Steering Toward “True North”: Canadian Corporate Law, Corporate Social Responsibility, and Creating Shared Value

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Recent developments in Canadian company law are stirring the legal imagination by suggesting that corporate social responsibility (“CSR”) could be integrated into mainstream governance frameworks. However, if such a transformative project is indeed underway, it remains incomplete. Landmark decisions from the Supreme Court of Canada have left more questions than answers concerning the fiduciary duties of directors. Commentators bemoan the lack of interpretive guidance from lawmakers on what it means to act in the “corporation’s best interests”, given the corporation’s recasting as a “good corporate citizen”. This article explores the cross-disciplinary potential of emerging business norms to provide such interpretive fodder. A variant of CSR, entitled “Creating Shared Value” (CSV), has had significant normative pull with companies, business academics, and policymakers alike. Emphasizing the social embeddedness of corporations, CSV suggests that a manager’s core objective is to maximize “shared value” (rather than shareholder value) by developing strategies and operations based on loci of mutual interest between the company and its stakeholders. By presenting managers with a clear objective and guidelines for balancing competing interests, CSV addresses two significant flaws in the current formulation of the fiduciary duty. The CSV norm ought to be embodied within existing corporate governance legislation, thus completing a “feedback loop”—business patterns will generate norms that breathe life into law so that law will have more instrumental vigour to regulate those business patterns. Ultimately, this could achieve more meaningful corporate sustainability patterns.

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De récents développements en droit commercial canadien ont agité le milieu juridique en suggérant que la responsabilité sociale des entreprises puisse être intégrée à leurs cadres de gouvernance. Cependant, si un tel projet est effectivement en cours, il reste incomplet. Des décisions marquantes de la Cour suprême du Canada ont créé plus de questions que de réponses quant aux obligations fiduciaires des gestionnaires. Des commentateurs-rices déplorent le manque d’orientation de la part du législateur ou de la législatrice quant à l’interprétation de ce que signifie agir « au mieux des intérêts de la société», étant donné la requalification des entreprises comme « bonnes citoyennes corporatives».Cet article explore le potentiel interdisciplinaire qu’ont les normes commerciales émergentes à constituer une telle matière interprétative. La «création de valeur partagée» (en anglais Creating Shared Value), un dérivé de la responsabilité sociale des entreprises, a reçu un soutien important d’entreprises, d’universitaires spécialisé-e-s en commerce et de décideurs et décideuses politiques. Mettant en relief l’intégration sociale des entreprises, la «création de valeur partagée» suggère que l’objectif principal du ou de la gestionnaire est de maximiser, plutôt que les dividendes des actionnaires, la «valeur partagée» en développant des stratégies et des fonctionnements basés sur les intérêts mutuels de la compagnie et des parties intéressées. En présentant aux gestionnaires un objectif clair et des lignes directrices permettant d’équilibrer des intérêts concurrents, la «création de valeur partagée» répond à deux imperfections majeures de l’articulation actuelle de l’obligation fiduciaire. La «création de valeur partagée» doit être intégrée à la législation actuelle en matière de gouvernance d’entreprise. Sera ainsi complétée une «boucle de rétroaction»—les pratiques commerciales généreront des normes qui insuffleront de la vie dans le droit de sorte que ce dernier ait des instruments plus robustes afin de réglementer ces pratiques. En définitive, cela engendrerait davantage de pratiques commerciales significatives et durables.
1. INTRODUCTION

Corporate social responsibility (CSR) among traditional corporations is evolving. It appears to be transforming from a cosmetic side-project to an entrenched priority in corporate boardrooms around the world. The question is no longer whether, but rather how companies demonstrate that they are promoting the public good. Business scholars generally agree that CSR should become a dimension of a company’s core business strategy and operations. Academics see CSR as an opportunity to gain a competitive advantage in the market, while simultaneously contributing to sustainable development. A particularly

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1 CSR is defined broadly for the purpose of this paper: “The way in which a company integrates social and environmental goals into its business operations, while still addressing shareholder and stakeholder expectations.” It will serve as an umbrella term for the remainder of the discussion. Michael Kerr, Richard Janda & Chip Pitts, Corporate Social Responsibility: A Legal Analysis (Markham: LexisNexis Canada Inc, 2009) at 5–8.

2 “Traditional corporations” include large public companies with transnational reach, including branded retailers and manufacturers of consumer products. See eg Peter Dauvergne & Jane Lister, “Big Brand Sustainability: Governance Prospects and Environmental Limits” (2012) 22:1 Global Environmental Change 36 at 37 (describing the sustainability practices of “big brand” corporations).

3 See e.g. Gareth Kane, “Sustainability hits the boardroom” (4 July 2011), Management Issues, online: <www.management-issues.com/opinion/6230/sustainability-hits-the-boardroom/>.

4 CSR can be understood as the business sector’s contribution to the broader societal goal of sustainable development, which is classically defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. See Report of the World Commission on Environment and Development: Our Common Future, UNGAOR, 42nd Sess, Annex, Agenda Item 83(e), UN Doc A/42/427 (1987) at 41.
resonant variant of this school of thought is entitled Creating Shared Value (CSV). CSV does not represent a radical departure from the latest wave of strategic CSR mentioned above. Rather, it is a manifestation of an existing theory that has been particularly well-received by both scholars and the industry. Developed by Porter and Kramer at Harvard Business School, the CSV approach encourages managers to focus on intersection points between business needs and social problems, leveraging both for mutual gain, or “shared value”, between the firm and its stakeholders. At the heart of the CSV approach is the principle that a corporation’s true purpose should be to maximize “shared value” rather than shareholder value. This is what is referred to as the CSV norm. While the operationalization of CSV is still in its early stages, evidence from academic publications, policymaking bodies, and business decision-makers suggests that it is shaping “big brand” company behaviour in Canada and around the world.

Until recently, Canadian corporate law has remained relatively passive about promoting CSR, trailing and responding to societal expectations about the business community’s social engagements, rather than anticipating them. However, there have been signs that this is changing, as evidenced by common law developments, the introduction of social enterprise legislation, and public consultations on whether the federal corporate statute should be amended to accommodate CSR. Some predict that this legal consciousness will usher in a

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7 Carol Liao, “The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise” (2013) 9:1 JSDLP 53 at 58 (“the role of corporate law in eliciting CSR practices has been a limited one, particularly in a Canadian context”); Edward Waitzer & Johnny Jaswal, “Peoples, BCE, and the Good Corporate ‘Citizen’” (2009) 47:3 Osgoode Hall LJ 439 at 463 (“the debate about imposing…social responsibility obligations through corporate law is long-standing. It is fair to say that courts and legislators have, overall, tended to follow and respond to heightened societal expectations over time”).


new wave of CSR in Canada—the arsenal of law deployed to improve corporate conduct in surrounding communities.\textsuperscript{11}

Thus, business and law are undergoing parallel developments that promise to gear corporations toward tangible, long-term contributions to social and environmental sustainability. The question remains can these business and legal developments reinforce each other? More specifically, can the CSV movement benefit from more regulation, and can regulation become more effective by engaging with CSV principles? This question merits a cross-disciplinary dialogue between businesses, legal practitioners, and academics, but the literature so far has been relatively silent, particularly in the Canadian context. This paper aims to fill the gap.

CSV has potential to clarify and reinvigorate aspects of Canadian corporate law with respect to traditional corporations. If internalized by existing legislation, CSV principles can serve as markers of a “true north” for directors fulfilling their fiduciary duties to the corporation. The argument of this article is developed in five parts. In Part II, the evolution of CSR and its current manifestation in the CSV approach are traced. At the heart of this approach is an emerging norm for responsible corporate conduct—the CSV norm. In Part III, the major relational dimensions between law and CSR are reviewed in order to contextualize the discussion of the role of corporate law in promoting CSV implementation. In Part IV, the fiduciary duty of directors to act in the company’s best interests is specifically examined. Part V applies theory to practice, and it is argued that the current Canadian formulation of this fiduciary duty opens the door to more robust CSV implementation, but falls short due to a lack of clarity. In the process, corporate law further undermines its instrumental capacity. Part VI suggests a path of law reform that embraces CSV. In particular, it is suggested that the CSV norm should play a complementary, gap-filling role in federal and provincial statutory formulations of the fiduciary duty.

This article postulates a positive feedback loop, one that reinforces itself. Business approaches generate powerful principles which shape legal reform and ultimately result in better regulation of those business approaches. Threading through the analysis is an underlying interpretation of law as an instrument of sustainable development—the faith that well-drafted law can and should play an active role in shaping sustainable corporate behaviour. Although corporate law is not the only legal channel to promote CSR, recent Canadian developments in this particular area merit a focused analysis. By conducting a general survey of the Canadian corporate landscape, this article outlines a conceptual trajectory for future research.

2. THE EVOLUTION OF CSR AND THE EMERGING CSV NORM

CSV must be understood against the backdrop of an evolving attitude towards corporate social and environmental engagement, and an evolving understanding of the corporation’s purpose in society. CSR emerged in the 1980s amid a series of industrial disasters which dealt serious blows to certain industries’ reputations as well as anti-apartheid campaigns which pressured corporations operating in South Africa to adopt voluntary codes of conduct.\textsuperscript{12} This

\textsuperscript{11} Liao, supra note 7 at 73–74.

\textsuperscript{12} For example, the 1984 Bhopal pesticide plant explosion and 1989 Exxon Valdez oil spill prompted companies to reconsider their environmental risk management systems and set voluntary environmental
trend accelerated in the early to mid-2000s, as more “big brand” corporations responded to mounting stakeholder pressure to be socially accountable for their global operations. For example, Nike implemented a dedicated CSR policy along its supply chain following leaked information about sweatshops and child labour practices.13 Similarly, Wal-Mart became a “global sustainability champion” after developing aspirational environmental goals related to waste reduction and 100% sourcing of renewable energy.14 Yet, as CSR policies were ostensibly advertised by more firms,15 they were criticized for being peripheral, uncoordinated, and cosmetic efforts, geared more towards “greenwashing” rather than achieving substantive social outcomes.16 Scholars argued that CSR, though generating positive results at times, predominantly masked rather than changed the profit-hungry nature of the corporation.17

The next wave of CSR was born out of this growing dissatisfaction and the desire to procure deeper commitments to sustainability from mainstream companies. Working in parallel, a number of scholars reconceptualised corporate engagement as a business opportunity, rather than an added expense or damage control. If CSR were integrated into a firm’s core strategy and operational process, it could be a driver of innovation, competitive advantage, and growth for the firm, while simultaneously creating lasting social impact.18 The appeal of this “strategic CSR” was its pragmatic harnessing of corporate self-interest: “If a business benefits from a CSR initiative, it is more likely to last, and its involvement may be more dynamic and innovative

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14 Dauvergne & Lister, supra note 2 at 38.
15 Porter & Kramer, “Strategy & Society”, supra note 5 at 80–81 (citing a statistic that 64% of the 250 largest multinationals published CSR reports in 2005).

too.”¹⁹ Scholars who have analyzed levels of CSR involvement by firms situate strategic CSR near the highest possible level of engagement.²⁰

Within this broader school of thought, Porter and Kramer’s CSV approach has served not only as an umbrella for related theories,²¹ but also as a more fundamental reflection on the corporation’s place in society. Their enlightened vision of the corporation is what gives CSV its normative pull and potential for cross-disciplinary uptake by law. They argue that earlier waves of CSR fell short because of a narrow, outdated interpretation of capitalism—the understanding that corporations benefit the public solely by maximizing shareholder value, to the exclusion of broader social considerations.²² Friedman famously asserted that corporations have only one responsibility, owed solely to their shareholders: to increase profits without engaging in fraud or deception.²³ CSR was compatible with “business as usual” insofar as it reduced risks, improved brand reputation, or increased profits in some other way. Additional CSR was considered a drag on the bottom line—an irresponsible use of shareholder money. CSR was inherently limited by this narrow conception.²⁴

In contrast, CSV is rooted in an acknowledged interdependence of firms and society. Companies need healthy communities for quality inputs, use of public assets, social licenses, and sustained demand. Society needs businesses for jobs, innovation, and improved living standards. CSV identifies and leverages these connections to generate shared value. For example, a company which lacks highly-skilled employees might recognize inadequacies in the local education system. Harnessing an opportunity for mutual gain, the company invests in education reform that ultimately benefits both the firm and the community.²⁵ This sort of value generation is not about redistributing wealth in the charitable sense, but rather about increasing the “total pie” of economic and social value for a broader set of stakeholders.²⁶

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²⁰ Cherry & Sneirson, supra note 16 at 1012.
²¹ Crane, supra note 6 at 133.
²² This is referred to as shareholder primacy theory (see Part IV).
²⁴ Porter & Kramer, “Creating Shared Value”, supra note 5 at 65; Cherry & Sneirson, supra note 16 at 1011–1012. A recent controversy surrounding Goldman Sachs CEO Hank Paulson’s environmental initiatives is illustrative. Paulson oversaw a gratuitous land donation of Karukinka Nature Reserve (previously acquired by Goldman Sachs using corporate assets) to the Wildlife Conservation Fund. Shareholders attacked Paulson for prioritizing personal, political and social interests over the promotion of shareholder value, which they insisted was “CEO Paulson’s primary job.” See letter from Thomas J Borelli, advisor to Free Enterprise Action Fund, to Goldman Sachs shareowners (March 21 2006), online: <www.freeenterpriseactionfund.com/GoldmanSachs_shareholder_letter_3-21-06.pdf>.
²⁵ This is what Microsoft achieved when it invested $50 million in technology, education and curriculum development at US community college IT departments. See Porter & Kramer, “Strategy & Society”, supra note 5 at 89.
Accordingly, Porter and Kramer offer a normative account of the corporation’s mandate: “The purpose of the corporation must be redefined as creating shared value, not just profit per se.”

This normative vision is followed by a practical approach for CSV operationalization. Companies create shared value by integrating social and environmental considerations into their core value proposition. CSR and “business as usual” become merged and indistinguishable. A useful example is Whole Foods Market, whose value proposition is selling responsibly sourced organic food. Social and environmental issues are fundamental to Whole Foods’ distinctive positioning among grocery retailers and the chain has commanded premium prices while promoting relevant social causes.

While not every company can build its entire value proposition around social issues (nor transition to such a model overnight), Porter nevertheless insists that all companies can integrate a CSV dimension into their strategy—whether through reconceived products and markets, enhanced supply chain capabilities, or cooperation with partners. For example, Toyota has taken a leadership role in the hybrid car industry with its Prius model, responding to automobile emission concerns while gaining a competitive advantage in a new market. Coca-Cola has partnered with the World Wildlife Fund to conserve freshwater resources, helping secure access to a key product ingredient. Recent empirical studies corroborate the link between CSV and economic value: companies that embed environmental and social policies into their core operations and strategy appear to outperform peers on both financial (e.g. stock market value) and accounting measures in the long term.

The potential applicability of CSV to a wide range of businesses helps explain why it has resonated with multinational firms, policymakers, and academics despite its recent genesis. It has been applied by Nestle, Wal-Mart, GE, Google, IBM, and Unilever, to name a few. Dedicated corporate responsibility directors and board-level CSR committees are emerging. The most recent European Union CSR policy has explicitly inserted CSV into its definition

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27 Ibid at 64.
28 “Core value proposition” refers to the firm’s unique offering in satisfaction of target customers’ needs. Ibid at 66.
30 Porter & Kramer, “Creating Shared Value”, supra note 5 at 67–75.
31 Porter & Kramer, “Strategy & Society”, supra note 5 at 88–89. Not everyone is sold on Toyota’s green motoring agenda. For example, it has been criticized for lobbying alongside other car manufacturers against tougher fuel-economy standards in the US. See The Economist, “Just Good Business”, supra note 12.
33 Robert G Eccles, Ioannis Ioannou & George Serafeim, “The Impact of Corporate Sustainability on Organizational Processes and Performance” (2012) Harvard Business School, online: <www.nber.org/papers/w17950> (finding that “High Sustainability” companies, i.e. companies with a substantial number of environmental and social policies integrated into operations or strategy for a number of years, significantly outperformed “Low Sustainability” companies over an 18 year tracking period. High Sustainability companies were long-term oriented, engaged with stakeholders, and more likely to assign responsibility to boards of directors for sustainability policies).
of corporate social responsibility. Several CEO roundtables at Davos have focused on CSV. Finally, Porter and Kramer’s 2011 article has garnered an exceptionally high number of citations, with mostly positive or neutral treatment.

Likewise, the concept appears to be gaining a foothold in Canada. In 2011, Suncor reformulated its CSR policy to focus on targeted investments in the communities where it operates: “By supporting resilience, skills development and social well-being in the communities around us, we are realizing Suncor’s opportunity…to create shared value.” Investing in surrounding communities translates into better employees and a more conducive operating environment for Suncor because the company draws on the local pool of human capital for its operations. Lululemon has vowed to “completely blur the line between what’s considered social, environmental and economic initiatives, celebrating [business approaches] that speak to all three.” Lulelemon has put this mission statement into practice by using sustainable technologies in its production processes and expanding its collaborations and partnerships to include brands, suppliers and NGOs that share its sustainability vision.

It is fair to conclude that CSV is moving the business community toward a consensus regarding the way responsible corporations ought to behave. It is emerging as a business norm among traditional corporations—a powerful principle shaping attitudes about the corporation’s function. This argument rests primarily on the potential of CSV to generate meaningful change, rather than maintain the current state of affairs.

How does law fit into this new wave of CSR? Porter and Kramer outlined a clear role for regulations that enhance shared value and help corporations set goals and spur innovation. They also cautioned that “the ways in which regulations are designed and implemented determine whether they benefit society or work against it.” Porter and Kramer’s portrayal of law as a tool for reinforcing CSR is part of an important body of research in this area. However, Part III will remind readers that the relationship between law and CSR is multidimensional—Porter and Kramer’s component is just one piece of the puzzle.

36 Crane, supra note 6 at 1133.
39 I use “norm” in the sociological sense, treating the business community as a social subset. See Cass R Sunstein, “Social Norms and Social Roles” (1996) 96:4 Colum L Rev 903 at 914 (defining norms as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done”).
40 Porter & Kramer, “Creating Shared Value”, supra note 5 at 74.
41 Ibid.
3. THE RELATIONSHIP BETWEEN LAW AND CSR

CSR is generally considered to be voluntary in nature, not subject to legal compliance.\(^\text{42}\) This begs the question: why should legal scholars pay attention to CSR at all? Apart from the trite reality that surpassing the law requires a baseline understanding of the law, observing the interactions between law and CSR matters because the two are not watertight compartments. The law informs CSR substance, implementation, and communication. By the same token, CSR shapes or even mimics hard law.\(^\text{43}\) An ongoing challenge for scholars has been to decouple precisely how corporate self-regulation interacts with mandatory domestic regulation, international law institutions, and civil society. Where are the points of exchange, in what direction, and who drives legal change on the ground?\(^\text{44}\) While a systematic analysis is beyond the scope of this paper, reviewing the well documented theories on how law intersects with CSR will help situate this paper’s forthcoming discussion of corporate law.

First, law is a rich source of norms and principles for CSR. International law on human rights, the environment, and labour, along with domestic legislation and regulation concerning workplace safety, non-discrimination and similar topics, provide substance to corporate ethics initiatives even if companies are not directly bound by international instruments.\(^\text{45}\) For example, the Global Reporting Initiative (GRI), which promotes voluntary sustainability reporting among companies and organizations, uses standards based on international conventions and declarations.\(^\text{46}\)

Second, CSR itself can play a quasi-legal role. Private codes and practices are emerging sources of legal norms.\(^\text{47}\) Businesses may be attempting to fill existing gaps in mandatory regulation by addressing issues on their own terms, perhaps in response to underdeveloped public laws.\(^\text{48}\) Alternatively, they may be seeking to influence the content of anticipated, imminent mandatory regimes.\(^\text{49}\) Regardless, voluntary initiatives often have core hallmarks of law: prescription by authoritative bodies (i.e. industry groups), effective mechanisms to


\(^{43}\) “Hard law” in this context refers to statutory, regulatory and common law rules supported by direct, legally enforceable consequences such as fines and administrative sanctions.


\(^{45}\) Buhmann, \textit{supra} note 42 at 191–193, 197. International law pertains primarily to state actors, not private non-state actors like corporations.

\(^{46}\) See GRI, “About GRI”, online: <www.globalreporting.org/information/about-gri/Pages/default.aspx>.


\(^{48}\) Porter & Kramer, “Creating Shared Value”, \textit{supra} note 5 at 74.

\(^{49}\) \textit{Ibid.}
induce compliance, and actual compliance by key actors. Some scholars have gone as far as describing particular CSR patterns as “private lawmaking” or “informal law.”

Finally, a growing number of countries and international bodies are promulgating formal laws of an instrumental nature that are meant to encourage, monitor, and enforce CSR. Regulators are effectively transforming a voluntary endeavour into a mandatory one. For example, Liao predicts that “the next significant stage in the CSR movement will be in the reformation and creation of corporate legal models that not only enable, but require, CSR concepts to be embodied within corporate governance practices.” This paper, as well as Porter’s aforementioned discussion of public regulation of CSV, focuses on this aspect of the law-CSV interface.

While it can be difficult to determine precisely when government regulation touching on aspects of CSR should be classified as regulation of CSR per se (rather than an incidental effect), the following are noteworthy: (i) mandatory reporting requirements; (ii) anti-fraud and false advertising laws; and (ii) corporate law. This list is not intended to be exhaustive. It merely illustrates spheres of public regulation attracting academic and legislative attention.

A number of jurisdictions are passing laws requiring public companies to engage in periodic non-financial reporting. For example, in 2014 the European Union Parliament and Council reached an agreement on an amendment to existing accounting legislation that will require certain large companies and financial institutions to disclose environmental, labour, human rights, diversity, and anti-corruption practices and risks. Likewise, in the United States, securities regulation has been enlisted to impose anti-bribery, due diligence, and disclosure requirements onto publically traded companies. Such laws aim to increase transparency and information provision.

False advertising and securities fraud laws in the United States have been studied for their potential as sources of remedies to “faux CSR.” Disingenuous claims of ethical corporate conduct have increasingly misled consumers and investors while tarnishing the overall legitimacy of the CSR project in the public mind. To address the problem, some scholars

50 Buhmann, supra note 42 at 191, 198–199.

51 See eg Michael P Vandenbergh, “The New Wal-Mart Effect: the Role of Private Contracting in Global Governance” (2007) 54:4 UCLA L Rev 913 (detailing how some multinationals have leveraged their contractual relationships with suppliers to “legislate” preferred labour, ethical and environmental standards along their global supply chains, thereby filling public regulatory gaps); Buhmann, supra note 42 at 190, 198 (arguing that CSR fits the definition of ‘informal law’ because it is often “not based on a sharp distinction between law and morals” and derives its validity from actual observance rather than state sanctions).

52 Liao, supra note 7 at 53.


propose expanding causes of action under false advertising and securities fraud law, and relying on the policing functions of emerging consumer financial protection regulators.  

Lastly, corporate law has attracted considerable attention from the CSR literature due to its obvious role in shaping corporate governance patterns in response to evolving social realities. Corporate law contains many promising levers for influencing CSR, including, but not limited to: statutory duties imposed on directors concerning their dealings with the corporation and stakeholders (including the fiduciary duty), enforcement mechanisms for stakeholders like the oppression remedy, anti-takeover defensive tactics, and shareholder-initiated proposals and procedural rights with respect to ethical corporate conduct.

This paper concentrates on the fiduciary duty of directors to act in the company’s best interests. The justification for this focus is two-fold. First, the fiduciary duty’s current formulation in Canadian corporate legislation and jurisprudence is relatively vague and open-ended. This formulation lends well to creative interpretation and can therefore make space for the fiduciary duty’s first dance with CSV. Second, Canadian common law is experiencing flux following recent judicial pronouncements regarding directors’ statutory duties and discretion. Amid mounting confusion emerges an opportunity to articulate a more deliberate and committed role for the fiduciary duty in promoting CSV operationalization. This aspect of corporate governance is therefore ripe for analysis.

4. CSV AND THE DIRECTOR’S FIDUCIARY DUTY IN THEORY

CSV has helped elevate social goals to the strategic level, making them a growing aspect of managerial decision-making. Social issues are meant to inform how company leaders set core objectives, implement them, and for whose benefit. This involves law in a very direct way: it triggers corporate governance regulation.

55 See Cherry & Sneirson, supra note 16 (analyzing how false advertising remedies, securities fraud claims, and the newly established Bureau of Consumer Financial Protection under the US Dodd-Frank Act can be applied to address the problem of empty and false CSR claims); Rachel Cherington, “Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10B-5” (2004) 25:4 U Pa J Intl L 1439 at 1441 (arguing for expanded use of antifraud rules in the Securities Exchange Act to hold transnational corporations accountable for false or misleading statements regarding their overseas operations).

56 Note that there is a degree of tension between corporate law and securities law as far as director duties in the takeover bid context. BCE emphasized that the best interests of the corporation may not be limited to shareholders alone. Meanwhile, takeover bid securities regulation asks directors to place the bona fide interests of target company shareholders above all others. David L Johnston, Kathleen Doyle Rockwell & Cristie Ford, Canadian Securities Regulation, 5th ed (Markham: LexisNexis Canada, 2014) at 387, 420.

57 See generally Waitzer & Jaswal, supra note 7 (canvassing various Canadian corporate law theories and mechanisms to promote a more clear and expansive interpretation of directors’ statutory duties and discretion following BCE).


59 Crane, supra note 6 at 133.

60 VanDuzer defines corporate governance as the “framework of practices and rules through which a corporation is administered and controlled”. J Anthony VanDuzer, The Law of Partnerships and Corporations, 3d ed (Toronto: Irwin Law, 2009) at 519.
Corporate law imposes a number of duties on directors and officers, among them a fiduciary duty to manage the company "with a view to the best interests of the corporation."61 Directors who do not prioritize the company’s interests may be held accountable for breaching this duty.62 Since the corporation is a legal fiction, implementing this abstract obligation in practice involves asking where the interests of the corporation actually lie.

Historically, common law jurisdictions have aligned the best interests of the corporation with those of equity security holders.63 This so-called “shareholder primacy model” postulates that a manager’s primary objective as a fiduciary is to maximize shareholder wealth.64 Other stakeholders (employees, creditors, suppliers, consumers, governments and the environment) are expected to rely on contractual and regulatory means, rather than participating in corporate governance, to safeguard their interests.65 Scholars continue to debate the extent to which shareholder primacy is institutionalized by modern company law.66 Nevertheless, managers seem to have a deep-rooted perception that their sole legal duty is to maximize shareholder profits, a perception that law has yet to overcome.67

Shareholder primacy may have a chilling effect on CSV implementation. CSV asks directors to align their company’s core strategy with social betterment. Rather than focusing exclusively on shareholders, directors must consider a broader set of stakeholders with a view to

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61 Canada Business Corporations Act, RSC 1985, c C-44, s 122(1)(a) [CBCA]. The fiduciary duty is a general standard of behaviour imposed on management with respect to its dealings with the corporation. Acting in the corporation’s best interest is one facet of that standard.

62 For example, the CBCA grants a statutory derivative action and oppression remedy for violations of the fiduciary duty. While the CBCA does not prohibit non-shareholder groups from using these remedies, courts have been reluctant to grant standing to anyone other than shareholders. See VanDuzer, supra note 60 at 411.


65 Liao, supra note 7 at 59.

66 See eg Stephen M Bainbridge, “In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green” (1993) 50:4 Wash & Lee L Rev 1423 at 1425; Judd F Sneider, “Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance” (2009) 94:3 Iowa L Rev 987 (arguing that US corporate law does not actually mandate shareholder profit-maximization; this is just a common myth); Michael Marin, “Disembedding Corporate Governance: The Crisis of Shareholder Primacy in the UK and Canada” (2013) 39:1 Queen’s LJ 223 at 244-245 (arguing that the Canadian corporate law framework entrenches shareholder primacy, despite recent common law overtures to stakeholders).

67 Lawrence E Mitchell, “A Critical Look at Corporate Governance” (1992) 45:5 Vand L Rev 1263 at 1288 (“[d]irectors seem to believe that their legal duty is to the stockholders’”; Sneider, supra note 66 at 1011 (“whether or not the law or the market actually requires managers to maximize shareholder wealth, social norms might induce them to do so […] because they believe—rightly or wrongly that is what the law requires.”).
For example, the highly-publicized Delaware case eBay v Newark scrutinized various anti-takeover measures initiated by craigslist to protect its community-focused culture from minority shareholder eBay. Former Chancellor Chandler ordered rescission of some of the measures, giving the following explanation: “Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.” eBay exemplifies a version of corporate law where shareholder profit-maximization is a non-derogable obligation for directors. Even in jurisdictions with less rigid laws and more robust business judgement rules (i.e. judicial deference to reasonable business decisions), socially-minded directors may feel uncertain about drifting from the “safe zone” of maximizing financial returns. Sneirson observes that shareholder primacy “lies at the heart of the conventional law-and-economics-laced view of corporate governance, thus imposing a formidable obstacle to corporations wishing to become more sustainable.” This is the sort of regulation that Porter described as working against society.

Fortunately, the law is capable of a broader definition of “best interests of the corporation.” For example, stakeholder theory postulates that companies are social institutions and therefore have responsibilities not just to their shareholders, but to a broader constituency. Managers should consider the interests of any groups or individuals who are affected by or may affect the

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68 Arguably, CSV is compatible with shareholder wealth maximization because it results in mutual value for shareholders and non-shareholder constituents alike, without trade-offs. While this may be true in the long term, shareholder primacy (in its conservative form) may pressure directors to prioritize short term returns and eschew dedicated pursuit of other interests.

69 eBay Domestic Holdings Inc v Newmark, 16 A(3d) 1 (Del Ct Ch 2010) [eBay].

70 Craigslist’s directors feared that a takeover by eBay would mean “departing from [craigslist’s] public-service mission in favour of increased monetization.” Ibid at para 10.

71 Ibid at para 11. The court noted that the adoption of a stockholder Rights Plan was not rationally connected to shareholder wealth maximization, and criticized craigslist’s directors for failing to establish how the company’s community-oriented culture increased stockholder profits.


73 Clark & Babson, supra note 72 at 835–837 (focusing specifically on mission-driven companies, but generally relevant to CSV-oriented corporations).

74 Sneirson, supra note 66 at 989.

75 Sunstein, supra note 39 at 915.

76 This idea can be traced back to E Merrick Dodd, who famously clashed with Adolf Berle in the 1930s, see E Merrick Dodd Jr, “For Whom are Corporate Managers Trustees?” (1932) 45:7 Harv L Rev 1145 at 1147–1148. While stakeholder theory has conceptual roots in a number of academic disciplines, much of its development is attributed to R Edward Freeman and others at the Wharton School of Business. See R Edward Freeman & John McVea, “A Stakeholder Approach to Strategic Management” in Michael
achievement of the organization's objectives, and to take a long-term managerial perspective. Stakeholder governance was most recently given legal effect in “benefit corporation” statutes in the US, which impose a fiduciary duty on directors to balance the pecuniary interests of stockholders and the interests of those affected by the corporation's conduct. In addition, separate constituency statutes in many US states explicitly allow companies to consider non-shareholder interests. By recognizing that corporations are publically-embedded and emphasizing a long term, multi-constituency perspective, stakeholder theory appears to reinforce CSV.

In sum, the fiduciary duty is one channel for law to modulate managerial behavior with respect to CSV. It defines the outer limit of which interests are legally appropriate to consider. It also reflects the broader question of a corporation's role vis-à-vis the public. The fiduciary duty is therefore a tool that helps or hurts CSV operationalization.

5. CANADIAN CORPORATE LAW AND THE FIDUCIARY DUTY IN PRACTICE

How has Canada chosen to wield the fiduciary duty as a tool? Canada's federal corporate statute contains a broadly-phrased fiduciary duty: “Every director and officer of a corporation in exercising their powers and discharging their duties shall...act honestly and in good faith with a view to the best interests of the corporation.” The legislation does not define “the best interests of the corporation” and is silent as far as stakeholders are concerned; these aspects have been left to judicial elaboration.

Historically, Canadian common law has embraced a shareholder-centric fiduciary duty. However, the recent Supreme Court of Canada (SCC) case BCE Inc v 1976 Debentureholders has overtly departed from shareholder primacy and arguably embraced elements of stakeholder theory, even if the Court did not explicitly refer to the theory in the decision. BCE affirms and builds on an earlier case, Peoples Department Stores Inc (Trustee of) v Wise. This section focuses on BCE not only because the judgment contains the SCC's most recent interpretation


Ibid.

See e.g. Del Code Ann tit 8 § 365(a) (2013), online: <delcode.delaware.gov/title8/c001/sc15/index.shtml>. Benefit corporation statutes have been adopted in a number of US jurisdictions including Delaware. They are a hybrid corporate form allowing socially-minded enterprises to pursue an explicit public benefit mandate while generating profits. So far, mainstream corporations have not made much use of the form. See Alicia E Plerhoples, “Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?” (2014) 14:2 UC Davis Business LJ 247.

Ibid at 251 (constituency statutes arose in the 1980s to protect companies in the hostile takeover context).

CBCA, supra note 61. Provincial company acts are analogous.

The Dickerson Committee, which produced the CBCA in the 1970s, consciously declined to offer interpretive guidance for the phrase “in the best interests of the corporation.” The Committee left this task to the judiciary in the hopes that its formulation would position courts to escape the constraints of the “anachronistic” focus that developed in English law on shareholder primacy. Waitzer & Jaswal, supra note 7 at 441.

VanDuzer, supra note 60 at 343–344.

Peoples, supra note 8.
of the fiduciary duty, but also because it introduces the unique concept of “good corporate
citizenship” discussed below.84

While BCE was decided in the particular context of a change-of-control transaction, the
ruling has general relevance for directors’ accountability and fiduciary duties to stakeholders.85
The case involved a plan of arrangement contested by a group of debentureholders on the
grounds that it was oppressive and in breach of management’s fiduciary duty to them. The
SCC explained that the fiduciary duty is a “broad, contextual concept. It is not confined
to short term profit or share value. Where the corporation is an ongoing concern, it looks
to the long-term interests of the corporation.”86 The Court added, “In considering what
is in the best interests of the corporation, directors may look to the interests of, inter alia,
shareholders, employees, creditors, consumers, governments, and the environment to inform
their decision.”87 Lastly, the SCC implied that corporations may have a socially-oriented
component when it described directors as acting in the best interests of the corporation as a
“good corporate citizen” or “responsible corporate citizen”—language not previously used by
the Court to describe corporations.88

It is not clear to what extent the SCC had CSR, stakeholder theory, or CSV in mind when
handing down its decision. Scholars can only speculate. However, the practical result of BCE
is that it has revealed cracks in the notion of shareholder primacy. By recognizing emerging
notions and interests beyond shareholder primacy, the SCC reinforced CSR implementation
in Canada, whether intentionally or not. It challenged the perception that directors ought
to focus exclusively on shareholder interests and financial returns,89 freeing management to
pursue CSV more rigorously. Furthermore, the BCE language of “good corporate citizenship”
acknowledged emerging social attitudes about the public embeddedness of corporations—the
underlying premise of CSV. Some scholars propose that Canada is on the cusp of a fundamental
transformation: “The indications from the SCC suggest that Canada is poised to transform its
corporate law to embrace a stakeholder approach to governance that may permit, and one day
even require some form of CSR.”90

However, while the SCC decision represented a progressive view, it was not without
fault. Two particular criticisms have been levied against BCE. First, it gave little practical

84 Jeffrey Bone, “The Supreme Court Revisiting Corporate Accountability: BCE Inc in search of a legal
construct known as the ‘Good Corporate Citizen’,” online: Alta L RevOnline Supplement <www.
85 Ibid.
86 BCE, supra note 8 at para 38.
87 Ibid at para 40.
88 Ibid at paras 66, 81–82.
89 Liao, supra note 7 at 57–58. It should be noted that the SCC may not have been cognizant of CSV as
a particular concept at the time of deciding BCE. This paper points out analogies between the Court’s
commentary and CSV, without drawing any conclusions as to whether the SCC had CSV, or any
particular variant of CSR, in mind.
90 Ibid at 73. Contra Marin, supra note 66 at 243–245. Marin argues that BCE has done little in practice to
displace shareholder primacy. The overall legal framework still favours shareholders—they elect directors
and are generally the only ones with standing to discipline them. In takeover bids, securities law continues
to favour target shareholder interests.
guidance to directors in prioritizing and balancing stakeholder interests beyond the need to treat all stakeholders fairly and in accordance with their “reasonable expectations.” In cases of conflicting interests, the court merely indicated that there are no absolute rules and that everything depends on the circumstances. Fadel noted that in the wake of BCE, “the Canadian corporate law of directors’ duties has become beset by uncertainty, incoherence and confused rhetoric with respect to one of the most basic issues of corporate law: how to reconcile the competing interests of shareholder and non-shareholder corporate stakeholders.” Waitzer and Jaswal added that, “[e]ven the questions of whether directors may consider, should consider, or are obliged to consider stakeholder interests, and, if so, at what point, were not addressed clearly by the Court.” Evidently, directors need more operational guidance on how to prioritize interests and toward what goal.

Secondly, the court’s call on corporations to be “good corporate citizens” was not fleshed out with any substantive legal analysis. The reference introduced “conspicuous ambiguity” at the conceptual level and compounded directors’ confusion about what is practically expected of them. While the phrase has been linked to the concept of CSR, scholars debate whether the court actually intended to impose precise legal obligations as opposed to merely setting a broader policy context. Commentators lament the lack of legislative norms to aid in the interpretive task. As the next section will argue, a promising source of such legislative norms may lie with CSV.

91 BCE, supra note 8 at paras 64, 72, 81–82.
92 Ibid at 84.
93 Fadel, supra note 58.
94 Waitzer & Jaswal, supra note 7 at 461 (suggesting that BCE has granted directors more deference in resolving conflicting interests, as long as they do so fairly and in the corporation’s best interests. This effectively expands the scope of the business judgement rule beyond negligence, without a clearly stated legal rationale).
95 Ibid at 439; Edward Iacobucci, “Indeterminacy and the Canadian Supreme Court’s Approach to Corporate Fiduciary Duties” (2009) 48 Can Bus LJ 232 at 241. Benefit corporation statutes have been similarly criticized for failing to give directors clear corporate priorities and objectives when balancing stakeholder interests. Murray, supra note 72 at 29.
96 Anita Anand, “Backing the BCE Board” (19 December 2008), University of Toronto Law School Faculty Blog (blog), online: <www.law.utoronto.ca/blog/faculty/backing-bce-board>.
97 Kerr, Janda & Pitts, supra note 1 at 22.
98 Sarah P Bradley, “BCE Inc. v. 1976 Debentureholders: The New Fiduciary Duties of Fair Treatment, Statutory Compliance and Good Corporate Citizenship?” (2010) 41:2 Ottawa L Rev 325 at 345 (“since corporations are not, in fact, citizens, and assessments of ‘goodness’ are not usually the subject of judicial determination, it would appear that the Court is attempting to suggest a contextual social standard, rather than a legally precise one”); Bone, supra note 84 at paras 41, 45 (arguing that BCE’s reference to “good corporate citizenship” may represent a new standard authorizing directors to consider non-financial interests, even if the immediate judgement has not imposed hard legal obligations).
99 Waitzer & Jaswal, supra note 7 at 441.
Canadian courts have opened up space for more dedicated CSR efforts, but leave two questions unanswered: (1) what directors should do when stakeholder interests conflict; and (2) what “good corporate citizenship” means in practice? The CSV norm emerging in business literature suggests answers to both questions. It ought to be given legal form in the corporate governance regime, as subsection (3) will elaborate.

6.1. Prioritization of Stakeholder Interests

A good sustainability policy needs to know when, and why, to say “no” as well as “yes” to stakeholders’ innumerable demands. If you don’t know your magnetic north, then the compass is useless. – Bjorn Stigson, President, World Business Council for Sustainable Development.

Porter and Kramer were clear on how business managers ought to choose between socially-desirable outcomes: “The essential test that should guide CSR is not whether a cause is worthy, but whether it presents an opportunity to create shared value.” This is the litmus test for determining which non-shareholder interests to pursue and which to forgo. Companies cannot solve all problems. Rather, they should prioritize issues that are compatible with their business needs and therefore generate mutual gains. This prioritization becomes more important as CSR rises to a strategic level—that is, when a company marries its value proposition to social and environmental concerns. The company’s best interests are those that optimize shared value.

Granted, business cannot always be run in a way that pleases all parties—shared value is merely “the best case scenario.” What happens in times of real conflict, when a manager has to make a difficult decision between short-term economic drivers and long-term social drivers? This is a challenge worth recognizing. However, the key argument offered in support of CSV is that it is a powerful evolutionary catalyst for businesses seeking new ways to stand out from rivals in an increasingly competitive market. CSV is influencing how mainstream businesses evolve over time and how they choose their core value proposition. This paper therefore takes a long-term perspective, while acknowledging the short-term challenges of integrating CSV.

The reason Porter’s approach of generating shared value improves on the Canadian legal formulation of a company’s “best interests” is that it gives directors a clearer end-goal in situations where stakeholder interests conflict: to maximize shared value. The CSV norm acts as the “magnetic north” that orients directors and helps them choose between alternative paths of action, where possible. Indeed, one of the reasons shareholder primacy has had such

100 Paul Kielstra, Doing Good: Business and the Sustainability Challenge (The Economist Intelligence Unit, 2008) at 6, online: <graphics.eiu.com/upload/Sustainability_allspoonf.pdf>.


102 A highly influential variant of this “single objective” approach is Jensen’s “enlightened stakeholder theory.” Starting from the proposition that directors can only make purposeful decisions with one objective in mind, he identifies long-term value maximization of the firm as the end-goal, which cannot be accomplished by ignoring stakeholder interests. CSV is analogous to enlightened stakeholder theory; however, rather than treating stakeholder welfare improvement as a means to a purely economic end, CSV shifts the mentality of company directors by encouraging them to treat shared value maximization as an end in itself. See Michael C Jensen, “Value Maximization, Stakeholder Theory, and the Corporate Objective Function” (2001) 7:3 European Financial Management 297.
enduring appeal in common law countries is that it gives directors a singular objective (i.e. profit maximization). CSV recognizes that such a single-faceted goal is increasingly outdated given the demands of informed modern-day consumers, who reward firms that prioritize meaningful social contributions. CSV sets a more ambitious agenda for managers—finding commonalities between firms and communities as they plan the long-term trajectory of their firms.

At this point an important counter-argument should be addressed. Not all scholars are convinced that CSV offers a truly enlightened alternative to profit-maximization. Despite promising to “redefine the purpose of the firm,” Porter and Kramer simply present new operational methods and products that allow the firm to gain a competitive advantage and ultimately generate wealth. Addressing social problems is just a means to the same old goal of economic value generation for the firm and its owners. Ironically, this critique would imply that CSV may actually fare better under a shareholder primacy model than a stakeholder model.

While the criticism has merit, it appears to conflate the typical measuring unit of shared value (economic) with its beneficiaries. In the shareholder primacy model, managers seek to benefit shareholders alone. In CSV, managers seek to benefit broader constituencies that in turn play a role in the company’s long-term success. Such benefits may be measured in monetary terms (i.e. higher wages for supply-chain employees), but they arguably move the corporation away from the prevailing self-centered mindset.

6.2. Defining “Good Corporate Citizenship” in Practice

CSV also sheds light on the meaning of “good corporate citizenship.” As Part II suggested, the business community is approaching a consensus that responsible corporate citizenship is a definable, workable concept as encapsulated by CSV. It involves rethinking products and markets, redefining productivity along the supply chain, and building local industry clusters, all in furtherance of shared value. Given its conceptual depth, CSV is a promising candidate for the role of “legislative norm” that scholars have asked for in response to the confusion surrounding the BCE decision (see Part V). In particular, CSV could help interpret the vague BCE language of “responsible corporate citizenship.”

Moreover, CSV answers a deeper question—why should corporations be expected to act as good corporate citizens to begin with? Canadian courts have not offered a direct response to this question thus far. CSV does. It posits that the interdependence of business and society inevitably makes companies quasi-public institutions with social obligations.

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103 Murray, supra note 72 at 28. This may explain why UK corporate law continues to prescribe profit-maximization as the company’s purpose. Directors must ultimately “promote the success of the company for the benefit of its members [i.e. shareholders] as a whole” even if they consider various stakeholder interests along the way, see Companies Act 2006 (UK), c 46, s 172(1), online: <www.legislation.gov.uk/ukpga/2006/46/section/172>. The problem with this view is that it continues to have one set of beneficiaries in mind. CSV seeks to simultaneously benefit the company as well as non-shareholder constituents.

104 See eg Crane, supra note 6 at 141.

105 Ibid at 142–143.

106 Waitzer & Jaswal, supra note 7 at 441.
In sum, by addressing two loose ends in Canadian corporate law theory with respect to the fiduciary duty of directors, CSV can make important cross-disciplinary contributions to the law. It can clarify where a corporation’s best interests lie and build on promising reforms already undertaken by the Supreme Court of Canada. It can prepare the corporate regime to take a more active role in the operationalization of CSV. The feedback loop—from business approaches, which generate relevant principles, to legal regulation of those business approaches—is complete.

6.3. Embedding the CSV Norm—Paths of Law Reform

The final question is how the CSV norm ought to be embedded in corporate law for optimal effect. A comprehensive law reform proposal is beyond the scope of this paper, but my recommendation is to focus on federal and provincial corporate legislation for the following reasons.

A high-level Canada Business Corporations Act (“CBCA”) amendment offers efficiency advantages because it can send a uniform, nation-wide message within the context of a familiar statute. Moreover, MacIntosh has expressed the view that “only legislative intervention can […] adequately address the difficulties that [Peoples and BCE] have created.”107 It is unlikely that this area of law will be re-litigated before the SCC anytime soon. Even if it is, the Court may decline to reverse or clarify its current stance.108 Given the Court’s reluctance to take a definitive stance on the nature of the fiduciary duty, it may be time to consider statutory intervention.

Coincidentally, the Canadian federal government has recently completed a round of consultations on amendments to the CBCA, including possible reforms to accommodate CSR.109 This is an opportune moment for legislators to consider embracing the CSV norm. As a start, the following provision could be a useful and measured addition to the CBCA:

The phrase “the corporation’s best interests” in section 122(1)(a) should be interpreted in light of a corporation’s purpose, namely, to maximize long-term shared value for the business and its stakeholders.110

The definition of “stakeholders” could be borrowed from existing literature on stakeholder management theory (e.g. employees, creditors, suppliers, consumers, governments and the environment). Since the CBCA and its provincial counterparts oversee a wide variety of business organizations, the definition must be general enough to give directors flexibility to manage their unique enterprises. It is acknowledged that the Ontario legislature amended the Business Corporations Act (Ontario) in 2006 to clarify that directors and officers owe their

107 Jeffrey G MacIntosh, “BCE and the Peoples’ Corporate Law: Learning to Live on Quicksand” (2009) 48:2 Can Bus LJ 255 at 255 (note that MacIntosh argued for a legislative declaration that directors duties’ are owed solely to shareholders—a reversion to the shareholder primacy model).

108 Ibid at 272.

109 Industry Canada, supra note 10.

110 The current EU CSR Policy provides a useful analogy. Part 3 (“A modern understanding of CSR”) says “enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of maximising the creation of shared value.” EU CSR Policy, supra note 35 at 3.1 [emphasis added].
fiduciary obligations exclusively to the corporation, making it more difficult to argue that the duty is owed to any other persons. However, those amendments took place before the BCE decision, whose after-effects may prompt future legislators to take a different direction. 111

Some have proposed housing CSV in a separate, purpose-built statute, similar to existing social enterprise statutes (i.e. “hybrid legislation”), which have given socially-minded entrepreneurs the flexibility of an alternative legal form.112 However, the problem is that such hybrid statutes pose the risk of creating a false dichotomy between “good corporations” and “regular” corporations.113 A dual system could send the message that non-CSV corporations do not need to be as socially and environmentally engaged as CSV corporations. Such a message may be unhelpful and outdated in light of changing perceptions about the public role of all corporations. Hence, amending the CBCA and provincial business acts may be more reflective of evolving realities.

A lingering question remains: to what extent can traditional state legislation like the CBCA regulate CSR among modern corporations, many of which are multinationals operating complex supply chains around the world?114 For example, even if Lululemon makes a bona fide effort to implement CSV along its value chain, what is to ensure that suppliers abroad comply with its policies? First, further regulation can be adopted in order to ensure that suppliers along a company’s value chain follow the CSV policies introduced. Second, it is important to keep in mind that a domestic regulation is part of a “larger coordinative mechanism” between state law, international treaties, “soft law” policies, and voluntary self-regulation, all of which can be harnessed simultaneously in furtherance of corporate sustainability. Therefore, national corporate law has a tangible role to play in promoting CSR.115

7. CONCLUSION

The Canadian corporate governance regime has a new vision for law in promoting CSR—the notion that law may be enlisted to strengthen current voluntary measures undertaken by


112 Commentators have not indicated that existing hybrid statutes are appropriate for traditional corporations. See eg Liao, supra note 7 at 75–85 (associating hybrid corporate forms with social enterprises rather than mainstream for-profit companies); Plerhoples, supra note 78 at 267–271 (finding that many companies currently registered under Delaware which benefit from corporation statute are new entities that could have registered as not-for-profits instead).


114 Waitzer & Jaswal, supra note 7 at 443 (“globalization has eroded the power of states to regulate large, multinational corporations”); Crane, supra note 6 at 140 (multinational companies may face challenges in ensuring compliance with CSR policies along their value chains due to weak legal regimes in host countries and supplier cheating).

115 Liao, supra note 7 at 63 (situating corporate law within a larger, dynamic social and regulatory context, but arguing that understanding the finer aspects of the law dealing with stakeholder interests, corporate purpose and director’s duties is “fundamental and imperative for achieving greater sustainable development”).
corporations. However, this vision remains blurry. To focus it, legislators should borrow a powerful idea emerging in the business community: Creating Shared Value. By providing both a practical framework and a normative view of a corporation’s purpose, CSV can fill important conceptual gaps in areas such as the fiduciary duty of directors to act in the company’s best interests.

The migration of CSV towards law is part of a broader feedback loop: business giving rise to influential norms that invigorate the law so that the law can serve as a stronger framework for business. Corporations, policymakers, and business academics are recognizing shared value generation as a marker of “true North” for sustainable twenty-first century businesses, where corporations should orient their operations toward shared value creation. The operationalization of this norm would benefit from a supportive legal regime. This paper suggests that Canada’s legal regime can become more supportive by internalizing the very phenomenon it seeks to regulate: CSV.

Some wonder if the CSR evolution actually needs law in order to continue. If companies are already forging ahead with voluntary CSV initiatives, what need is there for formal regulation? The response depends on our faith in law’s instrumental capacity. Law can facilitate and even accelerate change; it can play a transformational role in corporate social responsibility.116 Kent Greenfield has said in a seminal article, “It is foolish and inefficient as a matter of public policy to leave corporate law as an untapped resource.”117 Business leaders already recognize the potential of law to help them achieve sustainability goals.118 It is time that law realized its own potential.

116 Liao, supra note 7 at 73–74.
118 40% of global executives surveyed believe that additional regulation is necessary if society wants to reduce the impact of business in social and environmental areas. This attitude extends to North American managers, typically the most averse to regulation. See Kielstra, supra note 100 at 39.