

Certified B Corps: An Examination of a Standard Based Approach to Stakeholder Governance

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Abstract

In 2015, B Corp certification was launched in the UK. Since then, over 1,200 companies have adopted certified B Corps status. Most certified B Corps in the UK are small and medium-sized, with SMEs accounting for 99.9% of businesses in the UK. The B Corp movement seeks to change the economic system from a shareholder capitalism to a stakeholder economy. Certified B Corps adopt a stakeholder-driven mode towards ‘high standards of social and environmental performance, accountability and transparency’. The article explores the growth of the B Corp movement; issues around its standards; certification process, including the legal requirement; transparency; and governance. It examines the effectiveness of this standard-based approach for stakeholder governance. It argues that the certified B Corp creates an avenue for stakeholder governance. However, to fully realise the shift towards stakeholder governance, there is a need for greater work towards achieving accountability for all key stakeholders identified as shareholders, workers, community, environment, and customers.

Keywords

B Corps, B Lab, Corporate purpose, Director’s Duties, Enlightened Shareholder Value, Environmental Social and Governance, Standards, Stakeholder Governance, Shareholder Primacy, Sustainability Reporting.

1. Introduction

For a long time in the UK, the purpose of the company was seen as maximising shareholder value, also known as shareholder primacy.¹ To include consideration of wider stakeholder interests, section 172 established the enlightened shareholder value requiring directors to serve the interests of shareholders while considering stakeholder interests, including employees, suppliers, customers, community and environment (section 172 factors).² The enlightened shareholder value will be referred to as the statutory-based approach.

* Assistant Professor in Commercial Law, Durham Law School, Durham University. The author is grateful to Professor Bruce Wardhaugh of the Durham Law School for useful discussions on the statutory and standard based approaches to stakeholder governance. The author is also grateful for comments and contributions received at the Future of Company Law Conference hosted by the Edinburgh Centre for Commercial Law and supported by the Society of Legal Scholars’ Company Law Section, and to the anonymous reviewer for their comments. All errors and omissions remain the sole responsibility of the author.

¹ Andrew Keay, *The Corporate Objective*, 40-43 (Cheltenham: Edward Elgar, 2011); Baete Sjaafjell, *How Company Law has Failed Human Rights – and What to Do About It*, 5(2) Business and Human Rights Journal 179, 182 (2020); Joan Loughrey, Andrew Keay, Luca Cerioni, *Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance*, 8 Journal of Corporate Law Studies 79, 83 (2008).

² Companies Act 2006 (UK) section 172(1):

The term stakeholder has been the subject of some controversy.³ One definition sees stakeholders as those who have commitments to a company because of their relationship with the company.⁴ Stakeholders typically include employees, suppliers, customers, and communities. But stakeholders could refer to anyone with a contractual relationship with the company that, at best, only partially reflects their total involvement.⁵ Stakeholders could also refer to interests of inanimate objects like the environment, which can affect or are affected by a company's decision.⁶ A company is in the best position to identify key stakeholders to which it can be accountable. For the purposes of this research, key non-shareholder stakeholders of interest are those identified by the B Corp, namely workers, communities, customers and the environment.⁷

Stakeholder governance seeks to ensure companies identify, engage and appreciate the perspective of key stakeholders for the benefit of all stakeholders.⁸ Stakeholder governance aims to serve the interests of wider stakeholders, not just shareholders, in corporate decision-making.⁹ The stakeholder governance model is aligned with the pluralist view, which demands a more fundamental change to existing company law and, in any case is rejected in the UK.¹⁰

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 fairly as between members of the company.

³ See Keay, n.1 above, 123-125; Robert Philips, Robert Edward Freeman and Andrew Wicks, *What Stakeholder Theory Is Not* 13(4) Business Ethics Quarterly 479, 470-480 (2003).

⁴ Colin Mayer, *Firm commitment*, 32 (Oxford: Oxford University Press 2012).

⁵ *Ibid.*

⁶ Keay, n.1 above 119; Robert Edward Freeman, *Strategic Management: a Stakeholder Approach* (Cambridge: Cambridge University Press 2015) 25, 52.

⁷ B Lab, *Standards Development and Governance: Driving continuous improvement for high quality social and environmental business standards*, available at <<https://www.bcorporation.net/en-us/standards/development-and-governance/#:~:text=Driving%20continuous%20improvement%20for%20high,inclusion%2C%20independence%2C%20and%20credibility.>> (accessed 18 July 2023).

⁸ Daud Khan and Thomas Volland, *Stakeholder governance: Stakeholder-driven approach to embedding ESG into decision making*, available at <<https://www.cliffordchance.com/expertise/services/esg/sustainability-and-esg-services/stakeholder-governance.html>> (accessed 29 March 2023).

⁹ Lucian Bebchuk, Roberto Tallarita, *The Illusory Promise of Stakeholder Governance* 106(1) Cornell Law Review 91 (2020).

¹⁰ Hansard (2006, February 6) Company Law Reform Bill [HL] (Committee Stage) [Hansard]. (Vol.678) [Column GC255], available at <<https://publications.parliament.uk/pa/ld200506/ldhansrd/vo060206/text/60206-29.htm>> (accessed 23 March 2023).

However, increased calls for corporate law to shift from an emphasis on shareholders to include all stakeholders have included the need for the corporate purpose to be reformulated to include profits, public interests and societal goals.¹¹ Corporate purpose, seen as ‘the reason a corporation is created and exists, what it seeks to do and what it aspires to become’¹² should be put at the core of company law and the fiduciary responsibilities of directors.¹³ Suggested proposals have included the Better Business Act (BBA) proposal to change section 172 of the Companies Act 2006, empowering directors to exercise judgment in the interest of all stakeholders, not just shareholders.¹⁴ However, the BBA is unlikely to advance stakeholder governance much further than the current position under section 172.¹⁵ Developments in the US have called for the corporate purpose to create value for stakeholders, shape culture, decision making and support long-term financial return.¹⁶ In 2019, the Business Roundtable made up of American CEOs, announced that their corporate purpose would include the decision to benefit and deliver value to all stakeholders, not just shareholders.¹⁷ Commentators have argued that the updated statement does not represent a meaningful commitment towards stakeholder interests.¹⁸ There have been debates on whether stakeholder governance benefits companies and/or stakeholders and should be rejected.¹⁹

With the failure of corporate law to adequately cater to wider stakeholders, the increasing consideration of ESG matters in board rooms, and the vocality of stakeholder governance advocates, standard-based approaches to stakeholder governance have emerged. The B Corp epitomizes this standard-based approach. Certified B Corps are for-profit businesses that aim to meet high standards of social and environmental performance, transparency, and

¹¹ The British Academy, *Principles for Purposeful Business: How to deliver the framework for the Future of the Corporation*, November 2019, available at <<https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf>> (accessed 7 Aug. 2023).

¹² The British Academy, *Reforming Business for the 21st Century*, November 2018 available at <<https://www.thebritishacademy.ac.uk/documents/76/Reforming-Business-for-21st-Century-British-Academy.pdf>> (accessed 7 Aug. 2023).

¹³ The British Academy, *Policy and Practice for Purposeful Business: the final report of the Future of the Corporation programme*, September 2021, available at <<https://www.thebritishacademy.ac.uk/documents/3462/Policy-and-Practice-for-Purposeful-Business-The-British-Academy.pdf>> (accessed 7 Aug. 2023).

¹⁴ Better Business Act, *About The Better Business Act*, <https://betterbusinessact.org/about/#theact> (accessed 15 Aug. 2023).

¹⁵ For more on the BBA, see Jeff Twentyman and George Murray, *A bridge to better business: The positive case for updating directors’ duties*, Slaughter and May, available at <<https://my.slaughterandmay.com/insights/briefings/a-bridge-to-better-business-the-positive-case-for-updating-directors-duties>> (accessed 14 Aug 2023).

¹⁶ Larry Fink, *Profit & Purpose, 2019 Letter to CEOs* <https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter> (accessed 18 Aug. 2023).

¹⁷ Business Roundtable, *Statement on the Purpose of the Corporation*, <https://opportunity.businessroundtable.org/ourcommitment/> (accessed 15 August 2023).

¹⁸ Bebchuk & Tallarita, n 9 above; Geoff Colin, *America’s top CEOs didn’t live up to their promises in Business Roundtable letter, researchers find*, available at <<https://fortune.com/2021/08/05/business-roundtable-letter-statement-on-the-purpose-of-a-corporation-stakeholder-capitalism-american-ceos/>> (accessed 15 Aug. 2023); Luca Enriques, *The Business Roundtable CEOs’ Statement: Same Old, Same Old*, <https://www.promarket.org/2019/09/09/the-business-roundtable-ceos-statement-same-old-same-old/> (accessed 15 August 2023); Luigi Zingales, *Don’t trust CEOs who say they don’t care about shareholder value anymore*, available at <<https://www.washingtonpost.com/opinions/2019/08/20/dont-trust-ceos-who-say-they-dont-care-about-shareholder-value-anymore/>> (accessed 15 Aug. 2023).

¹⁹ Bebchuk & Tallarita, n. 9 above; Colin Mayer, *Shareholderism v Stakeholderism – A Misconceived Contradiction* 106 (7) Cornell Law Review, 1859 (2022).

accountability.²⁰ The certification process launched in the UK in 2015 involves eligibility, pricing, B Impact Assessment, legal requirements, review process, reporting and community partnership.²¹ The B Corp standards are developed, managed and verified by B Lab, a non-profit global network seeking to change economic systems from shareholder capitalism to a stakeholder economy.²² B Lab is also the driving force behind the Benefit Corporation model in the US²³ and the Better Business Act in the UK, seeking to reform section 172 to ensure companies advance the interests of shareholders, the environment and wider society.²⁴ B Corps are legally required to consider the impact of their decisions on all stakeholders.²⁵

Part two provides a background to the research. It discusses section 172's statutory based approach to stakeholder governance and its inadequacies. It considers the relevance of section 172(2) and the uncertainty in its application. Part two also considers voluntary standards and highlights the reasons the B Corp has been chosen as the focus of this article. Part three discusses the development and growth of B Corps, which emanated from the US, which like the UK, has the shareholder primacy model as the dominant model of corporate governance. The relevance and limitation of constituency statutes, the emergence of Benefit Corporation and B Corp as alternative models of stakeholder governance will be considered. Part four examines the B Corp standards and certification process. The B Corp standards are regularly reviewed and are currently undergoing review. The article considers the impact of the standards' reviews on what it means to be a B Corp; evaluation, improvement and maintenance of a company's social and environmental performance; and transparency. Part five examines the UK B Corp legal requirement for a company limited by shares (a for-profit company) and their implications for director's duties. Has the B Corp standards-based approach given rise to practical changes to the director's duty with the potential to influence the interpretation of the section 172 duty and advance stakeholder governance? Does it go far enough? Does it adequately deal with the issue of accountability to all stakeholders? Part six concludes the article.

2. Background to the research

2.1 Section 172's statutory based approach to stakeholder governance

²⁰ B Lab, *What is a B Corp ?*, available at <https://bcorporation.uk/b-corp-certification/what-is-a-b-corp/> (accessed 7 Aug. 2023).

²¹ B Lab, B Corp Certification, available at <https://bcorporation.uk/b-corp-certification/> (accessed 7 Aug. 2023).

²² B Lab, *2020 Annual Report*, available at https://assets.ctfassets.net/1575jm7617lt/4NX33XW2fuX2jcMyrplLU1/9dd8874c707745b0a6986e80613629cb/2020_B_Lab_Annual_Report_Final_1_.pdf (accessed 7 Aug. 2023).

²³ *Ibid.*

²⁴ B Lab, *Report of the Trustees and Financial Statements For the year ended 31 December 2020*, available at https://pardot.bcorporation.net/1/39792/2021-11-25/9ncmcq/39792/1637859908p9S30wTL/B_Lab_UK_Annual_Report_and_Accounts_2020.pdf (accessed 7 Aug. 2023).

²⁵ B Lab, *About B Corp Certification: Measuring a company's entire social and environmental impact*, available at <https://www.bcorporation.net/en-us/certification/> (accessed 7 Aug. 2023).

Section 172 requires directors to serve the interests of shareholders while paying regard to the section 172 factors.²⁶ The inclusion of section 172 factors is often seen as the basis for stakeholder governance. However, this has not addressed the demands of stakeholder governance. The few corporate cases that have considered the impact of section 172 factors on the director's duties have primarily concerned other areas of law and have placed the interest of shareholders at the forefront of the director's mind.²⁷ One exception is the *Antuzis* case²⁸ which is specific to the tort of inducing a breach of contract. In that case, attempts to maximize profit coupled with inadequate consideration of section 172(1)(b), (d), and (e) factors gave rise to personal director liability. However, the *Antuzis* case is very unusual, requiring directors to induce a breach of contract. Most cases on section 172 factors concern the failure of the board to consider the impact of policy decisions on stakeholders rather than breach of contract. The recent Supreme Court case of *BTI v Sequana*²⁹ makes it clear that for solvent companies, the shareholders are intended beneficiaries of the section 172 duty. Where insolvent companies are concerned, the creditor duty extends to include a duty to act in the interest of creditors.³⁰ Having regard to the section 172 factors is a secondary obligation that reflects the recognition that in promoting the success of the company in the interests of members, consideration should be given to the factors.³¹

The section 172(2)³² duty is a stronger advocate for stakeholder governance. Section 172(2) allows a company to promote the success of the company to achieve company purposes which may include purposes other than shareholder interests.³³ Unlike section 172(1) duty, which requires directors to manage the business honestly in their judgment for the benefit of the shareholders,³⁴ Section 172(2) commercial companies are managed for the benefit of the company in achieving the company's stated purposes.³⁵ However, it is unclear how the courts will apply the section 172 factors to a section 172(2) scenario. Section 172(2) has not been the subject of much scholarly or judicial attention, particularly where commercial companies are concerned. It was not discussed in the *BTI v Sequana* case.³⁶ The B Corp discussed in this article exemplifies a section 172(2) commercial company.

2.2 Voluntary standards and reasons for a focus on B corps

²⁶ See Companies Act 2006, n 2 above.

²⁷ For example, see *R (on the application of People & Planet) v HM Treasury* [2009] EWHC 3020 (Admin).

²⁸ *Antuzis v DJ Houghton Catching Services Ltd* [2019] EWHC 843 (QB).

²⁹ *BTI 2014 LLC (Appellant) v Sequana SA and others (Respondents)* [2022] UKSVC 25.

³⁰ *Ibid.*

³¹ *Ibid.*, see Lord Reed's statement [66].

³² Companies Act 2006 (UK) s172(2):

Where 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 the effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

³³ *Ibid.*

³⁴ *Re Smith & Fawcett* [1942] Ch 304.

³⁵ Explanatory Notes to the Companies Act 2006, para 307.

³⁶ *BTI 2014 LLC (Appellant) v Sequana SA and others (Respondents)* [2022] UKSVC 25.

Standards are voluntarily agreed ways of doing things derived from the wisdom of experts who know the organisation's needs.³⁷ There are myriads of standards on how companies should act when considering the impact of their decisions on shareholder and non-shareholder stakeholder interests.³⁸ However, many such standards do not provide a compliant based assessment framework. These include principle-based standards such as the United Nations Global Compact (UNGC)³⁹ and the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, providing broad guidelines (OECD Guidelines).⁴⁰ The UNGC promotes universal principles on human rights, labour, environment and anti-corruption through engagement with companies, civil society and organised labour. Companies are expected to communicate their progress using reporting standards such as the Global Reporting Initiative (GRI)⁴¹, Carbon Disclosure Project⁴², International Standards of Accounting and Reporting⁴³, and Integrated Reporting Framework (IRF).⁴⁴ The UNGC does not monitor corporate behaviour nor provide a compliance-based assessment framework.⁴⁵ The OECD Guidelines are recommendations addressed by governments to multinational enterprises, reflecting good practices for small and medium-sized companies.⁴⁶ Thirty eight OECD countries and thirteen non-OECD countries adhere to the Guidelines.⁴⁷ They cover key areas of business responsibility, including human rights, labour rights, environment, bribery, science and technology. Companies are encouraged to disclose financial and sustainability-related information.⁴⁸

In addition to the principle-based standards and reporting standards that do not set targets or benchmarks for performance, certified standards operate under a compliance-based assessment framework. Such standards include certifiable International Organization for Standardization

³⁷ BSI, *What is a Standard?*, available at <<https://www.bsigroup.com/en-GB/standards/Information-about-standards/what-is-a-standard/>> (accessed 8 Aug 2023).

³⁸ For some examples, see Dirk Gilbert, Andreas Rasche and Sandra Waddock, *Accountability in a Global Economy: the Emergence of International Accountability Standards* 21 (1) Business Ethics Quarterly 23 (2011)

³⁹ UN, *United Nations Global Compact*, available at <<https://unglobalcompact.org/>> (accessed 8 Aug 2023)

⁴⁰ OECD, *Guidelines for multinational enterprises* 8 June 2023, available at <<https://www.oecd.org/corporate/mne/>> (accessed 8 Aug. 2023).

⁴¹ The GRI framework allows companies to report on the impact and measures taken to manage impacts of their activities on sustainability issues. See GRI, *Global Standards for Sustainability Impacts*, available at <<https://www.globalreporting.org/standards/>> (accessed 8 Aug 2023).

⁴² The CPD helps companies measure, manage and disclose environmental impacts. See CDP, *About Us: Who We Are*, available at <<https://www.cdp.net/en/info/about-us>> (accessed 18 Aug. 2023).

⁴³ ISAR is an intergovernmental working group that helps improve quality and international comparability of financial and non-financial reporting. See UNCTAD, *International Standards of Accounting and Reporting (ISAR)*, available at <<https://unctad.org/topic/enterprise-development/ISAR-international-standards-of-accounting-and-reporting>> (18 Aug. 2023).

⁴⁴ IFRS Foundation, *Integrated Reporting Framework*, available at <<https://www.integratedreporting.org/resource/international-ir-framework/>> (accessed 14 Aug. 2023). For a more extensive scope of reporting frameworks, see UNGC, *Questionnaire Guidebook: Communication on Progress* February 2023 available at <<https://unglobalcompact.org/library/6107>> (accessed 8 Aug. 2023); KPMG, *Big shifts. Small steps: Survey of Sustainability Reporting 2022*, available at <<https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2022/10/ssr-small-steps-big-shifts.pdf>> (accessed 8 Aug.2023).

⁴⁵ UNGC, *Frequently Asked Questions*, available at <<https://unglobalcompact.org/about/faq>> (accessed 8 Aug. 2023).

⁴⁶ OECD, n. 40 above.

⁴⁷ OECD, *Declaration and Decisions on International Investment and Multinational Enterprises*, available at <<https://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm>> (accessed 8 Aug. 2023).

⁴⁸ OECD, n. 40 above.

(ISO) standards,⁴⁹ B Corp, and Good Business Charter⁵⁰, which accredits UK-based companies only.⁵¹ Although other compliance-based assessment frameworks exist, the B Corp standards and certification process has been chosen as the focus of this article for several reasons:

First, unlike other certified standards, the B Corp has a legal requirement and close connection to the statutory-based approach. Therefore, examining the standard-based approach is useful for discovering what more is needed to make the statutory-based approach effective. Second, the B Corp has a comprehensive and transnational scheme focused on for-profit companies. This singular focus removes the need to consider charities and community interest companies, a legislative company set up for social enterprise to benefit the community it serves rather than private profit.⁵² The Good Business Charter, for example, provides accreditation open to companies, the public sector and charities in the UK.⁵³ The lack of both standards development and a strong connection to the statutory-based approach limits its use for this research. Third, the majority of B Corps in the UK are small and medium companies (SMEs).⁵⁴ Much of the focus on stakeholder governance has been on big companies.⁵⁵ Examining this standard-based approach provides an opportunity to explore SMEs and stakeholder governance.

3. Development and Growth of the B Corp Movement

Since the Berle-Dodd debates⁵⁶ of the 1930s, US scholars have grappled with the question of what the purpose of the corporation is.⁵⁷ In the 70s, Friedman's view⁵⁸ that the company's purpose was to maximise shareholder value became mainstream, and the shareholder primacy view became the primary corporate governance model.⁵⁹ Under the shareholder primacy model, directors of public companies may be found to be in breach of their duties if they serve the interests of non-shareholder stakeholders.⁶⁰

⁴⁹ Popular standards include ISO 14001 and ISO 9001. For the full list of standards, see ISO, *Standards*, available at <<https://www.iso.org/standards.html>> (accessed 9 Aug. 2023).

⁵⁰ Good Business Charter, *Where we fit*, available at <<https://www.goodbusinesscharter.com/where-we-fit/>> (accessed 8 Aug 2023)

⁵¹ *Ibid.*

⁵² Department for Business, Energy and Industrial Strategy, *Office of the Regulator of Community Interest Companies: Information and Guidance notes - Chapter 1: Introduction*, available at <<https://www.gov.uk/government/publications/community-interest-companies-how-to-form-a-cic>> (accessed 14 Aug. 2023).

⁵³ Good Business Charter, n. 50 above.

⁵⁴ Craig Morley and Mark Goodchild, *An independent comparative study into the financial and operational performance of B Corporations in the UK*, available at <<https://bit.ly/3fGzsJH>> (accessed 8 Aug. 2023).

⁵⁵ See The Economist, *Big business is beginning to accept broader social responsibilities*, 21 August 2019, available at <<https://www.economist.com/briefing/2019/08/24/big-business-is-beginning-to-accept-broader-social-responsibilities>> (accessed 8 Aug. 2023); OECD n. 40 above.

⁵⁶ Adolph Berle, *Corporate Powers as Powers in Trust*, 44 Harvard Law Review 1049 (1931); Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 Harvard Law Review 1145 (1932).

⁵⁷ Lynn Stout, *Bad and not-so-bad arguments for shareholder primacy*, 75 Southern California Law Review 1189, 1189-1190 (2002).

⁵⁸ Milton Friedman, *The Social Responsibility of Business is to Increase its profits*, New York Times 13 September 1970.

⁵⁹ Lynn Stout, *New Thinking on 'Shareholder Primacy'* 2(2) Art 4 Accounting, Economics and Law (2012).

⁶⁰ See the Delaware law opinion in *Ebay Domestic Holdings, Inc v Newmark* 16 A.3d 1, 35 (Del. Ch 2010); Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held US Benefit Corporations*, 40 Seattle University Law Review, 611, 617 (2017).

3.1. Constituency Statutes

To allay the concern of directors operating under the shareholder primacy model, constituency statutes were adopted in many states in the 80s.⁶¹ Constituency statutes allow directors of public companies to act in the company's best interest, factoring in the interests of non-shareholder stakeholders in decision-making.⁶² They, therefore, provide legal justification for directors to consider the interests of non-shareholder stakeholders.⁶³

However, although constituency statutes are prevalent in the US, they have hardly been litigated in the courts and are not seen as bolstering non-shareholder interest.⁶⁴ Many of the constituency statutes were adopted at the request of directors at a time when hostile takeovers were common. They were used as a means of protection for directors who feared a breach of fiduciary duty claims being made against them for resisting a hostile takeover that provided short-term financial gains which were perceived to not be in the corporation's long-term best interests.⁶⁵ The statutes work within the remit of shareholder primacy⁶⁶ and have been criticised for their close alignment with shareholder interests; lack of wider stakeholder rights; inability to address trade-offs between shareholder and non-shareholder interests.⁶⁷ Despite the adoption of constituency statutes, directors focus on shareholder interests and rarely rely on constituent statutes as a defence for fiduciary duty claims.⁶⁸ Delaware state where most corporations are incorporated does not have a constituency statute, and this might be a significant reason why the statutes have not contributed much to existing law and practice in the US.⁶⁹

3.2 Alternative models

Due to the limitations of the constituency statutes, the B Corp and Benefit Corporation emerged as alternative models for stakeholder governance.⁷⁰ The B Corp and Benefit Corporation, both brainchildren of the B Lab, a non-profit organisation, are often mistaken for the same thing. They both are applicable to for-profit companies; adopt the stakeholder model, and have a legal

⁶¹ Anne Lockner, *Constituency Statutes: The Overlooked predecessor to the ESG movement*, September 2022, available at <<https://www.robinskaplan.com/resources/legal-updates/the-robins-kaplan-spotlight/2022/spotlight-september-2022/constituency-statutes>> (accessed 6 July 2023); Jitendra Aswani, Aloha Bilokha et al, *The Cost (and Unbenefit) of Conscious Capitalism* 3 September, 2022, available at <<http://dx.doi.org/10.2139/ssrn.3926335>> (14 Aug 2023).

⁶² Jonathan Karpoff, Micheal Wittry, *Institutional and Legal Context in Natural Experiments: The Case of State Antitakeover Law*, 73(2) *The Journal of Finance*, 657 (2018); Andrew Keay, *Moving towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado about Little?* *European Business Law Review* 1, 8-9 (2011).

⁶³ Karpoff, n. 62 above, 669; Lucian Bebchuk and Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99(5) *Columbia Law Review* 1168, 1179-1180.

⁶⁴ Lockner, n. 61 above.

⁶⁵ *Ibid.* Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land*, 42(3) *Loyola of Los Angeles Law Review* 765, 780-781 (2009).

⁶⁶ Bisconti, n. 65 above, 787; Brian M. McCall, *Benefit Corporations and the Common Law Tradition* in Henry Peter, Carlos Varas Vasserot and Jaime Alcalde Silva (eds) *The International Handbook of Social Enterprise Law: Benefits Corporations and Other Purpose-Driven Companies*, (Springer, 2023).

⁶⁷ See Keay, n. 62 above 14; Lockner, n. 61 above.

⁶⁸ Lockner, n. 61 above.

⁶⁹ *Ibid.*

⁷⁰ Kelsey Nunez, *Enforcing the "Benefit" Part of Benefit Corporations*, Idaho State Bar, 19 August 2019, available at <https://isb.idaho.gov/blog/enforcing-the-benefit-part-of-benefit-corporations/#_edn3> (accessed 7 July 2023).

purpose of ensuring directors consider the impact of their decision on non-shareholder interests.⁷¹ Although related, they are separate models.

3.2.1 *The B Lab and its initiatives*

The B Lab was founded in the US in 2006, seeking to change economic systems from shareholder capitalism to a stakeholder economy. In 2007, B Lab developed the B Corp certification process.⁷² It also developed the benefit corporation model, which was adopted by Maryland in 2010.⁷³

3.2.1.1 *Benefit Corporation Legislation*

Benefit corporation status provides an avenue for companies to fulfil the legal requirement needed to achieve B Corp Certification status.⁷⁴ The Benefit Corporation, also known as a public benefit corporation, was created to combat traditional corporate law's focus on shareholder primacy.⁷⁵ It ensures that directors of for-profit companies consider environmental, social and economic factors. It expands the obligations of directors to include broader corporate purposes maximizing shareholder and non-shareholder benefits.⁷⁶ Benefit corporations are required to achieve a general public benefit, which means they should create a material positive impact on society.

Like constituency statutes, Benefit corporation legislation is prevalent in the United States.⁷⁷ In 2018, adoption figures suggested 30 states had benefit corporations.⁷⁸ By 2021, 10 more states had passed some form of the law.⁷⁹ Delaware, which has already been mentioned because of its significance for US corporate law and practice, adopted the public benefit corporation statute in 2013.⁸⁰ In Delaware, benefit corporation status requires an obligation for a company to operate in a responsible and sustainable manner.⁸¹ Companies are required to have specific public benefits identified and stated in their certificate of incorporation.⁸² Public benefits could include protecting or restoring the environment, improving human health, and increasing capital flow to entities to benefit society or the environment.⁸³

Directors must also balance the interests of shareholders, other stakeholders and specific public benefits stated in the charter.⁸⁴ Like constituency statutes, questions around dealing with

⁷¹ B Lab, *Benefit Corporation vs. B Corp*, available at <<https://usca.bcorporation.net/benefit-corporation-vs-b-corp/>> (accessed 11 July 2023).

⁷² Susan Murray, *Explaining the adoption of benefit corporation laws by the US states*, 10(3) *Journal of Financial Economic Policy* 351, 356 (2018); B Lab, n. 71 above.

⁷³ Murray, n. 72 above.

⁷⁴ *Ibid.*

⁷⁵ B Lab, n. 71 above.

⁷⁶ *Ibid.*

⁷⁷ Howard Brownstein, *Benefit Corporation Law and Governance: Pursuing Profit with Purpose*, 45(5) *Directors and Boards* 10 (2021); Heminway, n. 60. Above.

⁷⁸ Murray, n. 72 above.

⁷⁹ Brownstein, n. 77 above.

⁸⁰ Del. Code Ann. tit 8 s 362 (2013).

⁸¹ *Ibid.*; B Lab, *Benefit Corporations*, available at <<https://usca.bcorporation.net/benefit-corporation/>> (accessed 7 July 2023).

⁸² Del. Code Ann. tit 8 s 362(a) (2015).

⁸³ *Ibid.*, s 362(a)(1).

⁸⁴ *Ibid.*, 362(a); s 365 (a)

tradeoff issues between shareholders and non-shareholder stakeholders need clarity.⁸⁵ It is unclear what protection benefit corporations will afford company directors against challenges to their fiduciary duties and potential liabilities. Delaware has amended its general corporation legislation to address concerns around director liability, increasing protection for directors of public benefit corporations.⁸⁶ Under Delaware law, the board of directors do not have duties to non-shareholder stakeholders. They will satisfy the balancing requirements if the decision 'is both informed and disinterested and not such that no person of ordinary sound judgment would approve'.⁸⁷ Directors' use of business judgement, discretion and lack of direct stakeholder enforcement may make attempts at stakeholder accountability futile. The difficulty in balancing profit and purpose and a reliance on the director's discretion is constant criticism against stakeholder governance.⁸⁸

The benefit corporation also has an obligation to report.⁸⁹ The Delaware public benefit corporation is slightly different from the model legislation provided by B Lab, particularly in reporting.⁹⁰ The model legislation requires public reports, third-party standards for the reports as well as shareholder reports on how the company achieved its general public benefit purpose.⁹¹ Delaware requirement is for reports to be made to shareholders. There is no requirement for a third-party standard.⁹² However, the bylaws of a Delaware public benefit corporation company may require third-party standards and certification.⁹³ Early research on compliance with reporting requirements for benefit corporations suggests improvements.⁹⁴ The novelty of the model, the size of benefit corporations and the lack of statutory enforcement were cited as reasons for non-compliance.⁹⁵ More will be said about reporting requirements and compliance under the B Corp movement, which now has considerable knowledge on reporting, mainly consists of small and medium-sized companies and does not require legal enforcement.

4. B Corp Standards and Certification Process

⁸⁵ Roxanne Thorelli, *Providing Clarity for Standard of conduct for Directors within Benefit Corporations: Requiring Priority of a Specific Public Benefit* 101 Minnesota Law Review 1749, 1751 (2017).

⁸⁶ Cydney Posner, *Renewed Interest in IPOs of Public Benefit Corporations*, Harvard Law School Forum on Corporate Governance, available at <<https://corpgov.law.harvard.edu/2020/07/31/renewed-interest-in-ipos-of-public-benefit-corporations/>>; Kevin LaCroix, *Will More Companies Adopt the Benefit Corporation Model?* The D&O Diary, available at <<https://www.dandodiary.com/2020/08/articles/corporate-law/will-more-companies-adopt-the-benefit-corporation-model/>> (accessed 14 Aug 2023).

⁸⁷ Del. Code n. 83 above s 365(b).

⁸⁸ Bebchuk, n. 9 above 119-122; Lynn Stout, *The Shareholder value myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett Kehler Publications 2012); Margaret Blair and Lynn Stout, *A Team Production Theory of Corporate Law*, 85 Virginia Law Review 247 (1999).

⁸⁹ Del. Code n. 83 above s 366.

⁹⁰ *Ibid*, s 362(b); B Lab, n. 81 above.

⁹¹ See B Lab, n. 71 above.

⁹² Del. Code n. 83 above s 366.

⁹³ *Ibid*, section 366(c); Haskell Murray, *An Early Report on Benefits Reports*, 118 West Virginia Law Review 30 (2015).

⁹⁴ *Ibid*, 33.

⁹⁵ *Ibid*, 44.

B Corps have performance standards certified by B Lab which they must meet. Any for-profit company with at least one year of operations can apply to become a certified B Corp.⁹⁶ The certification process takes place through a B Impact assessment of which companies need to achieve a minimum verified score of eighty out of 200 points.⁹⁷ Companies must make a legal commitment to be accountable to all stakeholders.⁹⁸ They are required to include information about their performance against the B Lab's standard on B Lab's website and recertify that they met the performance standards every three years.⁹⁹ There is also a fee chargeable depending on the company's total revenue.¹⁰⁰ From the initial push in the US, there are now 6,800 B Corps across 161 industries present in 59 countries.¹⁰¹ In the UK, B Corp certification was launched in 2015¹⁰², and since then, 1,200 companies have achieved certified B Corps status. From 2019 -2021, the UK had the fastest new certification growth rate of 70% compared to 37% for other parts of Europe.¹⁰³ Between October 2022 and February 2023, there was an increase of about 400 companies which gained B Certification status.¹⁰⁴

4.1 B Corp Standards

B Corp standards include the B Impact Assessment (BIA); risk standards and multinational company standards and baseline requirements.¹⁰⁵

4.1.1 The BIA

The BIA measures a company's social and environmental performance in the areas of governance, workers, community, environment, and customers.¹⁰⁶ The BIA has gone through many reviews. The most current BIA is the 2019 (version 6), with plans for further consultation in late 2023 for new standards which will be implemented.¹⁰⁷ It can be used by any organisation to measure and improve its social and environmental impact.¹⁰⁸ However, for certification purposes, companies must score eighty points across all areas assessed with no requirement of

⁹⁶ B Lab, n. 81 above.

⁹⁷ B Lab, *B Impact Assessment*, available at <https://www.bcorporation.net/en-us/programs-and-tools/b-impact-assessment/?_ga=2.48365679.892539770.1689066140-1043740486.1688472737> (accessed 11 July 2023).

⁹⁸ B Lab, n. 25 above.

⁹⁹ *Ibid.*

¹⁰⁰ B Lab, *Pricing*, available at <<https://bcorporation.uk/b-corp-certification/pricing/>> (accessed 8 August 2023).

¹⁰¹ B Lab, n. 20 above.

¹⁰² B Lab, *Future proofing B Corp: help us to design the standards of tomorrow*, available at <<https://bcorporation.uk/reinventing-business/by-b-lab-uk/evolving-the-b-corp-standards/>> (accessed 14 Aug 2022).

¹⁰³ Kali Gibson, *Scaling B Corp Certification: Reflections on 2021*, available at <<https://www.bcorporation.net/en-us/news/blog/scaling-b-corp-certification-reflections-2021/>> (accessed 14 Aug. 2023).

¹⁰⁴ B Lab, *New Trustees join B Lab UK board*, available at <<https://bcorporation.uk/reinventing-business/by-b-lab-uk/new-trustees-join-b-lab-uk-board/>> (accessed 11 July 2023); B Lab, n. 20 above.

¹⁰⁵ B Lab, n. 7 above.

¹⁰⁶ B Lab, n. 97 above; B Lab, n. 7 above.

¹⁰⁷ B Lab UK, *Preliminary consultation suggests new B Corps standards are ambitious yet attainable*, available at <<https://bcorporation.uk/news-stories-and-events/news/preliminary-consultation-for-the-b-corp-certification-standards/>> (accessed 14 Aug. 2023); B Lab, n. 7 above.

¹⁰⁸ B Lab, n. 97 above. B Lab UK, *Who can certify*, available at <<https://bcorporation.uk/b-corp-certification/who-can-certify/>> (accessed 11 July 2023).

a minimum score per area. Therefore, companies can choose areas of good performance to achieve certification at the expense of other areas.¹⁰⁹

Companies that fail to meet the eighty points score can take measures to improve their scores and reapply after implementation of improvements. The assessment considers day-to-day operations, business models, what a company does and how they do it.¹¹⁰ It is based on the business sector, size and market.¹¹¹ Benefits of the BIA include its accessibility and availability for all organisations, whether B Corp certified or not. It creates avenues for impact measurement, evaluation and improvement of social and environmental performance.

4.1.2 Risk Standards

Unlike the BIA, which measures positive impacts, the risk standards were originally used to screen companies, define eligibility requirements¹¹², and review potentially negative impacts associated with the company's industry and other practices.¹¹³ They did not include verifiable scores.¹¹⁴ B Lab uses disclosure questionnaires during the certification process, third-party formal complaints and public discourse on its certification requirements and standards to assess a company's negative impact.¹¹⁵ The addition of the risk standards to the BIA is an attempt to ensure that certification stays relevant and high standards are maintained.¹¹⁶

4.1.3 Baseline Requirements for Multinationals

To cater to concerns that large companies that are not maintaining high social and environmental performance standards, accountability and transparency are being certified,¹¹⁷ B Lab redesigned its certification process with baseline requirements for multinationals.¹¹⁸ These requirements are for large companies with over USD 5 billion in annual revenue. Such companies are required to provide impact reports using third-party standards such as the

¹⁰⁹ Adriana Liute, Maria Rosa De Giacomo, *The environmental performance of UK-based B Corp companies: An analysis based on the triple bottom line approach*, Vol 31(3) Business Strategy and the Environment 810 (2021).

¹¹⁰ Mandy Barker, *How to go through the B Corporation Process Blog*, available at <https://sailcreative.co.uk/b-corporation-process-how-it-works/?utm_source=Website+subscription&utm_campaign=6c2406c126-EMAIL_CAMPAIGN_2019_06_05_10_32_COPY_01&utm_medium=email&utm_term=0_74ac45c829-6c2406c126-438871864> (accessed 11 July 2023).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ B Lab, *B Lab Industry and Practice-Specific Risk Standards*, available at <<https://www.bcorporation.net/en-us/standards/controversial-issues/>> (accessed 8 Aug. 2023).

¹¹⁴ B Lab, Frequently asked questions about the evolution of the Standards for B Corp Certification, available at <<https://kb.bimimpactassessment.net/support/solutions/articles/43000651678-frequently-asked-questions-about-b-corporation-performance-requirements-2020-2021-review>> (accessed 19 July 2023).

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Elizabeth Umlas, *Etsy, B Corporations and Tax Avoidance*, Business & Human Rights Resource Centre, available at <<https://www.business-humanrights.org/en/blog/etsy-b-corporations-and-tax-avoidance/>> (accessed 14 Aug. 2023); Anna Canning, *Nespresso: Known for Human Rights Violations, Now B Corp Certified*, available at <<https://fairworldproject.org/b-corp-nespresso-human-rights/>> (accessed 14 Aug. 2023).

¹¹⁸ B Lab, *Large Companies*, available at <https://bcorporation.eu/company_type/large-companies/> (accessed 14 Aug. 2023).

GRI¹¹⁹; conduct materiality assessment and stakeholder engagement process including a grievance/compliant mechanism; devise management strategies on material business issues and performance goals overseen by directors; prepare disclosure statement on tax issues; adopt human rights risk assessment.¹²⁰

4.2 B Corp Certification and Improvements in Standards

It is not all companies that are B Corp certified to utilise the avenue created for improving their performance.¹²¹

One study on the impact of B Corp certification on four small and medium-sized Brazilian companies showed the companies obtained high scores in the certification assessment. However, after certification, the companies did not develop plans to improve their goals, and three had minimal improvement in their scores.¹²² The study is useful for showing the need for caution in equating high BIA scores with high standards of social and environmental performance.¹²³ This is noteworthy as the BIA provides external accreditation of a company's business practices that are socially and environmentally aligned.¹²⁴ There are also questions regarding the transparency of the BIA as the impact assessments are not public facing, and the reports do not include references to the maximum possible scores for each area.¹²⁵

Following criticisms of the difficulty in articulating what it means to be a B Corp, issues with impact and the lack of continuous improvements,¹²⁶ B Lab announced a review of its standards for B Corp certification in 2020.¹²⁷ Instead of companies basing their certification on the achievement of eighty points from the BIA, companies would be required to meet specific requirements for ten topics, namely purpose and stakeholder governance, worker engagement, fair wages, justice, equity diversity and inclusion, human rights, climate action, circularity and environmental stewardship, collective action, impact management and risk standards.¹²⁸ The risk standards would include questions on grievance mechanisms, honest communication, and responsible lobbying.¹²⁹

¹¹⁹ For more on the GRI, see footnote 41 above.

¹²⁰ B Lab, Driving continuous improvement for high-quality social and environmental business standards.

¹²¹ Malu Villela Garcia, Sergio Bulgacov, Glenn Morgan, *B corp certification and its impact on organizations over time*, 170(2) Journal of Business Ethics 343 (2021).

¹²² *Ibid.*, 6.

¹²³ *Ibid.*, 32.

¹²⁴ David Hunter, *The Arrival of B Corps in Britain: Another Milestone Towards a More Nuanced Economy?* In Nina Boeger & Charlotte Villiers (Eds.) *Shaping the corporate landscape: Towards Corporate Reform and Enterprise Diversity* 216 (Bloomsbury Publishing 2018).

¹²⁵ Liute, The environmental performance of UK-based B Corp companies; Sustridge, *Corporate Sustainability Reporting Frameworks and Standards Explained*, available at <<https://www.sustridge.com/blog-content/corporate-sustainability-reporting-frameworks-standards>> (accessed 14 Aug. 2023).

¹²⁶ B Lab, n. 114 above.

¹²⁷ *Ibid.* B Lab, *Why there's room for both big and small under the B umbrella*, available at <<https://bcorporation.com.au/blog/under-the-b-umbrella/>> (accessed 14 Aug. 2023).

¹²⁸ B Lab, *Evolving the Standards for B Corp Certification: Summary Report from B Lab's 2022 Preliminary Consultation*, available at <https://bcorp.imagerelay.com/share/3d011b0bbfb84f0ea7153911bec5ee0a?utm_source=ENG+Report&utm_medium=Full+Report&utm_campaign=EoS+PCSR> (accessed 8 Aug. 2023)

¹²⁹ *Ibid.*, 57- 64,

4.3 B Corps Standards' Development

The B Corp standards are developed through research and stakeholder input. The B Lab's independent standards Advisory Council (SAC), appointed by the B Lab Board of Directors,¹³⁰ plays a significant role in standards development. It is unclear what B Lab means by 'independent' when describing the SAC because members of the council include B Corps.¹³¹ Regional standards advisory groups and boards of directors are also relevant players. In 2021, B Lab appointed 25 new members to its regional standards advisory group in the UK, Latin America, East Africa and Australasia. It also launched advisory groups in Asia and Europe.¹³² The findings and insights from B Lab's consultation on the draft standards for B Corp certification have raised awareness and education in support of stakeholder governance.¹³³

There is scope for further development of the standards to strengthen perceptions of ESG ratings and ESG data. There are concerns divergence of ESG ratings, with research calling for greater attention to how the underlying ESG data used for ratings are generated.¹³⁴ The B Corp standards could help address these concerns by using a universal standard for measuring company performance that could help provide an accurate ESG picture of the corporation, which would be beneficial for ESG investing.¹³⁵

5. UK Legal Requirement for B Corp Certification and Advancement of Stakeholder Governance

The UK legal requirement for B Corp certification is met when a company limited by shares¹³⁶ does the following:

- amends its Articles of Association to include words to the effect that the objects of the company are to promote the success of the company for the benefit of members as a whole and,

¹³⁰ The UK Board of directors as of 11 July 2023 are Dr Mary Johnstone-Louis, George King IV, Amy Clarke, Louise Harman, Thom Kenrick and Nicola Clark OBE. See B Lab, *UK Board and governance*, available at <<https://bcorporation.uk/about-b-lab-uk/our-team-and-organisation/uk-board-and-governance/>> (accessed 14 Aug. 2023); B Lab UK, *New trustees join B Lab UK board*, available at <<https://bcorporation.uk/reinventing-business/by-b-lab-uk/new-trustees-join-b-lab-uk-board/>> (accessed 11 July 2023).

¹³¹ For the Standards Advisory Council, see B Lab, *Standards Advisory Council*, available at <<https://www.bcorporation.net/en-us/standards/advisory-council/>> (accessed 14 Aug. 2023). For advisory council connections to the B Corp movement, see for e.g. Sustainability Advantage, Honored to Be a 'Best for the World' B Corp, available at <<https://sustainabilityadvantage.com/2014/03/19/honored-to-be-a-best-for-the-world-b-corp/>> (accessed 14 Aug. 2023).

¹³² B Lab Global, B Corp Performance Requirements Review Update: September 2021, available at <<https://www.bcorporation.net/en-us/news/blog/b-corp-performance-requirements-review-updates-b-lab-expands-regional-standards-advisory-groups/>> (accessed 19 July 2023).

¹³³ B Lab, n. 128 above.

¹³⁴ Florian Berg, Julian Kolbel, Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings*, 26(6) Review of Finance 1315 (2022).

¹³⁵ Green Economy Law, *Social Enterprises, B Corps, Benefit Companies, ESG*, available at <<https://www.greeneconomylaw.com/social-enterprises-b-corps-benefit-companies-esg>> (accessed 14 Aug. 2023); Kevin Prall, *ESG Ratings: Navigating Through the Haze*, available at <<https://blogs.cfainstitute.org/investor/2021/08/10/esg-ratings-navigating-through-the-haze/>> (accessed 14 Aug. 2023).

¹³⁶ There are different requirements for other types of companies. See B Lab, *Meeting the Legal Requirement*, available at <<https://bcorporation.uk/b-corp-certification/how-to-certify-as-a-b-corp/legal-requirement/#guide>> (accessed 9 Aug. 2023).

through its business operations, will have a material positive impact on society and the environment.¹³⁷ Material positive impact refers to the company having a meaningful overall positive change that is relative to the scale and size of the company.¹³⁸

- Directors need to consider the section 172 factors, referred to as stakeholder interests when carrying out their duty to act in good faith to promote the success of the company in achieving the stated objective – long-term increase in value (shareholder interests) and high standards of social and environmental performance (social and environmental interests).¹³⁹
- No interests of any stakeholder or group of stakeholders are more important than others.¹⁴⁰
- The duty is owed to the company, and no one else would have a right or cause of action.¹⁴¹
- Directors are required to prepare and circulate impact reports.¹⁴²

5.1 Amendment Process

The amendment process requires the board of directors and stakeholder review to consider the impact of the changes. Directors would need to approve the amendment with the exact wording provided by B Lab, and a 75% majority in favour of the amendment by the company's shareholders is required.¹⁴³

5.2 Close Relationship with Section 172(2)

If the amendment is successful, the directors of the company would be required by law to act in the way they consider in good faith would most likely achieve the company's purposes.¹⁴⁴ It is a matter for their good judgement to determine what those purposes are; and where the purposes are for members as well as other purposes; the extent to which the other purposes apply in place of members' benefit.¹⁴⁵ Directors must factor in stakeholder interests and not prioritise the interests of any group. Directors who act with reasonable care, skill and diligence and take decisions in good faith will fulfil their duties.

The B Corp legal requirement brings the B Corp squarely within section 172(2). This raises the question about what more being a B Corp certified company adds to the section 172(2) duty.¹⁴⁶ The legal requirement is usually pointed out as a critical factor that differentiates the B Corp movement from other certification processes.¹⁴⁷ A careful consideration of the 172(2)

¹³⁷ For the exact wording of the proposed language to be included in the articles for the UK, see United Kingdom, *Company Limited by Shares Legal Requirement*, available at <<https://www.bcorporation.net/en-us/legal-requirement/country/united-kingdom/corporate-structure/community-interest-company-limited-by-shares/>> (accessed 9 Aug. 2023).

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ See B Lab, n. 136 above.

¹⁴⁴ Explanatory Notes to the Companies Act 2006, para 326.

¹⁴⁵ *Ibid.*

¹⁴⁶ Hunter, n. 124 above, 262.

¹⁴⁷ B Lab, *B Impact Assessment Support Portal, what is the legal requirement for my company and why do I need to meet it?*, available at <<https://kb.bimpactassessment.net/support/solutions/folders/43000194928>> (accessed 14 Aug. 2023).

provisions shows that directors can legally choose to consider other stakeholder interests if they have purposes other than shareholder primacy. However, the fact that commercial companies rarely consider section 172(2)¹⁴⁸ suggests that B Corp's application of the section should be welcomed but perhaps with caution. The policy council, which developed the legal requirement, felt section 172 was relatively well understood and intelligible to the layperson.¹⁴⁹ This has not proven to be entirely correct. One problem with section 172 is the interpretation of the law, which primarily has focused on section 172(1) and shareholder primacy.¹⁵⁰ Another problem is the issue of trade-offs between shareholders and non-shareholder stakeholders and how directors determine whose interests should be paramount.¹⁵¹

5.3 Close Alignment with the Interpretation of Section 172

The B Corp director duty is closely aligned with the current interpretation of section 172 duty.¹⁵² The current interpretation places a strong reliance on B Corps directors to deal with trade-off issues without much legal guidance and to make decisions in favour of stakeholders¹⁵³ within a shareholder primacy-dominant environment. It does not advance stakeholder governance.

The B Corp legal requirement does not provide any guidance on dealing with trade-offs nor address the issue of the director's discretion. The requirement is minimalist to cater to all prospective B Corps.¹⁵⁴ It appears that just having the legal requirement without further guidance on how to weigh shareholder and non-shareholder interests or carry out their discretion is insufficient. Over time, the B Corp's legal requirement that directors should have regard to the section 172 factors, coupled with some guidance in the articles of association on how to go about using their discretion, has the potential to shape concepts on how directors should weigh shareholder and non-shareholder factors beneficial for both section 172 and the standard based approach to stakeholder governance.

5.4 Close Alignment with Section 170(1) of the Companies Act¹⁵⁵ and the Issue of Accountability to Stakeholders

The legal requirement's alignment with section 170 of the Companies Act¹⁵⁶ is another problematic area in the advancement of stakeholder governance, particularly the issue of accountability to all stakeholders.¹⁵⁷ The reason for the alignment includes the need to ensure an uptake of certified B corps and prevent directors from being dissuaded for fear of director

¹⁴⁸ Hunter, n. 124 above, 262.

¹⁴⁹ B Lab, *The 'Legal Requirement' for a B Corp in the UK – An Explanation* 17 September 2018, available at <<https://drive.google.com/file/d/1h0iswtPoGeKW3nJqwketYsXBsFKn4aG5/view>> (accessed 9 Aug. 2023)

¹⁵⁰ *BTI 2014 LLC (Apellant) v Sequana SA and others (Respondents)* [2022] UKSVC 25. See also introduction above.

¹⁵¹ See Andrew Keay, *Having regard for stakeholders in practising enlightened shareholder value* 19(1) Oxford University Commonwealth Law Journal 118, 144, 155 (2019).

¹⁵² See part 5.2 above.

¹⁵³ Andrew Keay, n. 151; see also part 5.3 above.

¹⁵⁴ See B Lab, n. 179, para 3.13.

¹⁵⁵ Companies Act 2006 (UK) section 170(1):

The general duties specified in sections 171 to 177 are owed by a director of a company to the company.

¹⁵⁶ *Ibid.* para 3.16.

¹⁵⁷ See Twentyman & Murray, n. 15 above and the discussions around enforcement of stakeholder interests in the context of the BBA which is also aligned with section 170 of the Companies Act.

liability from multi-stakeholders.¹⁵⁸ To counter such arguments, company mechanisms can be put in place to protect directors against legal challenges and encourage good decision-making, which would prevent litigation from arising.¹⁵⁹ There could also be procedures to prevent frivolous claims, such as the procedure for bringing a derivative claim under the Companies Act¹⁶⁰ This could work on par with the use of derivative claims by shareholders on behalf of the company, which is now being explored for ESG issues, albeit without much success so far.¹⁶¹ This legal requirement does not add anything to the existing law. It could have been strengthened through the creation of enforceable stakeholder rights using the stakeholder covenants model as proposed by Chui.¹⁶²

Moreover, B Corp certification is voluntary. Companies that subscribe to certification should be prepared to face scrutiny from the stakeholders they have identified as crucial to their operations. Achieving the triple bottom line is at the heart of the B Corp. Accordingly, a duty owed to the company, shareholders, and identified stakeholders, specifically workers, community, environment, and customers, is justifiable for voluntary standards. Voluntary standards need to be compliant with the law but can go beyond the law where necessary.¹⁶³ Accordingly, a suggested approach is the use of a stakeholder due diligence framework which identifies and assesses adverse impacts on the identified stakeholders, implements a plan to address the risks of such impacts, effective monitoring by third parties and specific reports catered to stakeholders with the overall responsibility being placed on directors.¹⁶⁴ Employee ownership schemes¹⁶⁵ may also promote accountability to all stakeholders. This is especially considering evidence that businesses are choosing to become employee-owned to protect and promote the livelihoods of employees and become more sustainable and impactful for people and the environment.¹⁶⁶ Many employee-owned businesses want to be B Corp certified.¹⁶⁷

¹⁵⁸ See B Lab, n. 149 above; *Peskin v Anderson* [2001] 1 BCLC 372 [32].

¹⁵⁹ Twentyman & Murray, n. 15 above.

¹⁶⁰ See Companies Act 2006, ss 260-264.

¹⁶¹ *Ibid.* See *McGaughey v USS* [2022] EWHC 1233 (Ch); *ClientEarth v Shell Plc and others*, [2023] EWHC 1897 (Ch).

¹⁶² Iris Chiu, *Operationalising a stakeholder conception in company law* 10(4) Land and Financial Markets Review 173 (2017).

¹⁶³ K Bissinger, C Brandi et al, *Linking Voluntary Standards to Sustainable Development Goals*, International Trade Centre, available at <<https://intracen.org/resources/publications/linking-voluntary-standards-to-sustainable-development-goals>> (accessed 14 Aug 2023).

¹⁶⁴ This approach is derived from the Human Rights Due Diligence Framework. For discussions on human rights due diligence and how this could be relevant for stakeholder due diligence, see UN Digital Library, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, available at <<https://digitallibrary.un.org/record/720245?ln=en>> (accessed 14 Aug. 2023); OECD, *Due Diligence Guidance for Responsible Business conduct*, available at <<https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>> (accessed 14 Aug 2023) ; Re:Structure Lab, *Due Diligence and Transparency Legislation* available at <<https://www.restructurelab.org/the-briefs>> (accessed 9 Aug. 2023).

¹⁶⁵ Department for Business Innovation & Skills, *Moving to Employee Ownership* July 2013, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/210450/bis-13-949-moving-to-employee-ownership-guidance-on-model-documentation.pdf> (accessed 9 Aug. 2023).

¹⁶⁶ Employee Ownership Association, *What the Evidence Tells Us*, available at <<https://employeeownership.co.uk/resources/what-the-evidence-tells-us/>> (accessed 9 Aug. 2023).

¹⁶⁷ Employee Ownership Association, *why there's a growing trend of employee-owned businesses wanting to become B Corps* 12 November 2022, available at <<https://employeeownership.co.uk/news/why-theres-a-growing-trend-of-employee-owned-businesses-wanting-to-become-b-corps-eoa-big-read/>> (accessed 9 Aug 2023).

5.4.1 Role of Good Governance in Ensuring Accountability to Stakeholders

Good governance has a role to play in ensuring B Corps are accountable to stakeholders. Under current corporate governance, Boards of directors are responsible for the governance of their companies.¹⁶⁸ The definition of what this entails has changed over time. In 1992 the Cadbury report listed board responsibilities as including setting the company's strategic aims, leadership, management supervision and stewardship report to shareholders.¹⁶⁹ This is still true for the current corporate environment, but added to this is the pressure for companies to have a culture that promotes integrity and openness and caters to the needs of wider stakeholders.¹⁷⁰ In the 2018 Corporate Governance code, effective board practice involves leadership to promote the long-term sustainable success of the company; establishment of the company's purpose, values and strategy; engagement with wider stakeholders; alignment of policies and practices with values and long-term sustainable success.¹⁷¹

Certainly, in the case of B Corps, good governance should take a stakeholder-oriented view because certification requires B Corps to balance purpose and profit.¹⁷² Accordingly, good governance in such companies would include linking social and environmental performance to bonuses and other incentives, employee share ownerships, payment of living wages, employee satisfaction and engagement surveys.¹⁷³ These are measures non-B Corps companies are also taking, albeit without much direction, and so it may be said that this aspect of good governance is the same for all companies that recognise society's shifted view on good corporate governance.¹⁷⁴

In addition to adopting a due diligence approach and other measures discussed so far, Large B Corps could embed workforce engagement processes using the engagement tools already in place under Provision 5 of the Corporate Governance Code.¹⁷⁵ Research shows the uptake of the provision among listed companies is low, with many companies downplaying the

¹⁶⁸ Financial Reporting Council, *Report Of The Committee On The Financial Aspects of Corporate Governance*, available at <[https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-\(the-Cadbury-Code\).pdf](https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-(the-Cadbury-Code).pdf)> (accessed 14 Aug 2023).

¹⁶⁹ *Ibid.*

¹⁷⁰ Financial Reporting Council, *The UK Corporate Governance Code*, available at <<https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf>> (accessed 20 July 2023).

¹⁷¹ *Ibid.*, 4.

¹⁷² B Lab, *About B Lab*, available at <<https://www.bcorporation.net/en-us/movement/about-b-lab/>> (accessed 20 July 2023).

¹⁷³ Mark Odegard, *Build a Better Business – Governance*, available at <<https://measurepnw.com/blog/build-a-better-business-governance>> (accessed 10 Aug. 2023).

¹⁷⁴ Estelle Clark, *Supporting statement from the Chartered Quality Institute, The 2017 Good Governance Report: The great governance debate continued*, available at <<https://www.iod.com/app/uploads/2022/02/GGI-report-2017-IoD-dcd305b675293c1f0d04f0a37521cbc2.pdf>>; Estelle Clark, *Employment practices are a key plank of good corporate governance*, available at <<https://www.peoplemanagement.co.uk/article/1741820/employment-practices-key-corporate-governance>> (accessed 20 July 2023).

¹⁷⁵ Financial Reporting Council, n. 170; Katarzyna Chalaczkiwicz-Ladna, Irene-marie Esser and Iain MacNeil, *The Workforce Engagement Mechanisms in the UK: A Way Towards More Sustainable Companies? (Part 2)*, 2, available at <<https://ssrn.com/abstract=4296944>> (accessed 10 Aug. 2023).

importance of workforce engagement.¹⁷⁶ B Corps should also pay attention to addressing the issues raised in the preliminary consultation on the evolving standards.¹⁷⁷ These included governance issues pertaining to stakeholder considerations, impact and risk assessment, compensation, stakeholder governance, finance and reporting requirements.¹⁷⁸ The feedback received raised questions such as whether stakeholder consideration in decision making is attainable; how to identify relevant stakeholders; whether the purpose clause is achievable.¹⁷⁹ useful for advancing stakeholder governance.¹⁸⁰ A careful attention and appropriate response to such issues would be useful for advancing stakeholder governance.

5.5 Impact Report

The legal requirement that B Corps should circulate an impact report to shareholders can increase corporate transparency and accountability.¹⁸¹ It, therefore, has the potential to advance stakeholder governance. However, the reporting requirement should be changed to ensure circulation to key stakeholders and investors and published on the company website. This change appears to align with correspondence on the B Corp website.¹⁸²

Small and medium companies, which comprise the bulk of private businesses in the UK, do not currently have ESG reporting requirements. They are exempt from including a section 172(1) statement on how they have performed their section 172 duty.¹⁸³ The requirement that all B Corps, irrespective of size, should prepare an impact report is ahead of its time. However, clear guidelines or expectations need to be set for companies. In Europe, a new Corporate Sustainability Reporting Directive will apply to small and medium-sized listed companies from January 2026 with the option to opt-out till 2029 when reporting is required.¹⁸⁴ The directive provides such companies with clear guidelines on what needs to be reported.¹⁸⁵ Standards organisations like the International Sustainability Standards Board¹⁸⁶ have frameworks that are

¹⁷⁶ Chris Rees, Patrick Brione, *Workforce Engagement and the UK Corporate Governance Code: A Review of Company Reporting and Practice*, available at <https://www.frc.org.uk/getattachment/56bdd5ed-3b2d-4a6f-a62b-979910a90a10/FRC-Workforce-Engagement-Report_May-2021.pdf> (accessed 14 Aug 2023).

¹⁷⁷ B Lab, n. 128 above, 25-61.

¹⁷⁸ *Ibid.* 27-28.

¹⁷⁹ *Ibid.* 27-28.

¹⁸⁰ *Ibid.*

¹⁸¹ B Lab, n. 136 above.

¹⁸² See B Lab, *After you Certify*, available at <<https://bcorporation.uk/b-corp-certification/how-to-certify-as-a-b-corp/after-you-certify/>> (14 Aug 2023); See also B Lab, *Writing a B Corp Impact Report: A guide for B Corps by B Lab UK*, available at <[https://pardot.bcorporation.net/1/39792/2019-11-19/95x7d4/39792/223829/Writing an Annual Impact Report by B Lab UK.pdf](https://pardot.bcorporation.net/1/39792/2019-11-19/95x7d4/39792/223829/Writing%20an%20Annual%20Impact%20Report%20by%20B%20Lab%20UK.pdf)> (accessed 14 Aug 2023).

¹⁸³ Companies Act 2006 (UK), s 414C(1).

¹⁸⁴ European Union, *Directive of the European Parliament and of the Council amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting*, available at <<https://data.consilium.europa.eu/doc/document/PE-35-2022-INIT/en/pdf>> (accessed 26 July 2023); KPMG, *Corporate Sustainability Reporting Directive: Get ready for the next wave of ESG reporting*, available at <<https://kpmg.com/uk/en/home/insights/2023/01/corporate-sustainability-reporting-directive.html>> (accessed 14 Aug 2023).

¹⁸⁵ European Union, *Directive of the European Parliament and of the Council amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting*, Article 29c.

¹⁸⁶ *Ibid.*, para 43. See also IFRS Foundation, *International Sustainability Standards Board*, available at <<https://www.ifrs.org/groups/international-sustainability-standards-board/>> accessed (27 Oct 2023).

aligned with the EU and useful for reporting. The B Corps could adopt such frameworks for a standardised approach to reporting, especially for SMEs. There is also the need for transparency and the need to monitor impact reports if the B Corp is to stay true to its claim that certification ensures companies maintain the highest standards of environmental and social performance.

Larger companies are currently required under statute to produce reports including a section 172(1) statement, employee engagement, energy use and carbon emission, non-financial and sustainability information statement, including climate-related financial disclosures.¹⁸⁷ However, the statutory reporting requirements are focused on shareholders.¹⁸⁸ B Lab allows companies required to prepare a strategic report to publish their impact reports in accordance with the statutory requirement applicable to strategic reports.¹⁸⁹ Strategic reports are focused on shareholders. They aim to inform shareholders and help them determine how the directors have performed their section 172 duty.¹⁹⁰ This raises the question as to whether the strategic reporting requirements under the law are geared towards stakeholder governance. Reporting has been found to promote social washing, which occurs when companies cover up negative social impacts or appear to be more socially responsible than they are.¹⁹¹ It may therefore be beneficial for the requirement to change from the alignment with strategic reports to reporting focused on stakeholder governance reporting.

On a practical note, the transparency and rigour of the impact reports need to be improved. A review of the B Corp directory¹⁹² shows not all companies publish impact reports on their websites or reference reporting frameworks like the GRI¹⁹³, IRF¹⁹⁴ or other applicable frameworks.¹⁹⁵ Some companies simply have the B Corp logo on the website and a brief reference to impact.¹⁹⁶ There is no way of comparing impacts from previous years other than by reference to impact scores on B Lab's website, and these do not paint the full picture of

¹⁸⁷ The Companies (Miscellaneous Reporting) Regulations 2018, Part 3.

¹⁸⁸ Financial Reporting Council, *Guidance on the Strategic Report*, available at <https://www.frc.org.uk/getattachment/343656e8-d9f5-4dc3-aa8e-97507bb4f2ee/Strategic-Report-Guidance_2022.pdf> (accessed 14 Aug. 2023).

¹⁸⁹ B Lab, n. 136 above.

¹⁹⁰ Companies Act 2006 (UK), section 414C(1).

¹⁹¹ ESG the report, *What is Social Washing*, available at <<https://www.esgthereport.com/what-is-social-washing/>> (accessed 14 Aug. 2023); Financial Reporting Council, Reporting on stakeholders, decisions and section 172, available at <<https://www.frc.org.uk/getattachment/d0470ab4-f134-4584-9f54-a48a8bfdc62d/FRC-LAB-Stakeholders-Report-s172.pdf>> (accessed 2 March 2023).

¹⁹² B Lab, *Looking for a B Corp?*, available at <<https://www.bcorporation.net/en-us/find-a-b-corp/>> (accessed 14 Aug. 2023).

¹⁹³ See n. 41 above.

¹⁹⁴ Like the GRI, the IR framework measures impact of a company's activity on sustainability issues. However, it combines both financial and non-financial reporting and is focused on investors. This has led to increased criticisms. For more on the GRI framework, see footnote 41 above; See also Josua Oil and Sabrina Rommerskirchen, *What's wrong with integrated reporting? A systematic review*, 26 Sustainability Management Forum 19 (2018).

¹⁹⁵ Seismic, Impact reporting: best practice from the B Corp community, 17 February 2023, available at <<https://www.seismic-change.com/insights/impact-reporting-best-practice-from-the-b-corp-community/>> (accessed 14 Aug. 2023).

¹⁹⁶ For some examples, see Tilt, *We are Tilt*, available at <<https://wearetilt.com/about/>> (accessed 14 Aug. 2023); Context, *Sustainability in travel* available at <<https://www.contexttravel.com/content/sustainable-tourism>> (accessed 14 Aug. 2023); BetterWorldBooks, *Certified B Corp* available at <<https://www.betterworldbooks.com/go/b-corp>> (accessed 14 Aug. 2023).

impacts. Disclosure requirements are not included for all companies. No direct link from the B Lab directory connects the public to the impact reports.¹⁹⁷ This limits the accessibility of the impact reports. Where impact reports are publicly available, it is left to the public to scrutinise these reports. Scrutiny is key for the proper functioning of the B Corp movement, and improvements can be achieved using external independent third-party auditors. Beyond certification, it is important for the impact reports to be verified as accurate and to have a commonly agreed format, perhaps based on the size of the company. This may also help address the issue of social washing.

6. Conclusion

The focus on shareholder primacy, judicial discrepancies in the interpretation and application of section 172 and limited consideration of the impact of the section 172 factors have necessitated the adoption of standard-based approaches to stakeholder governance.

The B Corp standards and certification process has the potential to help companies measure progress towards their vision of getting the balance between people, planet and profit.¹⁹⁸ Its networking, sharing of best practices, and collaborative projects are creating much-needed awareness for stakeholder governance. Its reach extends to other companies not aligned with the movement that can use the BIA to measure and improve their impact.¹⁹⁹

The certified B Corp goes some way in strengthening stakeholder governance by putting the legal requirement squarely within the boundaries of section 172(2) of the Companies Act. However, the justification for this has been queried. Part five evidenced the close connection between the legal requirement and provisions under the company's act, raising questions about the ability of the legal requirement to promote stakeholder governance. This mandated an examination of the B Corp's governance to see how the claim of accountability plays out in corporate governance. B corps differ materially from other companies claiming to be accountable to all stakeholders, not just shareholders.²⁰⁰

At first glimpse, the B Corp's goal of accountability to wider stakeholders appears to remedy the criticisms against stakeholder governance highlighted in the introduction. However, the article showed that accountability to wider stakeholders does not mean the ability for wider stakeholders to pursue legitimate claims.²⁰¹ Accountability also cannot mean consideration of wider stakeholder interests without more because this will not add anything to existing law. Existing law already requires directors to consider the interests of wider stakeholders.²⁰² Accountability must mean consideration of stakeholder interests and concrete corporate practice evidencing stakeholder accountability. By adopting some of the measures listed in this article, B Corp's claim of accountability to all stakeholders would be more credible.

¹⁹⁷ See B Lab, n. 191 above where a search of UK B Corps reveals the overall B Impact Score but has no link to Impact report.

¹⁹⁸ Kin + Carta, *Building a world that works better for everyone – Annual Report and Accounts for the year ended 31 July 2021*, available at <https://s23.q4cdn.com/310765148/files/doc_financials/2021/q4/Annual-Report-2021.pdf> (accessed 14 Aug. 2023).

¹⁹⁹ B lab, n. 97.

²⁰⁰ B Lab, n. 25 above.

²⁰¹ See section 5.4 above.

²⁰² See Introduction above where the enlightened shareholder value is discussed.

With the upswell of the B Corp movement from small and medium enterprises, the B Corp has a vantage point to be a force for good and promote ‘high standards of social and environmental performance, accountability and transparency’. Yet, issues with accountability, transparency, monitoring and the lack of clear guidance mean these claims are yet to be well grounded. Despite these shortcomings, the B Corp’s growth and attempts to develop its standards and certification process are worthy of attention in exploring paradigm shifts in the future of company law.



Citation on deposit: Adeyeye, A. (in press).
Certified B Corps: An Examination of a Standard
Based Approach to Stakeholder Governance.
European Business Law Review

For final citation and metadata, visit Durham

Research Online URL: <https://durham-repository.worktribe.com/output/2763518>

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