

## **B CORP CERTIFICATION IN CANADA: LEGAL REQUIREMENTS**

### ***Introduction***

Certified B Corps are businesses certified by the nonprofit B Lab that are committed to using profits as a means to a greater end: positive impact for their employees, communities, and the environment. Canada's B Corp community is the first of its kind outside of the United States and includes hundreds of companies from a diverse range of industry sectors.

To achieve certification, B Corps are legally required to amend their articles of incorporation to demonstrate that they will consider the short and long-term impact of their business decisions on their stakeholders. The corporation's articles are part of the "constitution" of the corporation. Articles are public documents that may set out how the corporation is governed and managed.

Below, B Lab sets out summary information regarding the legal requirements in Canada for B Corp certification and the context for those requirements.<sup>1</sup>

### ***How do B Corps Fit in the Canadian Model of the Corporation?***

The Canadian model of the corporation readily accommodates B Corp certification. However, as explained below, conducting a business within that model is not sufficient by itself to satisfy B Lab's certification criteria.

In the leading decision on Canadian corporations, *BCE*, the Supreme Court of Canada established that directors and officers of corporations have a duty to act in the "best interests of the corporation" and that this duty is not owed directly to any particular stakeholder. The details of the fiduciary duty are highly contextual; for example, the duty may include but it is not confined to maximizing the corporation's profit in the interests of its shareholders. Depending on the circumstances, directors and officers, acting in the best interest of a corporation, will consider the impact of corporate decisions on various stakeholders including but not limited to shareholders, employees, suppliers, creditors, consumers, governments, and the environment.

Section s.122(1.1) of the *CBCA*, recently added pursuant to Bill C-97, mirrors *BCE* and confirms that directors acting in the best interest of the corporation may consider the interests of various stakeholders including but not limited to shareholders, employees, retirees and pensioners, creditors, consumers, governments, the environment and the long-term interests of the corporation.

The Canadian model of the corporation is different from approaches taken in other jurisdictions that put shareholders and profit-maximization at the legal core of the corporation and its management by directors and officers. The Canadian approach, by comparison, is a stakeholder model.

*BCE* and the *CBCA* tell us that directors and officers will consider various stakeholder interests, including employees, the environment, and the community, but the way those interests are taken

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<sup>1</sup> This memorandum addresses requirements for business organized under federal, provincial and territorial business corporations legislation. The memorandum does not constitute legal advice, and if potential B Corps are considering certification from B Lab, including by amending its articles, they should obtain advice from the organization's lawyers.

into account is left to the business judgment of the directors and consideration may go no further than complying with legal rights and obligations. B Corp certification requires a greater commitment to stakeholder interests.

### ***B Corp Certification Legal Requirements***

To become a certified B Corp, a corporation must include specified provisions in its articles. Amending the articles will require approval by the corporation's shareholders. Corporations have one year after B Corp certification to complete this process.

To satisfy the certification criteria, the following language must be included in the articles:

1. 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.
2. The Directors shall, when deciding what is in the best interests of the corporation, consider the short-term and the long-term interests of the corporation and the interests of the corporation's shareholders, employees, suppliers, creditors and consumers, as well as the government, the environment, and the community and society in which the corporation operates (the "Stakeholders"), to inform their decisions.
3. In discharging his or her duties, and in determining what is in the best interests of the corporation, each director shall consider all of the Stakeholders (defined above) but shall not be required to regard the interests of any particular Stakeholder as determinative.
4. Nothing in this Article express or implied, is intended to create or shall create or grant any right in or for any person other than a shareholder or any cause of action by or for any person other than a shareholder.
5. Notwithstanding the foregoing, any Director is entitled to rely upon the definition of "best interests" as set forth above in enforcing his or her rights hereunder, and under federal/provincial law and such reliance shall not, absent another breach, be construed as a breach of a Director's fiduciary duty of care, even in the context of a change in control transaction where, as a result of weighing other Stakeholders' interests, a Director determines to accept an offer, between two competing offers, with a lower price per share.

The above language to be included in the articles reflects the idea that B Corps, when deciding what is in the best interest of the corporation, must consider the broad impact of their decisions on a wide spectrum of stakeholders including but not limited to shareholders, employees, suppliers, creditors and consumers, as well as the government, the environment, and the community and society in which the corporation operates. The articles for B Corps commit the corporation – and its directors and officers in respect of their decision-making – to “the creation of a positive impact on society and the environment, taken as a whole”.

The stakeholder-focused amendments to the articles of a B Corp can be enforced by the corporation's shareholders. The amendments signal to all the corporation's stakeholders that the business will be conducted in a manner that centers stakeholder interests and a positive impact

on society and the environment, and the amendments should also protect directors from criticism if they take actions that promote the interests of stakeholders at the expense of short-term profit.

***Are the Amendments to the Articles Redundant Given the Canadian Stakeholder Model of the Corporation?***

The required amendments are necessary and nonredundant despite the Canadian model of the corporation. Unlike the Canadian stakeholder model which suggests that directors acting in the best interest of the corporation may take into account the interests of stakeholders other than shareholders depending on the circumstances, the articles amendments required for B Corp certification impose a positive obligation to advance stakeholder interests.

***An Additional Issue for B Corps: Precaution Against Restricting the Scope of Permitted Business Activity***

Business corporations legislation gives directors the responsibility and power to manage the day-to-day affairs of the corporation, including by delegating some of that power to the Chief Executive Officer and other officers. However, directors and officers must manage the corporation within the range of the corporation's permitted business activities, which is set out in its articles. Directors and officers may face liability for acting outside the scope of the corporation's articles.

Amendments to the articles that would restrict a corporation's business activities are unnecessary for B Corp certification and should be avoided as it would put directors and officers at increased risk of liability. The list of amendments to the articles that B Lab requires for certification (as listed above) do not include restrictions on the type of business activity a corporation may engage in.