becoming B Corporations may elect to amend their governing documents to ensure non-shareholder

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<sup>173</sup> "State by State Status", online: Benefit Corp Information Center <<http://www.benefitcorp.net/state-by-state-legislative-status>>.

<sup>174</sup> *MaRS White Paper*, *supra* note 7.

stakeholder interests are enshrined in their mandate, it is unclear what kind of fact scenario would require additional language in company documents to cause different end-results from what is already protected under Canadian common law. Canadian directors employing CSR principles in their governance are well protected on several fronts in the law, and it is not unreasonable to predict greater specificity in the future to some extent.

Now is the time for paradigm-busting, well-researched, and well-thought out models to come into being. Legislators need to work quickly, but they should also be smart. There is a latecomer advantage<sup>175</sup> to be had, where one can learn from the frontrunners of this movement. Further research on corporate hybridity will be crucial for optimal results in implementation, as well as ongoing support from leaders in both for-profit and non-profit sectors working in the realm of social enterprises.

## 5. CONCLUSION

The path to transformational corporate governance in Canada may be a challenging one. Thus, while the proper structuring of laws is critical to reform efforts, it is important to also consider the need for normative cohesion. While the shareholder primacy model may appear to be entrenched in the United States, reforms are occurring nonetheless both in corporate legislation and within the social sector. A growing movement is attempting to reclassify the shareholder primacy model, allowing businesses to pursue both economic and social mandates in their corporate decision-making. In light of Canadian corporate culture, the trajectory of Canadian common law, and the current Canadian corporate governance landscape with regard to the rise of CSR and sustainability, Canada is poised to become a leader of transformational corporate governance in the foreseeable future.

This article has outlined the high-level beginnings of the path Canada may take to foster sustainable development through for-profit and hybrid corporate models. Further development of effective corporate governance norms is necessary in Canada. Canadian corporate legal scholarship must not become stagnant in relation to practical reform efforts. The opportunities to redesign the corporate legal model are there, whether at a grassroots level or through legislative reforms in reaction to the market. The hybrid phenomenon is quickly becoming the new wave of corporate reform to which Canada should turn its focus. In light of the apparent lack of a cohesive theory within the counter-hegemonic discourses on corporate law, and the potentially divergent language between corporate scholarship and practice, a stream of intelligent and thoughtful Canadian commentary on the structural problems of the shareholder primacy model will be essential to the advancement of transformational Canadian corporate law and governance in the future.

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<sup>175</sup> Thorstein Veblen, "Economic Theory in a Calculable Future" (1925) 15:1 *The American Economic Review* 48.