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Bringing Corporate Purpose into the Mainstream:

Directions for Canadian Law

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Acknowledgments

McConnell

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Executive Summary

The idea that corporations should have a stated purpose articulating social and environmental objectives is no longer confined to academic circles. It is now driving conversations in boardrooms and at annual general meetings. Those conversations are also shifting from why statements of corporate purpose are needed to how they can be implemented and brought into the mainstream.

This paper seeks to advance the Canadian discussion of corporate purpose and to argue in favour of establishing a more solid legal scaffolding for it through reform of the *Canada Business Corporations Act*. It begins by reviewing different approaches to the definition of “corporate purpose” and settles on the following: *the reason for existence guiding a company’s business conduct*. A purpose statement explains why a company seeks to benefit from corporate status and thus relates directly to legal privileges extended to it, namely legal personality and limited liability for shareholders. It provides the underpinning to the corporation’s operations. We deliberately adopt a broad rather than narrower social definition of purpose and suggest, based especially on recent experience in the U.K., that nudging companies toward social purpose by having them state, and publicly defend, a purpose they have leeway to define is more likely to produce truly socially beneficial companies than the attempt to impose a legal obligation to identify a social purpose.

The paper then delves briefly into legal history to show that, far from being inconsistent with corporate law, identifying a purpose for incorporation was in fact at its origins. In considering the impact on businesses of having to state a purpose, we observe that as customers and the public generally become more sophisticated in their expectations of corporate behaviour, a reorientation toward a broader purpose than maximizing shareholder return can indeed be good for business as well.

The paper reviews recent developments in Canadian law, which have freed directors and officers to take account of social and environmental considerations when exercising their fiduciary duties. However, this discretion also gives them power to avoid taking such considerations into account. In sum, the *Canada Business Corporations Act* does not currently provide a firm foundation for corporate purpose that is not shareholder-centric.

A large part of the paper is then devoted to tracking recent developments in the U.K. and France, both of which have gone further in providing a legal framework for corporate purpose. We draw on a number of features of U.K. and French law, as well as on some existing proposals for reform to U.K. law, to arrive at five recommendations for reform to the *Canada Business Corporations Act*:

1. There should be a new mandatory statement of purpose by the Board from which small businesses should be exempt;
2. Corporations should be subject to a comply or explain approach to stating a social purpose;
3. The fiduciary duty of directors and officers should be extended to pursuing the purpose of the corporation honestly and in good faith with a view to its best interests;
4. The best interests of the corporation should be expanded to include impacts on the community, high standards of business conduct and fairness as between stakeholders of the corporation; and
5. The Board should make an annual section 122 statement explaining how directors and officers have advanced the purpose of the company and have regard to its best interests.



Introduction



This paper was commissioned by the David Suzuki Foundation and is a part of a broader research effort to promote the idea that legally significant statements of corporate purpose, affirming the positive social and environmental impacts a company seeks to have, should become an ordinary part of practice for Canadian businesses.¹ The paper aims to fulfil the narrow but extremely significant objective of identifying provisions that the federal government can introduce into the *Canada Business Corporations Act (CBCA)*² to bring the adoption and execution of “corporate purpose” into the mainstream. We propose that corporations should be oriented by the law toward making statements of social and environmental purpose, but that their boards should have the mandate to determine the scope and ambition of such statements. The overall purpose of corporate purpose, so to speak, should be to engage corporations in a process of ratcheting up their engagement with social and environmental concerns, a process upon which, it must be said, many corporations have already embarked. In the absence of a requirement to state corporate purpose, the current corporate regime might reinforce the view that the only, generally implicit, purpose of a corporation is to maximize value for shareholders, a view that is no longer even shared by business leaders themselves.

The paper makes five recommendations for reform of the *CBCA*. We have focused on that legislation because it provides an enabling framework for the more than 235,000 corporations incorporated federally³ and has had influence on parallel provincial legislation. As of 2014, approximately half of Canada's publicly traded companies were incorporated under the *CBCA*.⁴ The proposals made here could be extended to provincial incorporation statutes as well.

We have arrived at our recommendations ([section 6](#)) after a review of the literature on definitions of corporate purpose ([section 1](#)), a brief consideration of the sometimes fraught history of corporate purpose reflected in the now all but defunct *ultra vires* doctrine ([section 2](#)), an overview of the business case for stating corporate purpose ([section 3](#)), an examination of the current *CBCA* framework applicable to corporate purpose ([section 4](#)) and especially after a review of recent reforms in the United Kingdom and France ([section 5](#)).

We begin nevertheless with a certain return to first principles. The term “corporation” in its most general sense ordinarily refers to “a number of persons united in one body for a purpose.”⁵ Ironically, the most crucial element in that description—purpose—is the missing ingredient for most modern business corporations. The implicit purpose of all such corporations to make a profit does not, of course, explain the purpose of any particular corporation.⁶ One looks in vain to find meaningful statements of corporate purpose in articles of incorporation, though increasingly companies are adopting organizational purpose statements to guide their management decisions. As a result, there have been repeated calls in the corporate governance literature that the modern corporation ought to have a clearly defined and articulated purpose, whether that be oriented to social and environmental impacts or not.⁷ The prominence of shareholder primacy in several jurisdictions has reinforced the assumption that the company's true purpose is to maximize the value for shareholders.⁸ The diversity of the shareholders' investment objectives and priorities is sometimes held to render it untenable that there could be a central set of purposes that unifies a company.⁹ However, the dilution of shareholder

primacy and the promotion of stakeholder interests in some jurisdictions¹⁰ engendered the need for a defining set of purposes for a corporation, though not necessarily for a single purpose.¹¹ Even jurisdictions that preserve a shareholder-centric model of corporate governance tend to recognize that corporations must consider a plurality of interests in making business decisions.¹²

While corporations should take account of all their impacts, this paper proceeds from the premise that we will have better corporate citizens if they identify and aim to achieve specific social and environmental purposes within their sphere of influence. Such corporate purposes should not be kept unclear or left to supposition. Rather, they should be expressly defined and agreed upon as providing directing principles for corporate activities. Although a statement of purpose may seek to address a range of concerns, it should gather them together in a common thread. That common thread in turn should orient the fiduciary duties exercised by directors and officers of the corporation.

A final preliminary clarification is in order. The idea of establishing a legal foundation for corporate purpose discussed here is markedly different from that of enabling the existence of benefit corporations.¹³ Benefit corporations have a special form of incorporation that is gaining in popularity in North America.¹⁴ This paper's aim is not to explore the creation of a new special category of corporation for Canada, but rather to consider how to make statements of purpose a general feature of Canadian corporate practice.



1. Definitions of Purpose

It may be suggested that it is superfluous to require an artificial person to have a defining purpose when such expectations are not placed upon natural persons. On the other hand, it could be contended that since a corporation is a legal person, it has the free will to act as any person would, and that government should not mandate it to have a purpose. However, a corporation is also an entity established by a group of people and organized within formal legal structures to achieve certain goals. It is therefore reasonable to expect those using the corporate form to identify a purpose that orients its use. Furthermore, the sheer economic, social and political power of modern corporations grants them an influence that can transcend that of any individual or, indeed, sometimes that of governments. While individuals are the driving force behind corporations, corporations are greater than the sum of their parts, often amassing the power to determine the course of human lives. Al Gore pointedly observed that “more money is allocated by markets around the world in one hour than by all the governments on the planet in a full year.”¹⁵

As the shareholder primacy doctrine declines in influence, several concepts have been proposed to reorient corporate conduct toward better social outcomes. Corporate Social Responsibility (CSR), Business and Human Rights (BHR) and Environmental, Social and Governance (ESG) criteria have become mantras of good management practice, reflecting public expectations that a healthy business contributes to sustaining a healthy society and planet. While the idea of corporate purpose aligns with these ideals, it is not a synonym or substitute for them. Corporate purpose ought to further, but indeed can go beyond, CSR, BHR and ESG. Whereas the latter are sometimes taken to be “merely voluntary” standards informing

management systems or investment screening, giving legal significance to statements of corporate purpose allows those inside and outside the company to assess how and to what degree that purpose truly guides the conduct of the company's business and to keep it legally accountable according to its own public standard.

As shown in Table 1 below, modified and adapted from a similar table prepared by Dayana Jiminez *et al.*,¹⁶ the definitions of corporate purpose found in the literature reflect a broad range of formulations across a spectrum of ambition, from narrow (value and value creation) to broad (moral and social responsibility, and “beyond profit” motivations). At one end of the spectrum are corporate purposes that have retained shareholder and profit primacy as their “philosophical heartbeat,” while at the other lie those focused on environmental and social priorities. Between both ends of this spectrum lie purposes that prioritize a stakeholder orientation.

The ISO Corporate Governance Guideline defines an organization's purpose as its “meaningful reason to exist.”¹⁷ By contrast, the British Academy, in its 2019 report, *The Principles of Purposeful Business*, proposed the following explicitly socially and environmentally oriented definition:¹⁸

“The purpose of business is to solve the problems of people and the planet profitably, and not profit from causing problems.”

For its part, the United Way Social Purpose Institute states that a social purpose business has “[a]n enduring core reason for being. It is clear and consistent about why its business exists, what it stands for and what it is about—beyond what it makes, does or sells.”¹⁹ It also defines a social purpose business as a “company whose enduring reason for being is to create a better world. It is an engine for good, creating social benefits by the very act of conducting business. Its growth is a positive force in society.”²⁰

As we have noted, while the purpose of “corporate purpose” is to prompt business engagement with social and environmental challenges, we acknowledge that allowing companies a wide berth to identify their purpose is the pragmatic step to take, especially for companies new to the process

of identifying a purpose. Therefore, this paper broadly defines corporate purpose as “the reason for existence guiding a company’s business conduct.” A purpose statement explains why a company seeks to benefit from corporate status and thus relates directly to legal privileges extended to it, namely legal personality and limited liability for shareholders. It provides the underpinning to the corporation’s operations. It is not simply a list of corporate objectives or objects (e.g., “to operate a bakery”), but rather determines why these objects are chosen (e.g., “to improve health through nourishing baked food”). By contrast, a mission statement can explain how the purpose is undertaken, and a vision statement can explain what orientation is given to its pursuit.²¹

Based on the U.K. experience discussed below, this paper suggests that nudging companies toward social purpose by having them state, and publicly defend, a purpose they have broad leeway to define is more likely to produce truly socially beneficial companies than the attempt to impose a legal obligation to identify a social purpose. Indeed, it might be accepted by some executives and shareholders that corporations ought to have a purpose that acknowledges an overarching ambition that is beyond their daily activities and business interests without necessarily conceding that all corporations exist to help solve societal and environmental problems. How a specific statement of purpose is arrived at for any given company will inevitably be shaped by individual contexts and the company’s best interests. As will be made clear in the recommendations developed below, this paper has therefore opted for a more general, open-ended definition of purpose than that proposed by, for example, the British Academy or Social Purpose Institute. Thus, our premise is that all corporations ought to be able to state their purpose. Whereas some corporations may engage in this exercise only for the sake of virtue-signalling,²² we argue that this is a risk worth running, especially if statements of purpose become linked, as proposed, to the exercise of fiduciary duties by directors and officers.

Furthermore, the paper seeks to apply the purpose standard to itself: the overriding reason for having purpose statements is indeed well articulated by the British Academy and Social Purpose Institute.

Corporations, especially the most influential and powerful ones, but even emergent corporations that might have growing impacts on society at large, should engage with helping to solve the world's most pressing concerns.²³ These have been well articulated in the United Nations Sustainable Development Goals on which the British Academy, following the World Business Council on Sustainable Development, also draws.²⁴ Consequently, the paper seeks to identify how the law could be structured to require statements of purpose consistent with the broad definition adopted here but nevertheless create incentives to adopt statements consistent with the definition proposed by the British Academy and the Social Purpose Institute.

Jiminez *et al.* point to the dearth of literature concerning the process of articulating corporate purpose and generalizing its adoption.²⁵ The British Academy's first, capstone recommendation to that end, contained in the 2021 final report of its Future of the Corporation program, is that "[g]overnments put purpose at the heart of company law and the fiduciary responsibility of directors."²⁶ This paper does indeed seek to follow up on that recommendation. It does so by considering legal frameworks that have been used in other jurisdictions and drawing out implications for Canada. At the same time, however, this paper does not seek to elaborate upon additional directions for policy considered by the British Academy, namely changes to the powers given to regulators, to reporting requirements, to shareholder responsibility and governance arrangements, to practices around measurement and evaluation of corporate performance and to the role of investors. These additional measures could flow from a successful effort to place purpose at the heart of Canadian corporate law.

BOX 1: EXAMPLES OF CORPORATE PURPOSE STATEMENTS²⁷

Tesla: We exist to accelerate the planet's transition to sustainable transport.

Patagonia: We're in business to save our home planet.

Whole Foods: Our purpose is to nourish people and the planet.

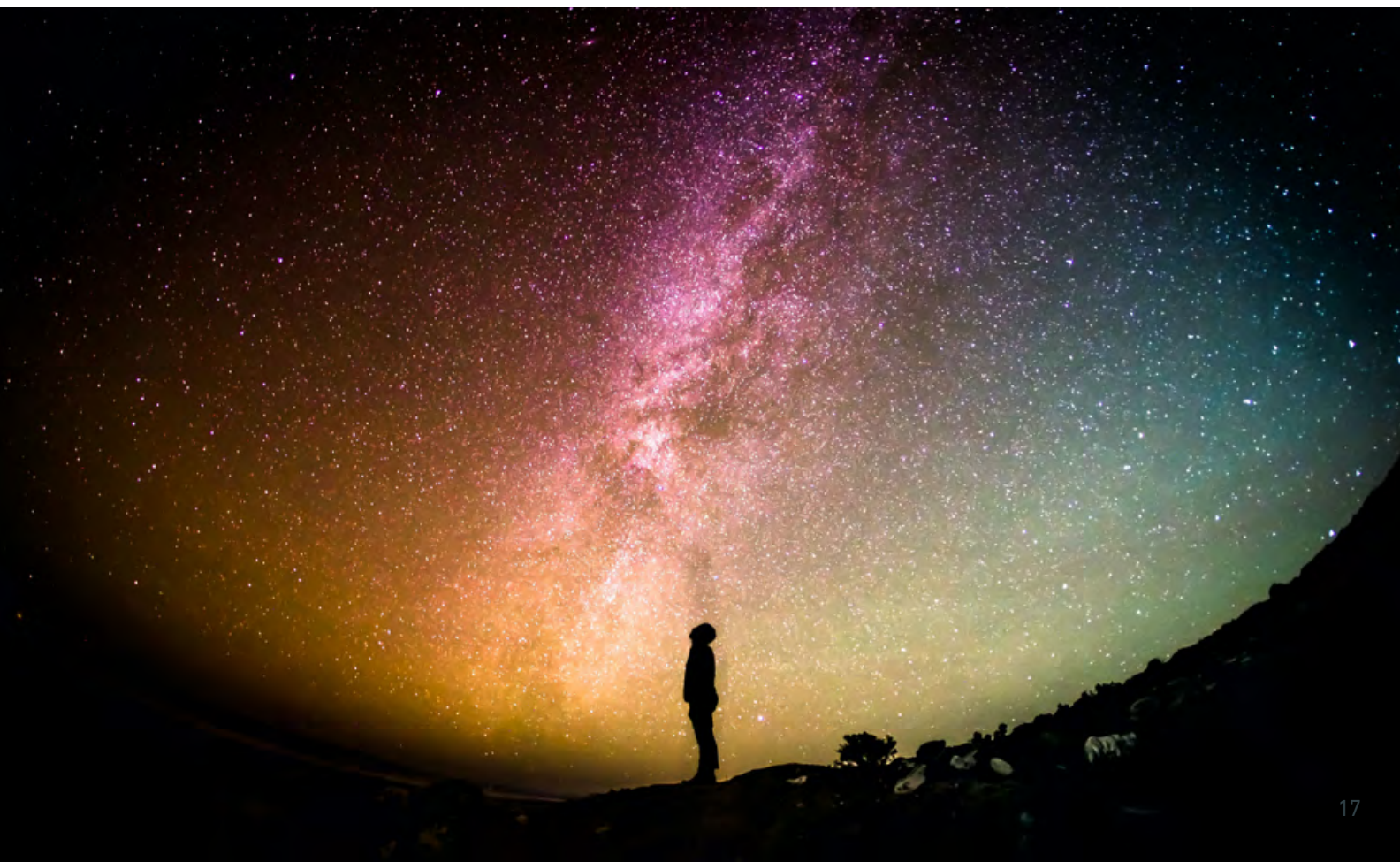
Walmart: We save people money so that they can live better.

Maple Leaf Foods: To raise the good in food.

TABLE 1: A SURVEY OF DEFINITIONS OF CORPORATE PURPOSE

Purpose emphasis	Definitions
Value and value creation	<p>Purpose is not a mere tagline or marketing campaign; it is a company's fundamental reason for being – what it does every day to create value for its stakeholders. Purpose is not the sole pursuit of profits but the animating force for achieving them.</p> <p>Larry Fink (2019)</p> <p>Corporate purpose is the higher purpose of a company that goes beyond the sole profit orientation. The purpose is to define and deliver a long-term value-creating promise, either in the company's local environment or in the global market environment, that is directly related to the company's value creation.</p> <p>Bruce and Jeromin (2020)</p> <p>The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value a company serves not only its shareholders, but all its stakeholders—employees, customers, suppliers, local communities, and society at large.</p> <p>World Economic Forum (2020)</p>
Moral and social responsibility	<p>An aspirational reason for being which inspires and provides a call to action for an organization and its partners and stakeholders and provides benefit to local and global society.</p> <p>Harvard Business Review (2015)</p> <p>Purpose is the statement of a company's moral response to its broadly defined responsibilities, not an amoral plan for exploiting commercial opportunity.</p> <p>Bartlett and Ghosal (1994)</p> <p>A higher purpose is a goal that transcends the usual business goals of the organization, but yet acts as the arbiter of all business decisions. That is, the decisions are made at the intersection of business goals and higher purpose.</p> <p>Thakor and Quinn (2013)</p> <p>An economy where the value lies in establishing a purpose for employees and customers—through serving needs greater than their own, enabling personal growth, and building community.</p> <p>Hurst (2014)</p>

<p>Moral and social responsibility</p>	<p>The purpose of business is to solve the problems of people and the planet profitably, and not profit from causing problems. British Academy (2019)</p> <p>A Social Purpose Business is a company whose enduring reason for being is to create a better world. It is an engine for good, creating societal benefits by the very act of conducting business. Its growth is a positive force in society. United Way Social Purpose Institute (2021)</p> <p>Purpose is a unifying statement of the commercial and social problems a business intends to profitably solve for its stakeholders. Gulati (2022)</p> <p>A meaningful reason to exist; reason for existence from all perspectives. ISO 37000 (2021)</p>
<p>Beyond profit (broad definition of purpose)</p>	<p>A concrete goal or objective for the firm that reaches beyond profit maximization. Henderson and Van den Steen (2015)</p> <p>The meaning of a firm's work beyond quantitative measures of financial performance. Gartenberg et al. (2016)</p>



2. A Brief Historical Perspective on Corporate Purpose

Corporate purpose was once at the heart of corporate law, though controversially so. Indeed, the powerful trading corporations established by the colonial empires of Europe to pursue their territorial conquests were given vast monopoly powers and a staggering array of purposes. For example, the 1670 Royal Charter of the Hudson's Bay Company charges it "to make, ordain, and constitute, such, and so many reasonable Laws, Constitutions, Orders and Ordinances, as to them, or the greater part of them being then and there present, shall seem necessary and convenient for the good Government of the said Company, and of all Governors of Colonies, Forts and Plantations, Factors, Masters, Mariners, and other Officers employed or to be employed."²⁸ In short, the Hudson's Bay Company not only had the purpose of engaging with social issues, it was to govern them directly!²⁹ The legacy of such colonial purpose continues to have horrific consequences for Indigenous communities.

The evolution of French law also illustrates how corporate purposes, albeit ones in service of an imperial power, were once anchored in corporate law. Anne Lefebvre-Teillard and Charles Freedeman have separately documented how, prior to France's general incorporation legislation of 1867, incorporation was granted on a case-by-case basis with applicants having to make the case for "*la reconnaissance de l'utilité publique*," that is, the recognition of public purpose or public utility.³⁰ After 1867, *utilité publique* was simply presumed.

In the Anglo-American context, a parallel phenomenon to that of 19th century France can be observed. In the wake of the *U.K. Bubble Act of 1720*, corporate charters required individual legislative approval and were granted when they were deemed to further the public welfare.³¹ Charlie Cray and Lee Drutman note that:

Much of what we attempt to accomplish today through regulation was accomplished in early America through the chartering process that defined a corporation's purpose. When a corporation violated its charter by operating *ultra vires*, or outside the powers bestowed upon it, the corporation could be dissolved by an act of the legislature that created it.³²

Morton Horwitz traces the erosion of the *ultra vires* doctrine in the United States and quotes the preface to William Cook's treatise, who wrote in 1898:

The doctrine of *ultra vires* is disappearing. The old theory that a corporate act beyond the express and implied corporate powers was illegal and not enforceable, no matter whether any actual injury had been done or not, has given way to the practical view that the parties to a contract which has been partially or wholly executed will not be allowed to say it was *ultra vires* of the corporation.³³

The erosion of the *ultra vires* doctrine meant that corporate purpose ceased to play a significant governance role. Corporations no longer needed to state a purpose and, if they did, it tended to be the generic purpose of conducting business. As Milton Friedman famously put it, encapsulating the dogma of the 1970s, "the social responsibility of business is to increase profits."³⁴

The colonial and Eurocentric origins of corporate law culminating in a

“ The colonial and Eurocentric origins of corporate law culminating in a purely profit-driven entity have left their trace and have tended to produce a single account of what a corporation is and can be, discounting the experiences and perspectives of other world views and legal traditions.

purely profit-driven entity have left their trace and have tended to produce a single account of what a corporation is and can be, discounting the experiences and perspectives of other world views and legal traditions. It is notable, for example, that as Indigenous Peoples come to establish their own corporate forms, they often take on a more ambitious set of social purposes. Thus, Makivik Corporation, which was established upon the settlement of the James Bay and Northern Quebec Agreement with the Inuit of Nunavik and operates a number of businesses, in addition to administering and investing the settlement compensation funds, has the following corporate objectives that constitute its purpose:

- (b) to relieve poverty and to promote the welfare and the advancement of education of the Inuit;
- (c) to develop and improve the Inuit communities and to improve their means of action;
- (d) to exercise the functions vested in it by other acts or the Agreement;
- (e) to foster, promote, protect and assist in preserving the Inuit way of life, values and traditions.³⁵

On part of the very territory where the Hudson's Bay Company had operated from 1670, Makivik Corporation now pursues the *obverse* of the public purpose that had been pursued in that colonizing Royal Charter. It seeks to decolonize and revitalize that Inuit territory.³⁶

We have rehearsed this legal history only to underscore that, far from being inconsistent with corporate law, identifying a purpose for incorporation was in fact at its origins. A return to statements of purpose would no longer be for the sake of specifying which of the state's goals are to be pursued through the delegation of sovereign power. Rather, since corporations have been granted autonomy to conduct business that can and does have significant collective impacts, they should be able to state how their reason for existence justifies their social licence to operate.



3. The Business Case for Purpose

Statements of purpose can assist rather than hinder a company in establishing its business case and operating financially as a going concern.

The idea of purpose has been driving changes in how many leading businesses are run in recent times, advancing a shift from the old thinking that sees a company as narrowly pursuing short-term profit. In 2019, the Business Roundtable, which comprises more than 200 of the largest U.S. corporations, embraced this shift by adopting a new Statement on the Purpose of a Corporation to overturn its 22-year-old policy statement “that defined a corporation’s principal purpose as maximizing shareholder return.”³⁷ In adopting this new statement, which includes the affirmation that “[w]e respect the people in our communities and protect the environment by embracing sustainable practices across our businesses,” the Business Roundtable acknowledged a much broader set of interests to which corporations should also attend.³⁸

As customers and the public generally become more sophisticated in their expectations of corporate behaviour, a reorientation toward a purpose broader than maximizing shareholder return can indeed be good for business as well. The corporate governance literature shows that the adoption of corporate purpose can have a positive impact on a company’s bottom line.³⁹ Accenture Strategy’s global survey

“The customer shift toward purpose-driven companies transcends markets and age groups, and purpose-driven companies are more likely to achieve customer loyalty, customer advocacy, strategic clarity, a good reputation, growth, talent attraction and retention and innovation.

reported that 62 per cent of 30,000 surveyed consumers wanted companies to take a stand on issues that align with their values.⁴⁰ Companies that disregarded customer values faced significant possible impacts on their business: 53 per cent of customers dissatisfied about a company's stance on a social issue would complain, 47 per cent would walk away and 17 per cent would not return. Another study showed that approximately 60 per cent of Americans would "choose, switch, avoid or boycott a company based on its stand on social issues"⁴¹; 77 per cent of those polled reported stronger emotional connection to purpose-driven companies over traditional companies, while 66 per cent would leave a product they commonly purchase for a new one from a purpose-driven company.⁴² The customer shift toward purpose-driven companies transcends markets⁴³ and age groups,⁴⁴ and purpose-driven companies are more likely to achieve customer loyalty, customer advocacy,⁴⁵ strategic clarity,⁴⁶ a good reputation, growth,⁴⁷ talent attraction and retention⁴⁸ and innovation.⁴⁹



4. The Canadian Legal Context for Corporate Purpose

The *CBCA* still contains traces of the now largely obsolete *ultra vires* doctrine. Section 6 stipulates that the articles of incorporation must include “(f) any restrictions on the businesses that the corporation may carry on.” However, no such restrictions need be specified and no positive statement of purpose need be made. Section 16 is worth reproducing in full:

Powers of a corporation

16 (1) It is not necessary for a by-law to be passed in order to confer any particular power on the corporation or its directors.

Restricted business or powers

(2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles.

Rights preserved

(3) No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act.

Thus, powers of the corporation need not be restricted in the articles, but if they are the corporation shall not act contrary to them. However, so as not to prejudice third parties, an act contrary to the articles is not for that reason alone rendered invalid. This latter point is reinforced by section 18,

which protects third parties against the invalidity of *ultra vires* acts except where such a party has received actual or constructive notice.⁵⁰

The *CBCA*'s failure to prescribe a statement of corporate purpose and its exclusion of a robust *ultra vires* doctrine betokens a strong continuing orientation toward shareholder primacy as the underlying and undifferentiated corporate purpose. As long as corporations make a return for shareholders, so goes the logic, they need not justify their existence. If they fail to do so, the market will punish them.

The orthodoxy of shareholder primacy can trace its legal force to the 1883 decision in *Hutton v. West Cork Railway Co.*, where Bowen J. reasoned that the fiduciary duties of directors must be exercised in the best interests of the company, and those interests are determined by the interests of the shareholders.⁵¹ This dictum was mirrored in the well-known *Dodge v. Ford Motor Company* decision, which affirmed that “a business corporation is organized and carried on primarily for the profit of stockholders” and that the duties and liberties of directors are circumscribed by the attainment of that goal.⁵² The business judgment rule, however, softened the shareholder primacy principle and allowed Canadian courts to defer to the judgment of the directors, as long as they acted in an informed manner. At the same time, Canadian courts aligned with their American counterparts⁵³ in following the *Revlon Rule*, which prescribes that directors must make reasonable efforts to obtain the highest value for a company during a hostile takeover or when the sale of the company becomes inevitable.⁵⁴ This is due to concerns that existing directors may act in their own interests and seek to entrench themselves even if the bid benefits shareholders. In *Ventas*, the Ontario Court of Appeal held that “[t]here is no doubt that the directors of a corporation that is the target of a takeover bid...have a fiduciary obligation to take steps to maximize shareholder (or unit holder) value in the process...”⁵⁵ Nonetheless, a strict focus on maximizing shareholder value in the takeover context need not extend to the ordinary conduct of business.

Indeed, Canadian jurisprudence has evolved to a point where courts are prepared to weigh interests separate from those of shareholders.

This began with the decision in *Teck Corp. Limited v. Millar*,⁵⁶ where Berger J. held that “directors will not be open to a charge that they have failed in their fiduciary duty to the company” if they consider interests in addition to those of the shareholders. In *Peoples Department Stores Inc. (Trustee of) v. Wise*, the Supreme Court of Canada cited *Teck* and widened the fiduciary duties of the board, emphasizing that “directors must be careful to attempt to act in [the corporation’s] best interests by creating a ‘better’ corporation, and not to favour the interest of any one group of stakeholders,”⁵⁷ thus whittling down the influence of shareholder primacy. In another landmark decision, *BCE v. 1976 Debentureholders*,⁵⁸ the Supreme Court described directors’ fiduciary duty as a “broad, contextual concept,”⁵⁹ which demands that the board safeguard the company’s statutory obligations. Directors should not elevate the interest of one group above others, nor should they equate the company’s interest with that of shareholders or any corporate constituent. Shareholders are “entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly.”⁶⁰ The Supreme Court was categorical that where there is a conflict between the interest of the shareholders/stakeholders and those of the corporation, the director’s duty to the corporation trumps any other.⁶¹

The Court’s emphasis that the “short- and long-term interests” of the corporation be considered by the board “in the course of making their ultimate decision” provides a legal foundation for a corporate purpose beyond shareholder primacy, incorporating broader interests, including those of creditors, shareholders, employees, governments and the environment.⁶² Since a corporate purpose ought to have some enduring significance, it should align well with long-term interests.

In 2019, Parliament adopted language inspired by the *Wise* and *BCE* decisions with an amendment to the *CBCA*.⁶³ Prior to the amendment, section 122 of the *CBCA* stipulated that directors and officers of a company must “act honestly and in good faith with a view to the best interests of the corporation.” As the Supreme Court held, this language already established that the corporation itself, and not the shareholders, is the object of the directors’ fiduciary duty. Bill C-97 added subsection 122(1.1) to the *CBCA*,


thereby including the following non-exhaustive list of factors that may be considered by directors and officers when exercising their fiduciary duties:

- (a) the interests of (i) shareholders, (ii) employees, (iii) retirees and pensioners, (iv) creditors and governments;
- (b) the environment; and
- (c) the long-term interests of the corporation.

Thus, the interests of the shareholders are only one of a multitude of priorities that the directors may consider when evaluating whether a decision is in the best interests of the corporation.

This codification and extension of the *Wise* and *BCE* decisions frees directors and officers to take account of social and environmental considerations.⁶⁴

This new paradigm, Ortvéd argues, provides the legal framework necessary to bring purpose into the mainstream and makes a further amendment to fiduciary duties under the *CBCA* redundant.⁶⁵ However, we hold the view that if purpose is to become a requisite part of corporate governance, then the current version of the law does not go far enough. Significantly, the word “may” makes the considerations in subsection 122(1.1) discretionary, which gives directors and officers leeway to avoid taking account of



“ The Court’s emphasis that the “short- and long-term interests” of the corporation be considered by the board “in the course of making their ultimate decision” provides a legal foundation for a corporate purpose beyond shareholder primacy, incorporating broader interests, including those of creditors, shareholders, employees, government and the environment.

subsection 122(1.1). Acting in “the long-term interests of the corporation” is arguably a crucial element of the board’s fiduciary duty, because it is not possible to act in the “best interests of the corporation” without paying attention to those interests.⁶⁶ Yet, acting in the long-term interests of the corporation remains optional under the *CBCA*. Finally, apart from being discretionary, the list of ESG factors that directors may take into consideration is not far-reaching, and falls short of similar practices in the jurisdictions studied. A broader requirement would fit into global efforts to reform company laws to expressly require companies to have and articulate a purpose.⁶⁷



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5. Some Relevant Foreign Examples

Across multiple jurisdictions, the growing emphasis on corporate purpose has resulted in different legal and regulatory approaches. We single out lessons from the United Kingdom and France, which have recently engaged in reforms designed to systemize purpose in the modern corporation. These jurisdictions offer important lessons for Canada. We should note that while some U.S. developments, notably the emergence of benefit corporations and of corporate constituency statutes,⁶⁸ align with an increasing legal significance for corporate purpose, as a general matter U.S. corporate law has not evolved to the same degree as that of the U.K. and France.

United Kingdom

General Legal Landscape for Corporate Governance

The statutory foundation of U.K. corporate law is the *Companies Act, 2006* as amended. Among other things, the Act codifies the procedure for incorporating a company; a company's powers, capacity and obligations; rights and responsibilities of "members" (shareholders); and rights and duties of directors and other officers of the company. The Act also confers statutory powers on a set of government institutions to oversee codes of conduct regulating specific aspects of corporate governance in the U.K.

There is no requirement under the Act for companies incorporated in the U.K. to articulate a purpose. Historically, companies were required to provide an object clause in their charters at the point of incorporation, and activities undertaken outside a company's objects were voidable.

That was why under the old regime, companies included a lengthy list of objects in their charters. However, Article 31 of the Act bears a resemblance to paragraph 6(1)(f) of the *CBCA* by allowing a company's objects to be unrestricted unless otherwise stipulated by the Articles of Association. In any event, object clauses were a list of activities and businesses that a company could undertake, but they were never really an expression of the company's purpose.

Corporate Purpose in the United Kingdom

There is a growing momentum among government and business leaders for the integration of corporate purpose into U.K. company law. As stated earlier, the British Academy affirms that the purpose of business is to “find profitable solutions to the problems of people and planet, not to profit from creating problems for either,” and this view is supported by 44 per cent of those surveyed for the British Academy's Future of the Corporation programme.⁶⁹ Moreover, 55 per cent back the creation of incentives to spur business change, while 40 per cent agree that changing company laws and regulations will help advance purposeful businesses. Indeed, Ed Miliband, then U.K. shadow secretary for business, called for a reform to U.K. corporate law to encourage purpose-driven companies to lead the recovery from the pandemic.⁷⁰

These developments need to be placed against the backdrop of the way the Act is currently framed. Subsection 172(1) codifies the common law duties of directors to exercise their powers in good faith and in a manner that furthers the interests of the shareholders (“members”), making shareholder interests the primary consideration of directors when determining the best interests of the company. At the same time, however, subsection 172(1) instructs directors to have regard to a broad range of ESG considerations, including “the impact of the company's operations on the community and the environment,” when assessing what is in the best interests of the shareholders. In addition, subsection 172(2) makes it clear that “[w]here or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.”

Kershaw and Schuster point out that this effectively places members' interests atop the list of company priorities, despite the breadth of stakeholders captured in paragraphs 172(1)(a)-(f).⁷¹ Indeed, paragraphs 172(1)(a)-(f) impose no obligation on a company to prioritize stakeholders, but merely to have regard to them.

This state of affairs is an important motivation for the Better Business Act campaign by an alliance of more than 1,000 U.K. corporations, which are urging the government to adopt legislation aimed at ensuring that "every single company in the UK, whether big or small, aligns the interests of their shareholders with those of wider society and the environment."⁷² The proposed legislation would include an amendment to section 172 specifying a duty on directors to advance the purpose of the company⁷³ and the requirement that the directors of medium- and large-sized companies issue an annual strategic statement of compliance with section 172 explaining how they have advanced the purpose of the company while performing their duties under section 172.⁷⁴ We have retained these ideas in our recommendations.

The U.K. Corporate Governance Code is a distillation of best-practice principles and guidelines for the 472 leading companies with a premium listing on the London Stock Exchange, whether incorporated within or outside the U.K.⁷⁵ The board of a parent company of a premium listed company is required to safeguard cooperation within the group and adherence to the Code.⁷⁶ As opposed to standard listed companies, premium listed companies must meet the U.K.'s highest standards of governance and regulation. Compliance with these standards allows premium listed companies to benefit from a lower cost of capital, a liquid market and wider access to investors.

The U.K. Financial Reporting Council (FRC) is responsible for issuance of the Code, the most recent version of which is that of 2018.⁷⁷ The Code is not a legally binding instrument or an act of parliament, but has achieved adherence to its "comply or explain" regime because of the role and influence of the FRC. Although the FRC is "a private body and is independent of government,"⁷⁸ it assumes notable statutory powers under the Act and other legislation.⁷⁹

Purpose Requirement and Applicability

The Code is made up of five sections that focus on board leadership and company purpose; division of responsibilities; composition, succession and evaluation; audit, risk and internal control; and remuneration. The Code affirms that a “company’s culture should promote integrity and openness, value diversity and be responsive to the views of shareholders and wider stakeholders.”⁸⁰ It articulates 18 principles and has 41 provisions. The Code stipulates that the role of an effective and entrepreneurial board is the promotion of the company’s long-term success, as well as the creation of value for shareholders and for society.⁸¹ It enjoins a company’s board to establish its purpose, values and strategy and to ensure their alignment with overall company culture, while leading by example, acting with integrity, engaging with stakeholders and aligning workplace policies with the company’s long-term success.⁸² If the board is not satisfied that corporate policies are aligned with corporate purpose, it should obtain assurances that corrective action has been taken. Other provisions of the Code relating to purpose include the principle that executive remuneration should align with company purpose and link with the delivery of long-term strategy, and that incentive schemes must align with corporate culture.⁸³ At the heart of corporate purpose in the U.K. is section 172 of the Act, which itemizes the fiduciary duties of directors, and urges regard for stakeholder interests.



BOX 2: PARAGRAPHS 172(1)(A)-(F) OF THE U.K. COMPANIES ACT 2006

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to


- a. the likely consequences of any decision in the long term,
- b. the interests of the company's employees,
- c. the need to foster the company's business relationships with suppliers, customers and others,
- d. the impact of the company's operations on the community and the environment,
- e. the desirability of the company maintaining a reputation for high standards of business conduct, and
- f. the need to act as between members of the company.

As is shown by the 2020 FRC assessment of the U.K.'s Governance Code, corporations may start out by stating that their purpose is simply to pursue profit, but a substantial majority of them tend to move away from that approach in subsequent iterations. In 2020, 93 per cent of U.K. companies covered by the Governance Code described a purpose without referring to profit and shareholder value, a notable transformation from the previous year, when profit drove most purpose statements. "Of that 93%, however, 45% of purpose statements either did not describe any social or stakeholder dimensions or indirectly referenced them. 23% of companies mentioned either a social or stakeholder dimension in their purpose, such as serving their customers, while 32% clearly described social and/or stakeholder dimensions to their purpose."⁸⁴

This experience is the basis for our suggestion that the prudent approach to having corporations articulate their purpose involves enabling the incremental adjustment of purpose statements through a company-owned process, allowing them ultimately to arrive at a social purpose at their own pace and with their own emphasis.

Reporting Requirements and Enforcement

Although compliance with the Code is not mandatory, reporting requirements are embedded in a set of disclosure rules allowing shareholders and stakeholders to assess the quality of the company's governance framework. Significantly, the board should issue a statement in its annual report on how it has complied with the Code and the statement should contain how the board has articulated the company's purpose and strategy. Compliance is not mandatory, but a company that does not comply has to explain the reasons for not doing so. Reasons for non-compliance should give background and explain the impact of the non-compliance. In cases where non-compliance with a provision is temporary, the company is required to identify when it intends to comply with the provision. In July 2018, the FRC issued a Guidance on the Strategic Report (GSR) to highlight best practices of good corporate reporting, especially on how companies should comply with the Code's requirement that they state their purpose. The GSR emphasizes that a company's purpose is why it exists, and that it could narrowly focus on creating benefits for members with due regard to section 172 of the Act, although generally it operates in a wider social context while contributing to inclusive and sustainable development.



“ This experience is the basis for our suggestion that the prudent approach to having corporations articulate their purpose involves enabling the incremental adjustment of purpose statements through a company-owned process, allowing them ultimately to arrive at a social purpose at their own pace and with their own emphasis.

BOX 3: FRC'S GUIDANCE ON BOARD EFFECTIVENESS

A company's purpose is the reason for which it exists. The board is responsible for setting and reconfirming the company's purpose. A well-defined purpose will help companies to articulate their business model, and develop their strategy, operating practices and approach to risk. Companies with a clear purpose often find it easier to engage with their workforce, customers and the wider public.

The Company Regulations, 2018, require directors to explain how they have complied with the requirements of section 172 concerning stakeholder engagement. Similarly, the Listing Rules require listed companies to provide an annual financial report that contains statements of compliance with all relevant provisions of the Code. Where a company fails to comply with the Code, it must state reasons for non-compliance.⁸⁵

Compliance

The Code has only been in existence for just over three years, but there have been encouraging signs that more companies are articulating their purposes. The FRC publishes periodic reviews of company compliance with the Code showing that, while an increasing number of companies do indeed comply, they need a better understanding of how to craft a purpose statement and align it with company values and strategy. A clearly defined purpose, according to the FRC, must contain four crucial elements: the reason for the company's existence; the business the company carries out or the market in which it operates; what it seeks to attain; and how the company's purpose will be achieved. However, results of compliance with this approach have been mixed. According to the FRC's 2020 review of statements submitted,⁸⁶ while 86 per cent of companies disclosed a purpose statement,⁸⁷ 11 per cent used a marketing catchphrase or confused their vision and values with their purpose; 21 per cent described a clear purpose for their existence, market segment, unique selling point and how purpose will be achieved; 22 per cent had a vague purpose that did not clearly state why the company existed, or the strategy for achieving their purpose. Most companies, amounting to 62 per cent, did not demonstrate

a connection between their purpose, strategy and values. Similar patterns were observed in 2021.⁸⁸

BOX 4: PROPOSED BETTER BUSINESS ACT

172 Duty to advance the purpose of the company

- (1) A director of a company must act in the way the director considers, in good faith, would be most likely to advance the purpose of the company, and in doing so must have regard (among other matters) to the following considerations:
- (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a well-deserved reputation for trustworthiness and high standards of business conduct, and
 - (f) the need to act fairly as between members of the company.
- (2) The purpose of a company shall be to benefit its members as a whole, while operating in a manner that also:
- (a) benefits wider society and the environment in a manner commensurate with the size of the company and the nature of its operations and
 - (b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs.
- (3) A company may specify in its Articles a purpose that is more beneficial to wider society and the environment than the purpose set out in subsection (2).
- (4) The duty imposed upon directors by this section:
- (a) has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company and
 - (b) is owed solely to the company and not to any other interested parties.

2 Amendment to s414CZA of the Companies Act 2006

Section 414CZA of the Companies Act 2006 shall be amended and replaced in its entirety as follows:

414CZA Section 172(1) statement

(1) A strategic report for a financial year of a company must include a statement (a “section 172(1) statement”) that describes how the directors when performing their duty under section 172:

(a) have advanced the purpose of the company and

(b) have had regard to the matters set out in section 172(1)(a) to (f).

(2) Subsection (1) does not apply if the company qualifies as medium-sized in relation to that financial year (see sections 465 to 467).



France

Unlike the U.K., which has chosen an approach to corporate purpose that rests heavily on a voluntary code applicable to a limited set of companies, the French attempt to incorporate purpose into the activities and governance of companies has a stronger legal starting point. The 2019 French reforms sought directly to change the legal definition and meaning of a corporation. One significant difference between the U.K. and French approaches is that the latter introduces a new category of company, the *société à mission*. The French government undertook these reforms because the original Napoleonic Code was “absolutely inadequate in so far as it considers [the enterprise] from the angle of the corporation only... Renaming things and doing so truthfully is extremely important.”⁸⁹

The French Civil Code, which establishes the general private law governing legal persons, operates together with the French Commercial Code, which establishes the specific types of commercial entities that may operate in France.⁹⁰ The relevant provision of the Civil Code had remained virtually unchanged since 1804. Article 1833 stipulated that “a company must have a lawful purpose and be incorporated in the common interest of shareholders”. The use of the word purpose in this provision may superficially buttress the view that French corporate law requires companies to have a defining purpose of the sort we have defined in this paper. However, this requirement is no more than a French version of the obligation of Canadian and U.K. companies to specify their objects or any restrictions thereto. In practice, companies use this provision to specify general objects rather than a purpose. Furthermore, Article 1833 does not reflect a contemporary understanding of corporate purpose because the “lawful purpose” is already circumscribed by a shareholder-centric approach that requires a company to be incorporated “in the common interest of shareholders.” Article 1833 of the Civil Code is paralleled by Article L210-2 of the Commercial Code, which specifies that French Sociétés anonymes must include in their statutes a definition of their “*objet social*” or object of the company.

Corporate purpose became an issue of policy focus in 2017, when French President Emmanuel Macron stated the need to “redefine the enterprise” and its *raison d’être*. In January 2018, the French government commissioned a study⁹¹ to examine ways to align corporate and collective interest, and this effort resulted in the Notat-Senard Report.⁹² That report made sweeping recommendations for changes to France’s corporate law and governance based largely on the view that modern corporations should show sensitivity to the social environment in which they carry on business. The Notat-Senard Report culminated in the adoption of the PACTE Law,⁹³ which made three significant amendments to the French Civil Code as it relates to corporate purpose.

Article 169(1) of the PACTE Law amends Article 1833 of the French Civil Code to include a new sentence:

The company is managed in its corporate interest, while taking into account the social and environmental issues related to its activity.
[our translation]⁹⁴

This amendment provides a new approach to corporate responsibility and emphasizes that company interests do not necessarily lead to the consideration of relevant social and environmental issues. The new wording of Article 1833 provides for partial incorporation of ESG standards into French corporate governance. The concept of corporate interest nonetheless remains undefined under the PACTE Law and its application is “based on its broad flexibility, which means it cannot be constrained by pre-established criteria.”⁹⁵ Similarly, the PACTE Law does not define the content of the “social and environmental issues” the company is to consider, nor does it demand that social and environmental consideration be given priority in the decision-making process. In principle, a decision with an adverse social and environmental impact may still be reached if it is in the company’s corporate interest.

Article 169(2) of the PACTE Law is the most directly salient to the discussion of corporate purpose. It amends Article 1835 of the French Civil Code to introduce the concept of a company’s *raison d’être* (the reason for its

existence; its purpose), allowing it to assign social and/or environmental purposes to itself in its articles of association. The amendment stipulates that:

The articles of association must be drawn up in writing. They determine, in addition to the contributions of each member, the form, the object, the name, the registered office, the share capital, the duration of the company and the methods of its operation. The articles of association *may* specify a *raison d'être*, consisting of the principles which the company has adopted and according to which it will allocate resources in the performance of its activities.⁹⁶ [our translation, emphasis added]

Like corporate interests,⁹⁷ *raison d'être* is not defined under the PACTE Law. However, the amendment points to the fact that it is not exactly a statement of why the company exists, but an assortment of the “principles which the company has adopted and according to which it will allocate resources in the performance of its activities.” The Notat-Senard Report provides further insight into the meaning of *raison d'être*, explaining that it is what is “essential to fulfill the object, that is to say the field of company activities.” Thus, although *raison d'être* literally means “reason for existence,” it may not correspond precisely to corporate purpose understood as the statement explaining why a company exists. Even if it does, the requirement for corporations to include a *raison d'être* in their articles of association is couched in voluntary and not mandatory terms. As a result, a French company may decide not to have a *raison d'être*.

Article 179 of the Law also creates the *société à mission*, a new form of company. Any company can register as a *société à mission* provided the company (i) defines a mission of pursuing social and environmental goals in line with its *raison d'être* and (ii) establishes a supervisory board that is separate from the management board and includes at least one employee of the company, to assess whether the company fulfils its mission. Articles L225-35 and L225-64 of the French Commercial Code have also been amended to allow boards to consider “social and environmental issues.”⁹⁸

BOX 5: THE FRENCH COMMERCIAL CODE (OUR TRANSLATION)

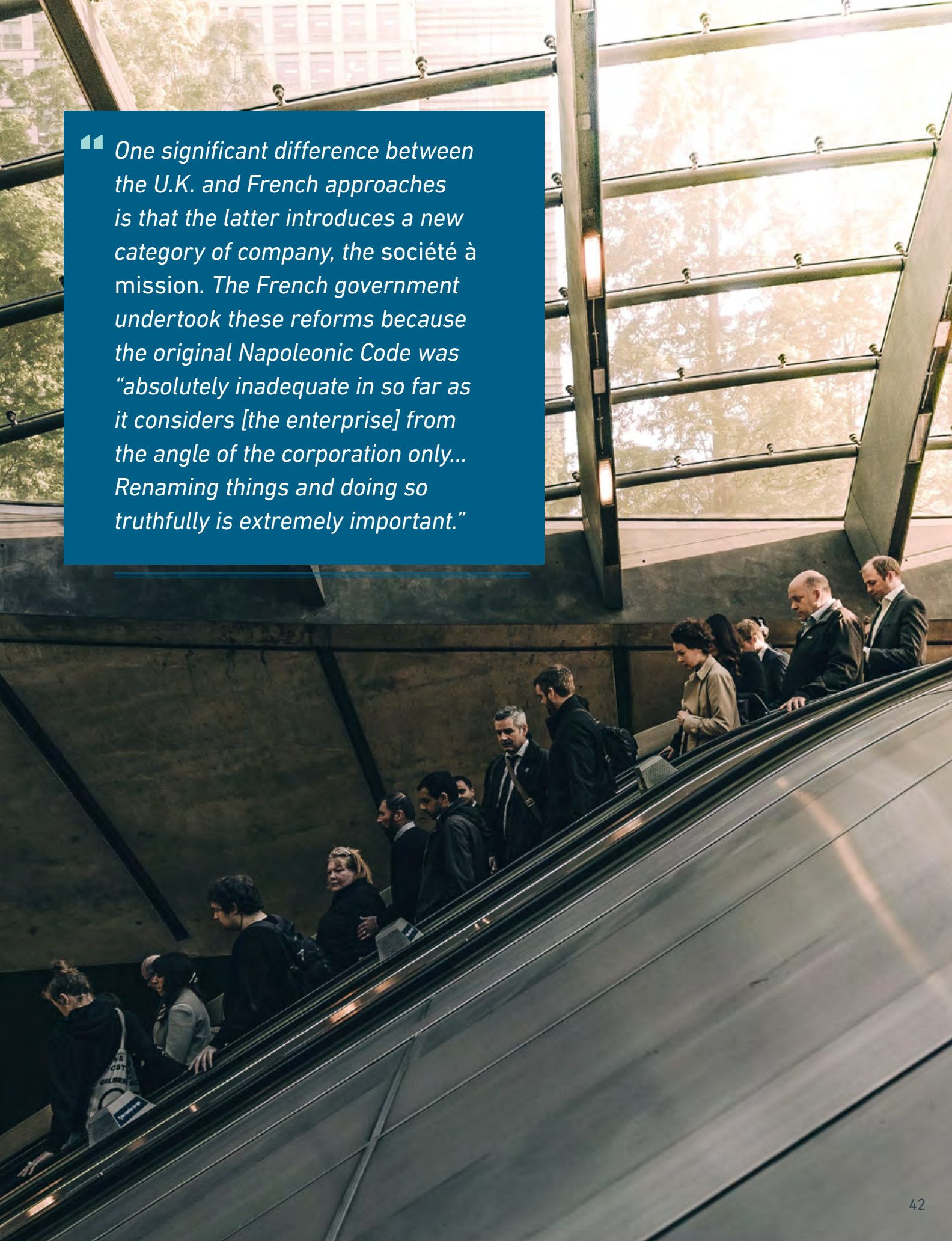
Article L225-35 (first paragraph)

The Board of Directors determines the orientations of the company's activity and ensures their implementation, in accordance with its corporate interest, taking into consideration the social, environmental, cultural and sports issues related to its activity. It also takes into consideration, if necessary, the *raison d'être* of the company as defined in application of article 1835 of the Civil Code. Subject to the powers expressly attributed to the shareholders' meetings and within the limits of the object of the company, it deals with any issue concerning the proper operation of the company and settles, through its deliberations, the matters that concern it.

Article L225-64 (first paragraph)

The Board of Directors is vested with the broadest powers to act in all circumstances on behalf of the company. It exercises these powers within the limits of the object of the company and subject to those powers expressly assigned by law to the Supervisory Board and to the shareholders' meetings. It determines the orientations of the company's business and ensures their implementation, in accordance with its corporate interest, taking into consideration the social, environmental, cultural and sports issues related to its activity. It also takes into consideration, if necessary, the *raison d'être* of the company as defined in accordance with Article 1835 of the Civil Code.

These innovative amendments create interesting options for French corporations and introduce new pathways for them in undertaking social and environmental purposes. However, they do not go so far as to create a general framework requiring corporations to adopt statements of purpose.



“ One significant difference between the U.K. and French approaches is that the latter introduces a new category of company, the *société à mission*. The French government undertook these reforms because the original Napoleonic Code was “absolutely inadequate in so far as it considers [the enterprise] from the angle of the corporation only... Renaming things and doing so truthfully is extremely important.”

6. Lessons For Canada: Recommendations

The foregoing discussion gives rise to the following recommendations.

Recommendation 1: A new mandatory statement of purpose by the board

While objects and corporate purpose are distinguishable, the requirement in paragraph 6(1)(f) of the *CBCA* that Canadian companies specify any restrictions on objects in their incorporation documents is already a modest legal point of entry into the articulation of corporate purpose. Inspired by the U.K. and French developments, and with a view to placing Canada at the forefront of bringing corporate purpose into the mainstream of business practice, we recommend that boards of *CBCA* companies be required to formulate a public statement of purpose, subject to an exemption for small- or perhaps even medium-sized companies. Such a general exemption would remove the burden from companies to apply for an exemption from the Director General of Corporations Canada as is currently the case pursuant to s. 156 of the *CBCA* (for the filing of financial statements). The requirement could take the form of an amendment to Part XIV, which would be entitled “Disclosure” (rather than “Financial Disclosure”), and could include a new section 155A:

The directors of a corporation shall place before the shareholders at every annual meeting a statement of purpose setting out the reason for existence guiding its business conduct.

Our recommendation is patterned on the U.K. *Companies Act 2006* regime governing the preparation of section 172 statements (the annual statements as to how directors have had regard to social, environmental and

other considerations in exercising their duty to promote the success of the company). The statement of purpose would be issued together with the annual financial statements required by s. 155 of the *CBCA*.

We would emphasize that greater rigour to sustainability reporting along the lines proposed by the Independent Review Committee on Standard Setting in Canada would in our judgment be entirely complementary to a mandatory statement of purpose.⁹⁹ Sustainability reporting should fulfil the important function of allowing markets and stakeholders to track ESG performance. Statements of purpose should allow the corporation and those who engage with it to chart a course toward continuous improvement in both ESG performance and the achievement of its identified purpose and to be held accountable for such improvement.

BOX 6: SMALL AND MEDIUM BUSINESS EXEMPTION

Small business exemption s.382 U.K. *Companies Act 2006*

The qualifying conditions are met by a company in a year in which it satisfies two or more of the following requirements:

- | | |
|------------------------|-----------------------------|
| 1. Turnover | Not more than £10.2 million |
| 2. Balance sheet total | Not more than £5.1million |
| 3. Number of employees | Not more than 50 |

Medium business exemption s.465 U.K. *Companies Act 2006*

The qualifying conditions are met by a company in a year in which it satisfies two or more of the following requirements:

- | | |
|------------------------|---------------------------|
| 1. Turnover | Not more than £36 million |
| 2. Balance sheet total | Not more than £18 million |
| 3. Number of employees | Not more than 250 |

We had considered whether section 6 of the *CBCA* might be amended to require all companies to articulate a purpose at the point of incorporation. In particular, we considered whether paragraph 6(1)(f) should become a new (g) and a new (f) inserted to read as follows:

6(1) Articles of incorporation shall follow the form that the Director fixes and shall set out, in respect of the proposed corporation,

...

(f) **a statement of purpose setting out the reason for existence guiding its business conduct; and**

(g) any restrictions on the businesses that the corporation may carry on.

Similar recommendations by the Business Purpose Commission for Scotland¹⁰⁰ that the law be amended to require companies to state their purpose in their articles of association suggest that this may ultimately be a direction in which the law should evolve, and one that is already open for companies to adopt themselves. However, we are mindful that mandatory inclusion of a statement of purpose in the articles of incorporation would represent a significant departure from current practice. Furthermore, its implementation might encounter procedural inflexibility since paragraph 173(1)(c) of the *CBCA* requires a special resolution to “add, change or remove any restriction on the business or businesses that the corporation may carry on.”¹⁰¹ Even if the statement of purpose were exempted from the special resolution requirement, the need to amend the articles every time there is a perceived need to review corporate purpose could become a disincentive for companies to ratchet up gradually the ambition of their purpose statement. Statements of purpose might become overly lawyered boilerplate. It is important to maintain the company’s responsiveness to market and public perception of its existing statement of purpose.

We should signal a final consideration. It is conceivable that for some corporations, the requirement to state a purpose could produce a perverse effect. They might choose to lock in purposes that are antithetical to “the purpose of purpose” especially if they are already operating in sectors characterized by negative social or environmental impacts. While there are no guarantees that market and public pressures will continue to push toward businesses playing a stronger role in society and improving their ESG performance, we suggest that it is reasonable to assume that in Canada, such pressures will tend to counteract possible perverse effects.

Thus, whereas there may be a market for poor ESG performers, we are prepared to assume that with adequate transparency, public scrutiny and legal accountability, good performance will drive out bad.

Recommendation 2: A “comply or explain” approach to stating a social purpose

Although we do not recommend that all corporations state a purpose that benefits wider society and/or the environment, we do recommend that corporations be nudged in that direction by the addition of a stipulation with respect to the board statement of purpose along these lines:

If the statement of purpose makes no reference to considerations in subsection 122(1.1) other than (1.1)(a)(i), the corporation shall issue a public explanation.

This provision would take a “comply or explain” approach to any statement of purpose that does not go beyond pursuing the interests of shareholders (identified in subparagraph 122(1.1)(a)(i)). For example, small businesses could explain that they have not yet achieved the sufficient size to allow them to undertake a broader purpose. However, even some small businesses can pursue a social purpose and thus all corporations could in principle be subject to a “comply or explain” approach. Once again, small- or medium-sized companies could also be exempted from this requirement.

Recommendation 3: An amendment to the fiduciary duty of directors and officers

The codification of the directors’ and officers’ duties to act with a view to the “best interests of the corporation” ought to be aligned with the corporation’s purpose. Although section 122 was only recently amended in response to the Supreme Court’s decision in *BCE*, it is nevertheless recommended that this provision be further amended to read:

Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) pursue the purpose of the corporation honestly and in good faith with a view to its best interests.

In the *BCE* decision, the court alluded to the notion of a “good corporate citizen,” but it did not expound upon the parameters of corporate citizenship. This amendment, read together with subsection (1.1) defining the best interests of the corporation, would clarify what good corporate citizenship means legally. The best interests of the corporation are defined in subsection 122(1.1), which recommendation 4 would expand. The effect of this recommendation would be to extend liability for breach of fiduciary duty to directors and officers who fail to pursue the purpose of the corporation honestly and in good faith. It would in some cases open up access to court-ordered investigation of the corporation under section 229 of the *CBCA*, in pursuit of the oppression remedy under section 241, and in extreme cases could even lead to the dissolution of the corporation under section 214. Indeed, we would support expanded use of the oppression remedy to recognize environmental and other non-governmental organizations as “proper persons” for the purposes of subsection 238(d).¹⁰²

Recommendation 4: An expanded definition of the best interests of the corporation

Subsection 122(1.1) provides that directors may—but need not—consider the interests of identified stakeholders, the environment and the long-term interests of the corporation. By contrast, the proposed U.K. Better Business Act would require that directors “*must* have due regard” to a significant range of ESG factors. Although this is a direction for Canadian law that we would favour, we acknowledge that in the most recent 2019 reform of the *CBCA*, which amended s. 122, this was a path not taken. However, if according to our proposals corporations are required to state a purpose, if the fiduciary duty must be exercised with a view to that purpose, and if a “comply or explain” approach is taken to statements of purpose that do not go beyond the maximization of shareholder value,

a permissive rather than compulsory approach can still be taken to the subsection 122(1.1) factors.

A more modest “housekeeping” amendment to s. 122 would involve expanding the list of ESG factors that directors and officers can take into account. That list should not lag behind global best practices—for example, section 172 of the U.K. *Companies Act 2006*—and thus we recommend that subsection 122(1.1) be amended to include factors parallel to those listed in paragraphs 172(1)(d), (e) and (f) of the U.K. *Companies Act 2006* as follows:

- (d) impacts on the community,
- (e) high standards of business conduct and
- (f) fairness as between stakeholders of the corporation.

While this list is not exhaustive, the proposed amendment to subsection 122(1.1) would also provide a useful menu from which companies could draw inspiration when framing their purpose.¹⁰³



Recommendation 5: An annual section 122 statement

The U.K. *Companies Act 2006* includes the requirement that directors prepare an annual strategic report, including a statement concerning how they have performed in relation to their fiduciary duties. The proposed U.K. Better Business Act would extend this reporting requirement to include a statement of how the directors have advanced the purpose of the company. The Business Purpose Commission for Scotland has also proposed that reporting requirements be amended “to ensure that larger businesses include information on non-financial measures such as impacts on and investment in workforces, society and the environment.”¹⁰⁴ Drawing on these proposals, we recommend that the *CBCA* be amended to require an annual statement by the board explaining how the directors and officers have advanced the purpose of the company and have had regard to the matters set out in subsection 122(1.1). The requirement might not apply to small- or medium-sized companies, and once again a regime parallel to that of the *U.K. Companies Act 2006* could be established to carve out such an exemption. This annual statement could be made in conjunction with a sustainability report.



Conclusion

We reiterate that the directive principle behind this paper is to orient companies toward having a social purpose taking account of their role in the wider community and the environment. However, if they are to apply to all companies incorporated under the *CBCA*, we conclude the transition to social purpose should be incremental and allow stakeholders to engage with companies to ensure that statements of purpose are truly meaningful and become a benchmark for corporate accountability. Based on the experience of the U.K. Corporate Governance Code, under public scrutiny generic statements of purpose could evolve relatively rapidly into more ambitious statements of social purpose at least among Canada's largest and most influential *CBCA* corporations.

The recommendations outlined in this paper would allow Canada to become a leader in making its companies purpose-driven and would bolster the global reputation of Canadian companies as reliable and ethical partners. We acknowledge that there is some regulatory fatigue in Canada's corporate sector at a time when sustainability reporting is also being subjected to overhaul.¹⁰⁵ Bringing statements of purpose into the mainstream of Canadian corporate practice will likely take time, and we hope that this paper will contribute to accelerating that process. The environmental and social challenges prompting the movement for purpose-driven business will only get more acute.

Inspired by the recommendations of the British Academy, we hope that future research will consider further changes to reporting requirements as well as changes to the powers of regulators, to shareholder responsibility and governance arrangements, to practices around the measurement and evaluation of corporate performance and to the role

of institutional investors. Those are elements of a broader governance framework needed to ensure that purpose-driven companies become solidly anchored in the Canadian economy.

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Endnotes

1 Michelynn Lafleche and Coro Strandberg, “The Social Purpose Transition Pathway: Helping Companies Move from ‘Say’ to ‘Do’”, online: corporateknights.com/wp-content/uploads/2022/03/The-Social-Purpose-Transition-Pathway-March-2022-Full-Report.pdf; Coro Strandberg, “Purpose Governance: The Role of the Board in Developing and Overseeing the Purpose of the Organization”, online: <https://corostrandberg.com/wp-content/uploads/2021/10/purpose-governance-august-2021.pdf>

2 Of course, companies are also incorporated under provincial statutes. For a discussion of social responsibility in the governance of companies incorporated under Quebec *Business Corporations Act*, see: Marc Barbeau, “De l’intégration de la responsabilité sociale dans la gouvernance des sociétés par actions du Québec” in Stéphane Rousseau, *10e anniversaire de la loi sur les sociétés par actions du Québec : rétrospective, perspective et prospective* (Wilson & Lafleur, Martel Ltée: Montreal, 2021) 171.

3 See Industry Canada, Consultation on the Canada Business Corporations Act (2014). https://ised-isde.canada.ca/site/corporate-insolvency-competition-law-policy/sites/default/files/attachments/CBCA_Consultation.pdf. p.4.

4 *Ibid.*

5 See, for example, Nina Totenberg, “When Did Companies Become People? Excavating the Legal Evolution,” NPR July 18, 2014. <https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution>.

6 On the various theoretical perspectives on the nature of the corporation, see Phillips, M.J. (1994) 'Reappraising the Real Entity Theory of the Corporation', *Florida State University Law Review*, 21(4), p. 1061. Generally, collective entities under the law are not limited to incorporated bodies and when people come together to form an organization, it is implicit that they have done so in pursuit of a common purpose. For example, the interpretation section of the *Criminal Code* defines an organization as "an association of persons that is created for a common purpose." While explaining the distinction between a company and the people that constitute it, A.V. Dicey famously stated that "when a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose they create a body which by no fiction of law but by the very nature of things, differs from the individuals of whom it is composed." Cited in Phillips, MJ, 'Reappraising the Real Entity Theory of the Corporation'.

7 See for example Christopher Michaelson, Douglas A. Lepisto, and Michael G. Pratt, "Why corporate purpose statements often miss their mark," *Strategy and Business* August 17, 2020. <https://www.strategy-business.com/article/Why-corporate-purpose-statements-often-miss-their-mark> and Arne Gast et al., "Purpose: Shifting from why to how" *McKinsey Quarterly* April 22, 2020. <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/purpose-shifting-from-why-to-how>.

8 On the view that shareholder primacy is a social norm, see Beate Sjøfjell and Mark B. Taylor, "A Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose" (2019) 13: 3 *International and Comparative Law Journal* 40-66.

9 See Jill Fisch and Stephen Solomon, "Should Corporations have a Purpose," (2021) 99 *Texas Law Review* 1309, where the authors argue that articulating corporate purpose around stakeholder value is unlikely to have any legal effect. Nonetheless, they conclude that having a corporate purpose could have a valuable signalling effect for its constituents and favour the default purpose of maximizing the economic value of the firm.

10 See Charles-Étienne Borduas, "Stakeholders' primacy: paradigm shift confirmed," 2019. <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/a979357b/stakeholders-primacy-paradigm-shift-confirmed>.

11 See Lynn Stout, “Why Do Corporations Need a Single Purpose?” Harvard Business Review May 29, 2012. <https://hbr.org/2012/05/why-do-corporations-need-a-sin> [arguing that the “dogma of ‘maximize shareholder value’” is defunct and that corporation can and should engage in “‘satisficing’ different goals rather than maximizing one.”].

12 However, in many jurisdictions, like Canada, where the legal force of shareholder primacy model has been displaced or diluted, its legacy arguably has been preserved in practice. Boards and corporate officers can still give shareholder interests exclusive attention and without running afoul of s. 122 of the *CBCA*.

13 See Richard Janda, Philip Duguay and Richard Lahun, “The Rise of the Benefit Corporation: Is This a Future for the Firm?,” in Pierre-Émanuel Moyse (ed.) *Quelle performance? De l’efficacité sociale à l’entreprise citoyenne* (Montréal: Thémis 2013). 95-146. Benefit corporations do have statements of public purpose in their articles of incorporation. For example, to become a certified B Corp under the auspices of B Lab, a not-for-profit that has promoted benefit corporation legislation, Canadian firms are required to adopt the following language in their articles of incorporation: “The purpose of the Company shall include, but is not in any way limited to or restricted by, the creation of a positive impact on society and the environment, taken as a whole, from the business and operations of the Company, which impact is material in view of the size and nature of the Company’s business.” See https://bcorporation.net/certification/legal-requirements?field_lr_country_tid_selective=12&field_lr_corporate_structure_tid_selective=13&field_lr_state_tid_selective=14&field_lr_publicly_traded_owned_value_selective=0.

14 In 2020, British Columbia became the first jurisdiction in Canada to create a dedicated legislative framework for the incorporation of “benefit companies” by adding a new Part 2.3 to its *Business Corporations Act*, [SBC 2002] c. 57. There is a private member’s bill that has been proposed by Quebec’s former finance minister, Carlos Leitão, to amend the Quebec *Companies Act* and to introduce a “entreprise mission” or benefit corporation: <http://www.assnat.qc.ca/fr/travaux-parlementaires/projets-loi/projet-loi-797-42-1.html?appellant=MC>. Nova Scotia has adopted the *Community Interest Companies Act*, S.N.S (2012) c. 38, which has certain parallels.

15 Quoted in Jason Saul, “Corporations are more powerful than governments,” Skoll Foundation Archives February 21, 2011. <https://archive.skoll.org/2011/02/21/corporations-are-more-powerful-than-governments/>

16 Dayana Jiminez, Isabel Franco and Tahila Smith, “A Review of Corporate Purpose: An Approach to Actioning the Sustainable Development Goals (SDGs),” (2021) 13(7) Sustainability 3899 p.18.

17 International Organization for Standardization, Governance of Organizations – Guidance ISO 37000, p. 4.

18 British Academy, “The Principles of Purposeful Business” (2019). <https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf>. The British Academy also noted: “A corporate purpose is the expression of the means by which a business can contribute solutions to societal and environmental problems. Corporate purpose should create value for both shareholders and stakeholders. A properly formulated purpose statement is neither purely descriptive about what a company does nor aspirational in saving the planet or society. Instead, it identifies how companies assist people, organisations, societies and nations to address the challenges they face, while at the same time helping companies to avoid or minimise the problems they might cause.”

19 United Way Social Purpose Institute, “What is a Social Purpose Business” <https://socialpurpose.ca/wp-content/uploads/sites/6/2021/03/sp-business-definition-united-way.pdf>.

20 *Ibid.*

21 Graham Kenny, “Your Company’s Purpose Is Not Its Vision, Mission, or Values,” Harvard Business Review (2014), online: <https://hbr.org/2014/09/your-companys-purpose-is-not-its-vision-mission-or-values>; see also Anjan Thakor and Robert Quinn, “Higher Purpose, Incentives and Economic Performance” (2020). <https://deliverypdf.ssrn.com/delivery.php?ID=8330040240290811070980641151141150301020560890140950610750980811707509311108400902802809702302902612703312407802600901611802404204203306502302507109808902009406607403707600503000709401409512102407402608600100211074126025099024015005098122076001081110&EXT=pdf&INDEX=TRUE> p. 9. It should be acknowledged that purpose statements and mission statements are often conflated.

22 A company may issue a public purpose statement that is inconsistent with its internal activities and operations.

23 Jennifer A. Quaid, “Balancing Risk and Reward in the Time of COVID-19: Bridging the Gap Between Public Interest and the ‘Best Interest of the Corporation’,” in Colleen M. Flood, Vanessa MacDonnell, Jane Philpott, Sophie Thériault and Sridhar Venkatapuram (eds.), *The Law, Policy & Ethics of COVID-19* (Ottawa, Canada: University of Ottawa Press. pp. 233-245 at 245:

“It is no longer enough to implore corporate managers to do the right thing when it suits them. The time has come for private economic interests to be subject to the obligation to be proactive about managing risk where some, or even most, of the impacts will be felt outside the corporation...[t]his is about the future of responsible corporate citizenship.”

24 *Ibid.* at 14. See World Business Council for Sustainable Development, “Business and the SDGs: A survey of WBCSD members and Global Network partners” (2019). https://docs.wbcsd.org/2018/07/WBCSD_Business_and_the_SDGs.pdf.

25 *Ibid.* at.17.

26 British Academy, “Policy & Practice for Purposeful Business” (2021). <https://www.thebritishacademy.ac.uk/publications/policy-and-practice-for-purposeful-business/>.

27 We reproduce these statements to show how companies have articulated their purpose, not as an endorsement of the statements or the conduct of the companies in fulfilling them.

28 Project Gutenberg, Charter and Supplemental Charter of the Hudson’s Bay Company. <https://www.gutenberg.org/ebooks/6580>.

29 For discussions of the history of corporations at the service of imperial purposes, see Erika George, “Incorporating Rights: Empire, Global Enterprise, and Global Justice,” (2014) 10 *University of St. Thomas Law Journal* 917; Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886–1981* (Oxford: Oxford University Press, 2020).

30 Anne Lefebvre-Teillard, *La société anonyme au XIXe siècle : du code de commerce à la loi de 1867* (Paris : Presses universitaires de France, 1985), pp. 420; Charles Freedeman, *Joint Stock Enterprise in France, 1807-1867 : From Privileged Company to Modern Corporation* (Chapel Hill: University of North Carolina Press, 1979).

31 See David Perrott, "Changes in Attitude to Limited Liability—the European Experience," in Tony Ornhial (ed.), *Limited Liability and the Corporation* (London: Routledge, 1982) 81 at 96ff.

32 Charlie Cray and Lee Drutman, "Corporations and Public Purpose: Restoring the Balance," (2005) 4(1) *Seattle Journal for Social Justice* 305 at 311.
<https://digitalcommons.law.seattleu.edu/sjsj/vol4/iss1/41>.

33 Morton Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," (1986) 88 W. Va. L. Rev. (1986) 1-52 at 16, citing 1 W. Cook, *Treatise on the Law of Corporations having a Capital Stock*, vii-viii (4th ed. 1898).
<https://researchrepository.wvu.edu/wvlr/vol88/iss2/5>.

34 Milton Friedman, "A Friedman doctrine—The Social Responsibility of Business is to Increase its Profits," *New York Times*, September 13, 1970.
<https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

35 An Act respecting the Makivik Corporation, R.S.Q c. S-18.1, section 5.
<http://www.legisquebec.gouv.qc.ca/en/document/cs/S-18.1>. See also Richard Janda, "Why Does Form Matter? The Hybrid Governance Structure of Makivik Corporation," (2006) 30:3 *Vermont Law Review* 785–822.

36 While acknowledging that contemporary corporate law cannot fulfil a promise of universal applicability, our discussion does not directly consider the prospects for and merits of new kinds of corporations or address corporate purpose within indigenous and other non-Eurocentric contexts. Rather, we restrict ourselves to the discussion of general corporate law statutes.

37 Business Roundtable, *One Year Later: Purpose of a Corporation: How CEOs Put Principles into Practice*, online: <https://purpose.businessroundtable.org/#:~:text=In%20its%20place%2C%20the%20CEOs,communities%20in%20which%20they%20operate>.

- 38** Business Roundtable, "Statement on the Purpose of a Corporation," Business Roundtable. 19 August 2019.
<https://opportunity.businessroundtable.org/ourcommitment/>.
- 39** Thomas W. Malnight, Ivy Buche, and Charles Dhanaraj, "Put Purpose at the Core of Your Strategy," (2019) 97(5) Harvard Business Review 70.
- 40** Accenture Strategy, "To Affinity and Beyond: From Me to We, the Rise of the Purpose-Led Brand," Accenture, https://www.accenture.com/_acnmedia/Thought-Leadership-Assets/PDF/Accenture-CompetitiveAgility-GCPR-POV.pdf. Similar findings were made in a study conducted for the Social Purpose Institute at United Way, "Social Purpose Business Case and Workbook," February 2021.
<https://socialpurpose.ca/wp-content/uploads/sites/6/2021/08/sp-business-case-toolkit-united-way.pdf>.
- 41** Suzanne Kapner, Dante Chinni, "Are Your Jeans Red or Blue? Shopping America's Partisan Divide", 19 August 2019 *New York Times*.
<https://www.wsj.com/articles/are-your-jeans-red-or-blue-shopping-americas-partisan-divide-11574185777>.
- 42** Porter Novelli and Cone, "How to Build Deeper Bonds, Amplify Your Message and Expand Your Consumer Base," 2018 Cone/Porter Novelli Purpose Study.
<https://www.conecomm.com/research-blog/2018-purpose-study>.
- 43** Edelman Insights, "Earned Brand 2017," *Edelman* 18 January 2017.
<https://www.edelman.com/research/earned-brand-2017>.
- 44** Fuse Marketing, "Your Future Consumers Views on Social Activism and Cause Marketing and How it Differs from What Millenials Think," Fuse. October 2015. <https://www.fusemarketing.com/thought-leadership/future-consumers-views-cause-marketing-social-activism/>.
- 45** Sustainable Brand, "Enabling the Good Life Report," (2017).
<https://insights.sustainablebrands.com/full-report/>.
- 46** Thomas W. Walnight, Ivy Buche and Charles Dhanaraj, "Put Purpose at the Core of Your Strategy," September-October 2019 Harvard Business Review.
<https://hbr.org/2019/09/put-purpose-at-the-core-of-your-strategy>.
- 47** Kantar, "Purpose 2020: Igniting Purpose-Led Growth," (2020) Kantar.
<https://kantar.no/globalassets/ekspertiseomrader/merkevarebygging/purpose-2020/p2020-frokostseminar-250418.pdf>.

48 Edelman, “The Belief-Driven Employee,” (2021) Edelman Trust Barometer. <https://www.edelman.com/sites/g/files/aatuss191/files/2021-09/2021%20Edelman%20Trust%20Barometer%20Special%20Report%20The%20Belief-Driven%20Employee%20Global%20Report%20Full%20ow%20Talk%20Track.pdf>.

49 Harvard, “The Business Case for Purpose,” *Harvard Business Review Analytic Services Report*, 2015. [https://www.ey.com/Publication/vwLUAssets/ey-the-business-case-for-purpose/\\$FILE/ey-the-business-case-for-purpose.pdf](https://www.ey.com/Publication/vwLUAssets/ey-the-business-case-for-purpose/$FILE/ey-the-business-case-for-purpose.pdf). However, reputational damage cannot be the sole source of accountability because customers face transaction costs in verifying claims that corporations are fulfilling social and environmental purposes.

50 Section 17 also specifies that “No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed by the Director or is available for inspection at an office of the corporation.”

51 (1883), 23 Ch. D. 654 at 673: “The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.”

52 *Dodge v Ford Motor Co.* 204 Mich. 459, 170 N.W. 668 (Mich. 1919) at para 507.

53 *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div.), at para. 41.

54 *Revlon v. MacAndrews and Forbes Holdings* 506 A. 2d 173 (Del. S.C. 1985). *Ventas Inc v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 OR (3d) 354 at para 34 (CA) [Ventas].

55 *Ibid.* Ventas at para 53.

56 *Teck Corp. Ltd v. Millar* (1972), [1973] 2 W.W.R. 385 at para 104 (B.C. S.C.).

57 *Peoples Department Stores Inc. (Trustee of) v. Wise* 2004 SCC 68 at para. 47.

58 *BCE v 1976 Debentureholders* [2008] SCR 560 [BCE].

59 *Ibid.* at para 38

60 *Ibid.* at para 64.

61 *Ibid.* at para 37: “The fiduciary duty of the directors to the corporation originated in common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors’ duty is clear—it is to the corporation.”

62 *Ibid.* at para. 102.

63 *Bill C-97, An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 1st Sess, 42nd Parl, 2019, cl 141 (1.1) (a) (b) (c) (as adopted by the House of Commons on June 21, 2019). [Bill C-97].

64 Anita Anand, “A New Director to Director’s Duties: Bill C-97,” (2019) 3 *Canadian Bar Association Business Law Quarterly*, online: <https://www.cbabc.org/Sections-and-Community/Business-Law/Business-Law-Quarterly/Business-Law-Quarterly-Archives/Q3-2019-Federal-Budget/A-New-Dimension-To-Directors%e2%80%99-Duties-Bill-C-97>. Anand notes: “While Bill C-97 codifies... judicial precedent, directors already had the option to consider concerns other than shareholders’ interests under *BCE*. It is important to note Bill C-97 is potentially broader than the *BCE* case. For example, Bill C-97 specifically enumerates retirees and pensioners stakeholder groups not mentioned in the *BCE* case. Furthermore, the proposed list in Bill C-97 is non-exhaustive and directors can therefore consider stakeholders that are not enumerated in the legislation.”

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66 Chat Ortvéd, “Corporate Duties, Indeterminacy and the 2019 Federal Budget,” April 26, 2019, *Business Law Blog*. <https://www.lawsonlundell.com/the-business-law-blog/corporate-duties-indeterminacy-and-the-2019-federal-budget>.

67 See “Now is the Time for Purpose: Putting Purpose at the Heart of Scottish Business” Report by the Business Purpose Commission for Scotland. <https://www.scdi.org.uk/policy/commission-calls-for-purpose-led-recovery-and-growth/>.

68 See Robert Goodyear Murray, “Money Talks, Constituents Walk: Pennsylvania’s Corporate Constituency Statute Can Maximize Shareholders’ Wealth” (2000) 48:2 Buff L Rev 629.

69 British Academy, “Survey Highlights Appetite for New Definition of Corporate Purpose Among UK Business.” <https://www.thebritishacademy.ac.uk/news/survey-highlights-appetite-new-definition-corporate-purpose-among-uk-businesses/#:~:text=Survey%20highlights%20appetite%20for%20new%20definition%20of%20corporate%20purpose%20among%20UK%20businesses,-15%20Oct%202020&text=Of%20those%20surveyed%2C%2044%25%20agreed,from%20creating%20problems%20for%20either%E2%80%9D>.

70 Financial Times, “Ed Miliband calls for ‘purpose-driven’ Covid recovery,” February 2, 2021. <https://www.freshbusinessthinking.com/purpose/ed-miliband-calls-for-purpose-driven-covid-recovery/47829.article>.

71 Kershaw, D. and Schuster, E. “The Purposive Transformation of Company Law” (2021) ECGI Working Paper Series in Law, (Paper No 616/2021), p. 10.

72 See Business on Purpose, “Why we need a Better Business Act,” online: <https://businessonpurpose.uk/bop-blog/why-we-need-the-better-business-act>.

73 The Better Business Act, online: <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf>.

74 *Ibid.*

75 Corporate Citizenship, List of Premium Equity Commercial Companies 29th April 2020. <https://corporate-citizenship.com/wp-content/uploads/Premium-Listed-Companies.pdf>.

76 Financial Reporting Council, “The UK Corporate Governance Code” July 2018, online: <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf>. [the Code].

77 See, Evolution of the UK Corporate Governance Code, <https://www.icaew.com/technical/corporate-governance/codes-and-reports/uk-corporate-governance-code/history>.

78 Memorandum of Understanding between the FRC and the Department for Business, Innovation and Skills.” <https://www.frc.org.uk/about-the-frc/procedures-and-policies/memorandum-of-understanding/memorandum-of-understanding-between-the-frc-and-th>.

79 For instance, it exercises the functions of the “competent authority” under the Statutory Audit and Third Country Audit Regulations, 2016; it carries out the functions of the Secretary of State for the Department of Business, Energy and Industrial Strategy under Part 42 of the Act; it exercises the function of an “independent supervisor” appointed under Chapter 3 of Part 42 of the Act; it is the prescribed standard issuing body for the purposes of section 464 of the Act; and the Secretary of State has delegated to the FRC the exercise of independent oversight over the regulation of the auditing profession by the recognized supervisory and qualifying bodies. The FRC also provides a report of its oversight responsibilities to Parliament pursuant to the Act, and the Secretary of State appoints the Chair and Deputy Chair of the FRC Ltd.

80 Introduction to the Code.

81 Principle A of the Code.

82 Principles A-E, the Code.

83 Provision 40 of the Code.

84 Financial Reporting Council, Review of Corporate Governance Reporting, November 2020. <https://www.frc.org.uk/getattachment/c22f7296-0839-420e-ae03-bdce3e157702/Governance-Report-2020-2611.pdf>. [The Review] p. 8.

85 Financial Conduct Authority, Listing Rules (LR 9.8 Annual Financial Report). <https://www.handbook.fca.org.uk/handbook/LR/9/8.html>.

86 The Review, *ibid* at 8.

87 The Review, *ibid* at 6.

88 The Review, *ibid* at 7.

89 Bruno Le Maire, Minister for Economy and Finance, quoted in Blanche Segrestin, Armand Hatchuel and Kevin Levillan, “When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose,” (2021) 171:1-13 *Journal of Business Ethics* 1.

90 Although Quebec does not have a Commercial Code, Title Five of Book One of the *Civil Code of Québec*, on Legal Persons, should be read in conjunction with Quebec *Business Associations Act* S.Q. S-31.1.

91 Nicole Notat and Jean-Dominique Senard were commissioned with the following terms of reference, among others: “Our idea is to open up the field of possibilities and consider all levers allowing any stakeholders that so desire to give an enterprise a wider corporate purpose [objet social]. In short, this means giving an enterprise a purpose that is not exclusively guided by short-term considerations, thus promoting a vision of capitalism that is more respectful of the general interest and that of future generations. Translated by Segrestin *et al* at 7.

92 N. Notat and J.-D. Senard, Rapport aux Ministres de la Transition écologique et solidaire, de la Justice, de l’Economie et des Finances, du Travail, L’entreprise, objet d’intérêt collectif, 9 mars 2018.

<https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000133.pdf>.

93 *Plan d’action pour la croissance et la transformation des entreprises* [Action Plan for Business Growth and Transformation]. A corporation now has an obligation to consider the social and environmental dimensions of its business; second, companies can articulate their *raison d’être*; and finally, France now has a new form of corporation, the *société à mission*, for companies with the defined mission of pursuing social or environmental goals.

94 La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité.

95 HHR, “Consequences of France’s New PACTE Law (Action Plan for Business Growth and Transformation) on Corporate Governance.”

<https://www.hugheshubbard.com/news/consequences-of-the-french-pacte-action-plan-for-growth-and-transformation-of-companies-on-the-corporate-governance-management-of-companies-based-on-their-interests-and-potentially-their-raison-detre-1>.

96 Les statuts doivent être établis par écrit. Ils déterminent, outre les apports de chaque associé, la forme, l'objet, l'appellation, le siège social, le capital social, la durée de la société et les modalités de son fonctionnement. Les statuts peuvent préciser une raison d'être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité.

97 N. Notat and J.D. Senard, Rapport aux Ministres de la Transition écologique et solidaire, de la Justice, de l'Économie et des Finances, du Travail, L'entreprise, objet d'intérêt collectif, page 4.

98 Most recently on March 2, 2022, "cultural and sports" issues were added: Article L225-35 : « Les statuts doivent être établis par écrit. Ils déterminent, outre les apports de chaque associé, la forme, l'objet, l'appellation, le siège social, le capital social, la durée de la société et les modalités de son fonctionnement. Les statuts peuvent préciser une raison d'être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité. » Article L225-64 : « Le directoire est investi des pouvoirs les plus étendus pour agir en toute circonstance au nom de la société. Il les exerce dans la limite de l'objet social et sous réserve de ceux expressément attribués par la loi au conseil de surveillance et aux assemblées d'actionnaires. Il détermine les orientations de l'activité de la société et veille à leur mise en œuvre, conformément à son intérêt social, en considérant les enjeux sociaux, environnementaux, culturels et sportifs de son activité. Il prend également en considération, s'il y a lieu, la *raison d'être* de la société définie en application de l'article 1835 du code civil. »

99 Independent Review Committee on Standard Setting in Canada, *Consultation Paper*, December 8, 2021: online: <https://www.ircsscanada.ca/en/consultation-paper>. See also Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189>; Iris H-Y Chiu, "The EU Sustainable Finance Agenda: Developing Governance for Double Materiality in Sustainability Metrics" (2022) 23 Eur Bus Law Rev 87-123.

100 Report by the Business Purpose Commission for Scotland, *supra* note 67 at p. 77, 112.

101 A special resolution is one passed by a majority of not less than two-thirds of the votes cast by the shareholders who voted in respect of that resolution or signed by all the shareholders entitled to vote on that resolution.

102 See Ed Waitzer and Douglas Sarro, “In Search of Things Past and Future: Judicial Activism and Corporate Purpose,” (2018) 55(3) *Osgoode Hall L.J.* 791 at 822.

103 The 17 UN Sustainable Development Goals are of course another more ambitious source of inspiration for corporate purposes. UNDP, “What are the sustainable development goals.” https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=CjoKCQiA_c-OBhDFARIsAIFg3ew-tvzl_Lnbj-Ob4n755qBE3-q1XWCUJpksL8WYZis9LVPhU_33-00aAh34EALw_wcB.

104 Report by the Business Purpose Commission for Scotland, *supra* note 67 at 112.

105 See *supra* note 99.

About David Suzuki Foundation



The David Suzuki Foundation is a science-based non-profit environmental organization headquartered in Vancouver, British Columbia, Canada, with offices in Montreal and Toronto. DSF empowers people to take action in their communities on the environmental challenges we collectively face. Through evidence-based research, policy analysis, education and citizen empowerment, DSF conserves and protects the natural environment to create a sustainable Canada. Its mission is to protect nature's diversity and the well-being of all life, now and for the future. As part of its new well-being economies program, DSF is stewarding a transition to an ecologically sustainable and socially beneficial economic system in Canada at different scales, from local to national. It is working to influence and transform the core economic model, and its underlying values and beliefs from a framework in which people and nature are in service of economic growth to one in which the actual aspirations of people and the flourishing of nature are the core purpose of the economy. davidsuzuki.org