

Indigenous Economic Development and Sustainability: Maintaining the Integrity of Indigenous Culture in Corporate Governance

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Economic development provides a pathway for Indigenous peoples to become self-sustaining. Yet, constraints in current Canadian laws and legislation impact the ability of Indigenous Nations to create and develop sustainable economies on their own terms. Consequently, alleviating the poverty and economic disadvantage plaguing Indigenous communities in Canada, while preserving Indigenous culture, requires some creativity. One solution is to integrate Indigenous economies into the “mainstream economy.” However, the Supreme Court of Canada has ruled that when Indigenous peoples participate in the mainstream economy, they do so on the same terms as non-Indigenous peoples. This approach results in the danger that an Indigenous Nation’s cultural and traditional values — that which makes them a Nation — are at risk of being compromised in the course of doing “mainstream” business. While various contemporary forms of asset governance, including non-profit or corporate structures, may assist in advancing Indigenous economies, an unconventional hybrid structure may more closely align with the ambitions of Indigenous communities seeking to merge business enterprise with social purpose and the communal values inherent to many Indigenous cultures. This article first discusses the various corporate structures available to Bands in Canada then critiques the newly available hybrid structures for how they may or may not meet the sui generis needs of Indigenous Nations. I argue that ultimately these structures are not likely to assist in achieving the goal of economic reconciliation. Rather, Canada could take guidance from both the United States and Australia in establishing its own unique Indigenous-centric model.

Le développement économique offre aux peuples autochtones une voie qui leur permet de devenir autonomes. Cependant, les contraintes imposées par les lois et la législation du Canada ont des conséquences sur la capacité des nations autochtones à créer et à développer des économies durables à leurs propres conditions. Par conséquent, la réduction de la pauvreté et des désavantages économiques qui frappent les communautés autochtones du Canada, tout en préservant la culture autochtone, exige une certaine créativité. Une solution consiste à intégrer les économies autochtones dans l’“économie générale”. Cependant, la Cour suprême du Canada a décidé que lorsque les peuples autochtones participent à l’économie dominante, ils le font dans les mêmes conditions que les peuples non autochtones. Cette approche présente le risque que les valeurs culturelles et traditionnelles d’une nation autochtone - ce qui en fait une nation - risquent d’être compromises dans le cadre de l’activité économique “générale”. Alors que diverses formes contemporaines de gestion des actifs, notamment les structures à but non lucratif ou les structures d’entreprise, peuvent contribuer à faire progresser les économies autochtones, une structure hybride non conventionnelle peut correspondre plus étroitement aux ambitions des communautés autochtones qui cherchent à fusionner l’entreprise commerciale avec les objectifs sociaux et les valeurs communautaires inhérentes à de nombreuses cultures autochtones. Cet article examine tout d’abord les différentes structures d’entreprise disponibles pour les bandes au Canada, puis critique les nouvelles structures hybrides disponibles afin de déterminer comment elles peuvent ou ne peuvent pas répondre aux besoins sui generis des nations autochtones. Je soutiens que ces structures ne sont finalement pas susceptibles de contribuer à la réalisation de l’objectif de réconciliation économique. Le Canada pourrait plutôt s’inspirer des États-Unis et de l’Australie pour établir son propre modèle unique centré sur les autochtones.

Titre en français : Développement économique autochtone et durabilité : Maintenir l’intégrité de la culture indigène dans la gouvernance d’entreprise

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The reasonable man adapts himself to the world; the unreasonable one persists in trying to adapt the world to himself. Therefore, all progress depends upon the unreasonable man.¹

—George Bernard Shaw

1. INDIGENOUS ECONOMICS

From time immemorial, Indigenous Nations have been economically organized around self-sustaining systems of resource and community asset management, primarily through the gathering and dispersing of goods acquired through traditional economic activities.² These economic activities have been recognized under the Canadian common law system.³ Because of the diversity among Indigenous nations, including First Nations, Métis, and Inuit, across what is now Canada, Indigenous economies or governance cannot be easily generalized, except to highlight that all Indigenous societies had (and have) distinct economies and governance systems.⁴ For example, both historically and to present day, the cedar forest plays a central role in the economy and culture for the Haida people in British Columbia who constructed canoes, clothing, utensils and totem poles that guarded local lodges.⁵ Alternatively, in Eastern Canada the Mi'kmaq engaged in trade through fishing, hunting and gathering activities.⁶

¹ George Bernard Shaw, *Man and Superman* (1903) at 238, online (pdf): [Archive <ia800209.us.archive.org/31/items/mansupermancomed00shawrich/mansupermancomed00shawrich.pdf>](https://ia800209.us.archive.org/31/items/mansupermancomed00shawrich/mansupermancomed00shawrich.pdf).

² Brenda L Gunn, “Exploring the International Character of Treaties 1–11 and the Legal Consequences” in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond*, Paper No 5 (January 2018) at 1 [International Character of Treaties]; John J Borrows and Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 5th ed (Markham ON: Lexis Nexis Canada Inc, 2018) at 1, 183.

³ See e.g. *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *R v Sioui*, [1990] 1 SCR 1025, SCJ No 48; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]; and *R v Marshall*, [1999] 3 SCR 456, 179 DLR (4th) 193 [*Marshall*]. See also Frankie Young, “Indigenous Settlement Trusts: Recharacterizing the Nature of Taxation” (2019) 24 Appeal: Rev Current L & L Reform 3 at 3 [Young].

⁴ Alan Hanna, “Making the Round: Aboriginal Title in the Common Law from a Tsilhqot’in Legal Perspective” (2015) 45:3 *Ottawa L Rev* 365 at 369 [Hanna, “Making the Round”].

⁵ *Haida*, *supra* note 3 at para 2.

⁶ *Marshall*, *supra* note 3.

Nonetheless, settler colonialism interrupted Indigenous production and resource governance systems. The result was that these resource governance systems, and the kinds of resources engaged, more generally evolved, out of necessity, over hundreds of years. However, Indigenous Nations' economic systems, while taking many different forms depending upon the Nation in question, is more generally distinguished from Eurocentric systems by their imperative to benefit and enrich the collective rather than individuals.⁷ For those Nations that follow more traditional forms of governance, two core concepts are typically embedded in communal Indigenous governance and economic structures: "sharing and group recognition" and "social economic equity."⁸ Typically, for these Bands, any decision-making structure that does not account for the opinions of community members is "antithetical to Indigenous ways of doing business."⁹ That is not to say that individual Indigenous entrepreneurship that employs a market-based approach has not historically been a cornerstone of Indigenous economies. Indeed, Indigenous peoples globally were encouraged to engage in individual commerce and communities established laws to make trade and commerce possible for individual members.¹⁰ Nonetheless, this paper is focused on Indigenous Nations' collective approach to economic development.

In section 2, I begin with an overview of the key arguments that resulted from the research herein. I follow in section 3 with a discussion of the advantages and disadvantages of two modes of asset governance—corporations and non-profits—by Indigenous communities. In section 4, the discussion focuses on the current hybrid model structures recognized in Canada in British Columbia and Nova Scotia. This section also distinguishes the advantages and disadvantages of each of these models as it relates to Bands.¹¹ In section 5, an overview of Indigenous corporate models in both the United States (US) and Australia is provided. This section discusses how Canada could be informed by these models and serves to highlight what is missing in the currently available corporate forms.

I conclude that due to the limited application of hybrid corporate law provisions in Canada to date, ongoing monitoring and research may be required.¹² *Prima facie* the unique nuances

⁷ See *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 53; John A Curry, Han Donker & Paul Michel, "Social Entrepreneurship and Indigenous People" (2016) 4 J Co-operative Organization and Management 108 at 108 [Curry et al].

⁸ Curry et al, *supra* note 7 at 108–09.

⁹ Gail Henderson, "Indigenous Entrepreneurship and Social Entrepreneurship in Canada" (2018) 83 SCLR (2d) at 276 [Henderson, "Indigenous Entrepreneurship"]. Notably, Indigenous ways of doing business in Canada range in business approach and forms of governance. The connection to community ranges based upon the business endeavor engaged. See e.g., Aboriginal Economic Development Corporations at Canadian Council for Aboriginal Business, "National Perspectives on Indigenous Prosperity: Aboriginal Economic Development Corporation Capacity" (2020) at 4, online (pdf): *Canadian Council for Aboriginal Business* www.ccab.com/wp-content/uploads/2020/02/CCAB-Report-1-web.pdf

¹⁰ Adam Creppelle, "Decolonizing Reservation Economies: Returning to Private Enterprise and Trade," (2019) 12 J Bus Entrepreneurship & L 413 at 415.

¹¹ While there are various Indigenous governance forms in Canada, the discourse focuses on First Nations' Bands that are recognized under the *Indian Act* and therefore experience particular legal constraints. *Indian Act*, RSC 1985, c I-5, s 2(1).

¹² Bob Doherty, Helen Haugh & Fergus Lyon, "Social Enterprises as Hybrid Organizations: A Review and Research Agenda" (2014) 16 Intl J Management Rev 417 at 417. While scholars have previously only

of Indigenous economies—the desire to advance Indigenous profit while retaining custom and tradition—may align with the tensions inherent in hybrid business models. However, due to the limited Band autonomy in asset distribution, the lack of flexibility in reporting requirements and the potential restrictive definition of community purpose, I argue that these structures likely do not extend far enough to achieve the goal of economic reconciliation. Rather, Canada could take guidance from both the United States and Australia in establishing its own unique Indigenous-centric model.

2. OVERVIEW

The principle of sustainability guides many, if not most, Indigenous Nations. The prerequisite to take only as much as you need impacts how a community might conduct business and engage in economic development.¹³ For example, the Mi'kmaq in eastern Canada are guided by *Netukulimk*, which means “achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity, or productivity of our environment.”¹⁴ The Tsilhqot'in also understand sustainability through the concept of *Nulb Ghah Dechen T'sedilhtan*, which means killing only what you need to carry you through.¹⁵ Consequently, the “larger emancipatory projects of self-governance and improved economic, social and cultural well-being”¹⁶ of Indigenous Nations should take into consideration the unique and diverse Indigenous cultures involved.

Today, many Indigenous governments are working to gain greater political autonomy¹⁷ with a view to attaining self-determination. As such, they are considering how to manage Indigenous assets and resources in ways that assert Indigenous cultures. Respecting Indigenous Nations' unique ways of engaging in economics grounds the principle of “economic reconciliation.” Economic or business reconciliation refers to the practice of “actively promoting equal economic opportunity for *all Canadians*.”¹⁸ As such, promoting economic opportunity

focused on relevant terms and frameworks related to socially minded enterprise, a shift has more recently occurred to the actual management and performance of social enterprises.

¹³ Robert Yalden et al., *Business Organizations: Practice, Theory and Emerging Challenges*, 2nd ed (Toronto: Emond Montgomery, 2018) at 240 [Yalden].

¹⁴ See Unama'ki Institute of Natural Resources, “Netukulimk” (last visited 15 December 2019), online: *Unama'ki Institute of Natural Resources* <www.uinr.ca/programs/netukulimk>.

¹⁵ *Tsilhqot'in Nation Wildlife Law*, s 2 (enacted by the Xení Gwe'tin First Nations Government Chief and Council on July 16, 2019), online at: www.tsilhqot'in.ca/wp-content/uploads/2020/12/Law_2019_08_23_Tsilhqot'inNationNGDT-WildlifeLaw.pdf See also Hanna, “Making the Round”, *supra* note 4 at 370 citing *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 397.

¹⁶ Henderson, “Indigenous Entrepreneurship”, *supra* note 9 at 244.

¹⁷ *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group, 1996) at 7 [RCAP].

¹⁸ Canadian Council for Aboriginal Business, “Business Reconciliation in Canada Guidebook” (2019) at 9, online (pdf): *Canadian Council for Aboriginal Business* <www.ccab.com/research/ccab-collaboration-series/business_reconciliation/> [CCAB Guidebook] [emphasis mine]; National Indigenous Economic Development Board, “Without Equal Economic Opportunities, There Can be No Reconciliation with Indigenous Canadians” (22 November 2016), online: <www.naedb-cndea.com/en/without-equal-economic-opportunities-no-reconciliation>; Indigenous Corporate Training “Why Canada Needs Indigenous Economic Reconciliation” (5 April 2017), online (blog): *Indigenous Corporate Training* <www.icitinc.ca/blog/why-canada-needs-indigenous-economic-reconciliation>.

for Indigenous peoples should be on par with the greater Canadian economy and should not compromise Indigenous customs and traditions. Therefore, if the principle of “economic reconciliation” is ultimately aimed at promoting economic equity for all Canadians, concrete action should be taken to actively promote business opportunities for Indigenous peoples in ways that support Indigenous cultures.

In 2015, the Truth and Reconciliation Commission of Canada (TRC) suggested that economic reconciliation should be a significant element in the larger reconciliatory framework that guides relations between Indigenous peoples and the greater Canadian society. In the Calls to Action Report, the Commission implored the Canadian corporate sector to adopt corporate policy and core operational activities involving Indigenous peoples and their lands and resources to ensure that Indigenous peoples are able to gain long-term sustainable benefits from economic development projects.¹⁹ Sustainability for Indigenous peoples means engaging in not merely capitalist ventures, but economic endeavors that align with community culture, values and autonomy.²⁰ However, rather than disposing of the global capitalist approach to asset accumulation entirely, Indigenous communities should still be able to engage with a range of regional, national and global markets in ways that uphold Indigenous values while still generating revenues to benefit the community.²¹

There is a growing movement in “mainstream” economic development to advance “social enterprise-,” a business model that addresses social needs.²² Social enterprises are distinguished from corporations with corporate social responsibility (CSR) that could include a wider social purpose as a part of the corporate code.²³ Rather, for social enterprises the responsibilities of the social enterprise are embedded in the firm’s constitution and governance model both procedurally and structurally.²⁴ Typically, a social enterprise’s main objective is to make a social, cultural or environmental impact rather than simply return profits for its shareholders.²⁵

This kind of economic engagement may closely align with Indigenous traditional values in that some social economists or entrepreneurs engage with markets through selling goods and providing services, but they typically do not pursue the generation of profit for its own sake (or for private gain); alternatively, they may pursue profit while contemporaneously pursuing a community benefit.²⁶ This “third sector” economy designed to use profit to address social needs may be conceptually problematic in that it may not fit neatly into existing models of capitalism

¹⁹ *Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Ottawa: Library and Archives Canada, 2015) at 306 (Call to Action 92).

²⁰ Curry et al, *supra* note 7 at 109.

²¹ Henderson, “Indigenous Entrepreneurship”, *supra* note 9 at 245.

²² Nina Boeger, “Beyond the Shareholder Corporation: Alternative Business Forms and the Contestation of Markets” (2018) 45:1 *J L & Society* 10 at 10; Yalden et al, *supra* note 13 at 516.

²³ Arguably, the nature of a corporation is not changed in making a voluntary CSR commitment that is “linked to a business case for improving the company’s performance.” Boeger, *supra* note 22 at 11.

²⁴ *Ibid* at 11.

²⁵ *Ibid* at 12.

²⁶ Mary Sue Schmaltz, Book Review of *The Power of Unreasonable People: How Social Entrepreneurs Create Markets that Change the World* by J. Elkington and P. Hartigan, (2010), 22:2 *J of Nonprofit & Public Sector Marketing* at 152.; JJ McMurtry, “Introducing the Social Economy in Theory and Practice” in JJ McMurtry, ed, *Living Economics: Canadian Perspectives on the Social Economy, Cooperatives, and*

in which social goals are separated from economic activity, nor does it fit into the idea of the welfare state being the primary mechanism to achieve social objectives.²⁷ However, this third sector economy could also be understood as not capitalism as usual, but instead where stakeholders “take back the economy.”²⁸ Regardless, in relation to Indigenous communities that work to advance the community’s profit objectives without compromising culture, the conceptual problem is more likely that social enterprise discourse (including issues of asset governance) has not considered Indigenous cultures and the ongoing effects of colonialism on Indigenous economies.

Notwithstanding, social enterprise discourse could take guidance from how Indigenous communities have sought to balance mission and profit over the years. That is, strategically aligning Indigenous community values (traditional and cultural) with market-based values is not a recent notion for many Indigenous communities that have tried to balance both objectives in economic development corporations. Despite the many inherent tensions between Indigenous cultures and the mainstream economy, or perhaps because of them, in present-day economic dealings, Indigenous communities more commonly use statutory forms of asset management, including non-profit or corporate structures.²⁹

Non-profit and corporate structures each present advantages and disadvantages in shaping economic practices and values. For-profit corporations encourage asset accumulation and hold community purposes as a lower priority. While non-profit structures promote public benefits, opportunities to raise capital may be lacking. The challenge for Bands that rely upon current statute is that the distinction between the two forms may be somewhat ambiguous, particularly in aiming to specify what constitutes a community purpose or what constitutes the advancement of economic development.

For instance, in the case of the *Gull Bay Development Corporation v Canada*,³⁰ the Band set up a non-profit corporation and was denied tax-exempt status, pursuant to section 149(1)(l) of the *Income Tax Act*,³¹ a provision that allows non-profit corporations pursuing special public purposes to be exempt from tax. The Minister of National Revenue argued that a logging operation set up by the Band to gain access to funds did not qualify as a non-profit enterprise

Community Economic Development (Toronto: Emond Montgomery Publications Ltd., 2010) at 4 cited in Henderson, “Indigenous Entrepreneurship”, *supra* note 9 at 242.

²⁷ *Ibid* at 242.

²⁸ See generally JK Gibson-Graham, Jenny Cameron & Stephen Healy, *Take Back the Economy: An Ethical Guide for Transforming Our Communities* (Minnesota: University of Minnesota Press, 2013).

²⁹ To name a few, Mushkegowuk Development Corporation; Mississaugas of the Credit Business Corporation; Six Nations of the Grand River Development Corporation; Gitga’at Development Corporation; Campbell River Indian Band Development Corporation; Tahltan Nation Development Corporation; Gull Bay Development Corporation; Fort McKay Group of Companies; Penticton Indian Band Development Corporation; and Membertou Economic Development Corporation.

³⁰ See *Gull Bay Development Corp v R*, [1983] FCJ 1133, 84 DTC 6040 [*Gull Bay*]. Seventy-one employees of the corporation, 49 engaged in logging and 22 in other activities, were employed by The Gull Bay Development Corporation. The mandate was to carry out maintenance work on the recreational and administrative buildings and facilities and perform other social and charitable activities determined to be beneficial to the social and economic welfare of the members of the Reserve. The logging operations contributed to this end.

³¹ *Income Tax Act*, RSC 1985 c1 (5th supp) s 149(1)(l) [*Tax Act*].

according to the purposes of the *Tax Act*.³² Although there was no doubt that commercial enterprise had been engaged, the purpose of accumulating corporate assets, from the Band's perspective, was for social welfare activities; that is, the profits were to be spent to clean up the community.³³ In essence, provided that a non-profit corporation's business activities are ancillary to its community purpose, and the corporation is not accumulating profit for shareholder gain, it will meet its mandate.³⁴ The Federal Court ruled in favour of the corporation, finding that the purpose of the corporation was to engage "worthy social and charitable activities required on the Reserve"³⁵ and the assets were used for that mission. As such, it was found that social and welfare activities of the corporation were not a cloak to avoid payment of tax on a commercial enterprise but were the real objectives of the corporation. This decision demonstrates that, as it relates to Bands and the application of non-profit corporate structures, whether an entity is conducting business that prioritizes mission could be challenged by third parties.

This article therefore addresses the ways in which a current shift in Canadian corporate law (as well as possible future changes) may align with and support the kinds of Indigenous objectives at the forefront of Indigenous community development discussions and initiatives for decades. The current shift in the law relates to new legal structures explicitly designed to facilitate social enterprise, a kind of enterprise that has traditionally been at the heart of Indigenous economies. These structures have been called hybrid corporate structures³⁶ and have garnered more recent, albeit limited, discussion in legal scholarship. A hybrid structure has been defined as a "corporate legal structure that blends traditional for-profit and non-profit legal characteristics that enable—and at times, require—businesses to pursue both economic and social mandates."³⁷

To date in Canada, both British Columbia, in establishing the Community Contribution Company (CCC),³⁸ and Nova Scotia, in establishing the Community Interest Company (CIC),³⁹ have introduced provisions in corporate law statutes that promote this kind of unique asset management within a corporation. However, the requirement of locating hybrid provisions in Canadian corporate law has been questioned due to the more recent recognition that directors may consider other objectives in assessing the overall "best interests of the corporation." Historically, shareholder primacy, in which the interests of the corporate shareholders are prioritized, and maximizing profits have been recognized as wholly characteristic of the

³² See *Gull Bay*, *supra* note 30 at para 6.

³³ *Ibid* at para 10.

³⁴ *Ibid* at para 18.

³⁵ *Ibid* at para 26.

³⁶ See Gail E Henderson, "Could Community Contribution Companies Improve Access to Justice" (2016) 94:2 Can Bar Rev 209 [Henderson, CCC]; Carol Liao, "A Critical Canadian Perspective on the Benefit Corporation" (2017) 40:2 Seattle UL Rev 683 at 684 [Liao, Benefit Corp]; Lorne Sossin & Devon Kapoor, "Social Enterprise, Law & Legal Education" (2017) 54:4 Osgoode Hall LJ 997 [Sossin & Kapoor]; Henderson, "Indigenous Entrepreneurship", *supra* note 9 at 242; Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise" (2013) 9:1 MJSDL 56 [Liao, CSR].

³⁷ See Liao, Benefit Corp, *supra* note 36 at 684.

³⁸ *Business Corporations Act*, SBC 2002, c 57, Part 2.2 [BCA BC].

³⁹ See *Community Interest Companies Act*, SNS 2012, c 38 [CICA].

corporate structure.⁴⁰ Some scholars have argued that maximizing shareholder profits rather than meeting stakeholder concerns as the predominant purpose of a corporation has sustained beyond the evolving and contradictory theories of the purpose of corporation.⁴¹

Whether directors could contemplate other factors, aside from profit, has been addressed by the Supreme Court of Canada (Court) in several decisions over the last 15 years. The Court has found that the best interests of the corporation could also include other stakeholder interests.⁴² The ongoing debate in legal scholarship relates to how these obligations intertwine. Existing competing arguments—maximizing shareholder profits versus prioritizing stakeholder interests—⁴³ seemingly continue to be debated however. The nuances are complex, and in fact, even in these Canadian legal decisions, contradictory views are espoused (discussed further in section 3.1). Therefore, a review of these legal decisions will highlight that the development of Indigenous-centric corporate models could assist in leaving no doubt as to the ability of directors to place other considerations above profit objectives in carrying out the corporate mandate.

The recent developments in British Columbia and Nova Scotia could inform how a hybrid approach might reconcile the dichotomy of interests at stake to benefit Indigenous communities. Because there is no official legal form attached to the term “social enterprise,” there is ample opportunity for this form to be developed and an Indigenous business to subsequently classify itself in this manner.⁴⁴ Further, developing a hybrid-type corporation would still enable the raising of capital through equity financing,⁴⁵ as is possible with a general corporation. In contrast, non-profit structures that typically prioritize “social welfare, civic improvement, pleasure or recreation or for any other purpose except profit”⁴⁶ cannot issue shares and therefore distribute dividends to its members.⁴⁷ Finally, corporate law typically *mandates* that directors go beyond the profit objective by including a community purpose in the provisions of a hybrid corporation. Normally a statement is required in the corporation’s notice of articles that identifies the community purpose of the corporation⁴⁸ such that, in issuing shares and distributing dividends, the corporation would be restricted by the kinds

⁴⁰ Adolf Berle & Gardiner Means, *The Modern Corporation and Private Property*, Revised ed (New York: Harcourt, Brace and World, 1967); Adolf Berle, “Corporate Powers as Powers in Trust” (1931) 44:7 Harv L Rev 1049 [Berle]; Milton Friedman, “The Social Responsibility of Business is to Increase its Profits” *The New York Times Magazine* (13 September 1970).

⁴¹ See Henry Hansmann & Reinier Kraakman, “The End of History for Corporate Law” (2001) 89:2 Geo LJ 439.

⁴² See *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 3 SCR 461 [Peoples]; *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 40 [BCE].

⁴³ Christopher C. Nicholls, *Corporate Law* (Toronto: Emond, 2005) at 272.

⁴⁴ Yalden et al, *supra* note 13 at 516.

⁴⁵ *Ibid* at 574. Raising capital in general is an issue that has plagued Indigenous communities.

⁴⁶ *Tax Act*, *supra* note 31, s 149(1)(l).

⁴⁷ Yalden et al, *supra* note 13 at 534.

⁴⁸ See *BCA BC*, *supra* note 39, s 51.91(1). Community purpose is defined as “a purpose beneficial to (a) society at large, or (b) a segment of society that is broader than the group of persons who are related to the community contribution company, and includes, without limitation, a purpose of providing health, social, environmental, cultural, educational or other services, but does not include any prescribed purpose”; See also *CICA*, *supra* note 38, s 9(1). The memorandum of association must state that the

of activities it can pursue and *to whom and to what extent it may distribute profits*.⁴⁹ Arguably, without these specific protections in place, for-profit corporate structures do not adequately protect the community purpose of a corporation because a short-term focus on shareholder profit and value could easily supplant a corporation's community purpose.⁵⁰

As a solution in a larger reconciliatory framework, hybrid corporate models could be one way for Indigenous Nations to design Indigenous-centric economically sustainable business models.⁵¹ I address some of the more pragmatic benefits and drawbacks of using hybrid models in this paper. Nonetheless, I argue that current Canadian hybrid forms may not actually extend far enough to advance the 92nd Call to Action, which calls upon the corporate sector to ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.⁵² Economic reconciliation should effectively promote the unique complexities of Indigenous business ventures. For this reason, it may be more judicious to establish a specific Indigenous-centric corporate model by following other jurisdictions. In the next section, I begin this discourse with a discussion on the both the standard and non-profit corporations as applied to Bands.

3. CORPORATIONS AS FORMS OF INDIGENOUS ASSET MANAGEMENT

For Indigenous communities (Bands) whose activities are regulated under the *Indian Act*,⁵³ numerous constraints in advancing economic development initiatives exist due to the nature of a Band. Legally, a Band is not a natural person with legal standing and the rights, powers and privileges of a natural person.⁵⁴ Bands have limited legal capacity under the *Indian Act* to act in certain circumstances.⁵⁵ This is an impediment to economic growth because it prevents Bands from entering into certain kinds of agreements that would permit them to

business is a NSCIC, has a community purpose and is restricted in its ability to pay dividends or distribute assets.

⁴⁹ Yalden et al, *supra* note 13 at 575–576 [emphasis mine].

⁵⁰ Henderson, “Indigenous Entrepreneurship”, *supra* note 9 at 272.

⁵¹ Rick Colbourne, “Indigenous Entrepreneurship and Hybrid Ventures” in Andrew C. Corbett & Jerome A. Katz, eds, *Hybrid Ventures*, Advances in Entrepreneurship, Firm Emergence and Growth, vol 19 (Bingley, UK: Emerald Publishing Limited, 2017) 93 at 93.

⁵² Canada, Truth and Reconciliation Commission of Canada, *Calls to Action*, Catalogue No IR4–8/2015 (Ottawa: Truth and Reconciliation Commission, 2015) at 10, online (pdf): *National Centre for Truth and Reconciliation* <nctr.ca/reports.php>.

⁵³ *Indian Act*, *supra* note 11.

⁵⁴ The Courts have recognized the Band's legal capacity in limited situations. Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis, 2017) at 96–97, citing *West Moberly First Nations v British Columbia*, 2017 BCSC 1700 on the capacity to contract, employ, and sue and be sued. For examples of recognized legal capacity see also *Telecom Leasing Canada (TLC) Ltd. v Enoch Indian Band*, [1992] AJ No 845, [1994] 1 CNLR 206 (Alta QB) on the capacity to execute a contract of guarantee; *Heron Seismic Services Ltd. v Muscowpetung Indian Band*, [1990] SJ No 493 (SK QB), 1990 CanLII 7500 on the capacity to contract and enter into commercial agreements.

⁵⁵ *Indian Act*, *supra* note 11, s 81(1), 83, 89(2), 81(1)(h) (capacity to create by-laws, collect taxes, enter conditional sales contracts, own buildings and personal property on reserve, or deal with financial institutions).

own fee simple lands, lease reserve lands, or enter into joint ventures or partnerships.⁵⁶ To work around *Indian Act* provisions, Bands must rely upon land claim agreements, recognized self-government agreements, or modern treaty agreements to remove the constraints of the *Indian Act* and designate the group a legal entity with capacity; otherwise, a Band could also establish a separate legal entity that is not subject to the *Indian Act* in the same way a Band is.⁵⁷ The corporate form is of considerable assistance here. Indigenous Nations in Canada use these kinds of legal structures to enable certain functions, including liability protection, separation of business and politics, tax advantages, access to finance and regulatory certainty.⁵⁸

In its simplest form, for a Band the Canadian business corporation—formed by filing articles of incorporation,⁵⁹ a notice of the registered office of the corporation, a notice of directors, and paying the prescribed fee⁶⁰—is a legal vehicle created to promote the economic interests for those who hold shares in the corporation.⁶¹ Unless a corporation explicitly dictates otherwise, certain default rules regulate the workings of the business corporation.⁶² There are numerous advantages of corporations for Bands. First, the corporation is considered at law to be a separate legal entity from the creator of the corporation; it carries on the business of the corporation, owns property, possesses rights and incurs liabilities related to carrying on the business.⁶³ This is of particular value to Bands due to their unique legal status. It is also a curious solution for Bands given that corporations are abstract concepts; in many respects a corporation is an artificial legal entity that can only be understood by “the effects it has on the world in which it operates.”⁶⁴ Similarly, a Band, declared by the Governor in Council to be a Band for the purposes of the *Indian Act*, and described as a body of Indians for whose use and

⁵⁶ Hanna, *supra* note 54 at 103. For instance, a Band does not fit the definition of legal owner under provincial land regimes. See *Land Titles Act*, RSO 1990, c L-5, s 1. Further, in order to lease reserve lands the Crown must enter into a lease on behalf of the Band (unless the Band obtains authority under the *First Nations Land Management Act*, SC 1999, c 24).

⁵⁷ Hanna, *supra* note 54 at 103.

⁵⁸ Yalden et al, *supra* note 13 at 309; Because of the character of Bands and the aggregation of members in the community, the question arises as to who would be shareholders or directors in a corporation. Often the Band will have an internal arrangement for “nominating” individuals to be directors on behalf of the Band, such as Chief and Council. The Band itself may not directly hold shares in the corporation. Rather, it can create a trust and the trustees can hold shares with the Band members as beneficiaries. See Hanna, *supra* note 54 at 102–03.

⁵⁹ Depending upon the jurisdiction, different requirements are necessary. For example, in NS, a memorandum of association is required (constating documents constitute a contract), in PEI, letters patent are necessary (granted to incorporators and govt. has power to issue letters patent), in BC, a notice of articles is necessary, and all remaining common law provinces and under federal jurisdiction, articles of incorporation are required (not contractual in nature but the statute governs shareholder and director roles). See Nicholls, *supra* note 43 at 40.

⁶⁰ Yalden et al, *supra* note 13 at 144.

⁶¹ See PM Vasudev, “The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward” (2012) 41:2 Hofstra L Rev 399 at 399 [Vasudev, Stakeholder].

⁶² Yalden et al, *supra* note 13 at 135.

⁶³ See J Anthony VanDuzer, *The Law of Partnerships and Corporations*, 4th ed (Toronto: Irwin Law Inc., 2018) at 14.

⁶⁴ Nicholls, *supra* note 43 at 3.

benefit lands and moneys are set apart,⁶⁵ is also an abstract entity that can only be understood by the effects it has in the world in which it operates. Nonetheless, a Band does not have the same legally recognized status that a corporation does.

The long-standing authority confirming the nature of a corporation as a separate legal entity is *Salomon v Salomon & Co.*⁶⁶ In the facts of this case, Salomon transferred his business from a sole proprietorship to an incorporated company from which he and his family were the members.⁶⁷ The transfer met all of the necessary form requirements under the *Companies Act 1862*.⁶⁸ After such time as the business failed and was liquidated, the liquidator, seeking recourse for the unsecured creditors, sought to have the company declared a “sham corporation” arguing that Salomon was principally an agent and should be personally liable for the debt.⁶⁹ However, the House of Lords, overruling the lower court, found that if a company legally incorporates and follows all of the necessary form elements, the corporation is akin to any other independent person with independent rights and liabilities; further, the House of Lords found Salomon’s motives in promoting the company were irrelevant in determining the corporation’s relevant rights and liabilities.⁷⁰

This decision is critical as it relates to the liability of shareholders because at law the corporation is considered a distinct person from the parties who created it, regardless of whether it precisely resembles a previous business or structure.⁷¹ Shareholders, while having rights related to the business and their ownership of shares, do not in actuality own the business carried on by the corporation.⁷² Because a corporation is a new legal person, it has its own rights analogous to the rights of a human person and the business’s liabilities would be distinct from those of its shareholders, directors and employees. As such, other than what is provided for in the Act, the parties who created the corporation cannot be held liable for the decisions of the corporation.⁷³

Accordingly, irrespective of whether a Band is the only shareholder or director in the company, when a Band establishes a corporation, it creates a separate legal entity regardless of how close the Band’s identity is tied to the corporation. While this is a means to overcome the *Indian Act*, it also produces somewhat unreliable results for Bands. Given the traditional forms

⁶⁵ See *Indian Act*, *supra* note 11, s 2(1).

⁶⁶ [1897] AC 22 9 HL at 42 [*Salomon*].

⁶⁷ *Ibid* at 23.

⁶⁸ 25 & 26 Vict c 89.

⁶⁹ *Salomon*, *supra* note 66 at 24.

⁷⁰ *Ibid* at 30.

⁷¹ *Ibid* at 51.

⁷² See VanDuzer, *supra* note 63 at 13. The nature of a business corporation is that a nexus exists between the various of stakeholders and shareholders in the business.

⁷³ See e.g. *Business Corporations Act*, RSO 1990, c B 16, ss 40, 92(1) [*OBCA*]. Employees and officers of corporations may only be found liable in certain distinct factual circumstances including where acts of fraud, deceit, dishonesty, or want of authority on the part of employees or officers are found. Further, the corporate veil may be pierced where the use of a corporate structure was a sham and officer, or employee actions, were themselves tortious. See *ScotiaMcLeod Inc. v Peoples Jewellers Limited*, [1995] 26 OR (3d) 481 (CA) at 490–1 (leave to appeal refused), [1996] SCCA No 40 (SCC) [*ScotiaMcLeod*]; *Budd v Gentra Inc.*, 1998 CanLII 5811 (ON CA), 111 OAC 288 [*Budd*].

of governance and social structure, the concept of a “corporation as a mirror” for an Indigenous community is nebulous at best; arguably, corporate law cannot possibly mirror traditions and legal practices that date back to hundreds of years prior to the creation of corporate law.⁷⁴

Next, most corporate structures also provide shareholders with limited liability protection. Liability is limited to the amount of the shareholders’ investment, which could include the expenditures associated with setting up and running a corporation such as a one-time set-up fee and legal fees for creating the corporation, in addition to certain ongoing costs for annual meetings and corporate tax return filings.⁷⁵ Essentially, other than the initial amount of the corporate contribution, any liabilities of the Band corporation would not accrue to the Band personally. This crucial characteristic of a corporation protects the Band if the corporation reports losses for the fiscal year. On the other hand, the benefit of corporate limited liability for shareholders may be unfavourable for creditors who might seek to counterbalance the risk by charging higher interest rates or providing other less favourable credit terms, including, in some cases, requiring personal guarantees from shareholders.⁷⁶

The “stakeholder principle” in corporate law does demonstrate, however, that the promotion of corporate engagement by protecting the interests of non-shareholder groups is gaining some traction. In fact, the *Canada Business Corporations Act*⁷⁷ provides for some creditor protection via the oppression remedy and derivative actions for wrongs to a corporation.⁷⁸ Historically, these remedies were only available to shareholders. Nonetheless, as was found in *Peoples Department Stores Inc. (Trustee of) v Wise*,⁷⁹ the Court may also give deference to the director’s exercise of the “business judgment rule” in protecting shareholders to the detriment of creditors.⁸⁰ As such, Bands may still be somewhat hindered by creditor reluctance to assume risks in Band corporate financing schemes.⁸¹

However, the ability to secure certain capital through more flexible options, a feature critical to this kind of business structure, is a distinguished benefit and better option than a Band seeking financing on its own. Due to *Indian Act* constraints around Indigenous lands

⁷⁴ Yalden et al, *supra* note 13 at 310.

⁷⁵ See VanDuzer, *supra* note 63 at 100; Yalden et al, *supra* note 13 at 17.

⁷⁶ See Paul L Davies & Sarah Worthington, *Principles of Modern Company Law*, 10th ed (Thomson Reuters: London, 2016) at 34.

⁷⁷ RSC 1985, c C-45 [CBCA].

⁷⁸ *Ibid*, ss 238–241. Further, section 122(1.1) of the CBCA explicitly states that directors may consider numerous stakeholder interests in determining the best interests of the corporation.

⁷⁹ *Peoples*, *supra* note 42.

⁸⁰ *Ibid* at para 65. For a further discussion on the stakeholder principle see PM Vasudev, “Corporate Stakeholders in Canada—An Overview and a Proposal” (2013) 45:1 Ottawa L Rev 137. Stakeholder conflicts are typically about competing interests, not necessarily well-defined rights in which the legal system is most familiar, and the adversarial nature of court proceedings and the technical rules of form, procedure, and evidence may bar stakeholders from successfully seeking remedies; see Vasudev, Stakeholder, *supra* note 61 at 423.

⁸¹ While it would circumvent the benefit of limited liability protection, if a Band wanted to improve creditor accessibility and demonstrate good intentions, it could take advantage of the unlimited liability corporation recognized in Alberta and Nova Scotia. See *Business Corporations Act*, RSA 2000, c B-9, s 15.2; *Companies Act*, RSNS 1989, c 81, s 9(c).

in which the Crown is found to hold underlying title, such property is not able to form the normative attachment required in secured property transactions for the purposes of accessing credit arrangements.⁸² Therefore, Bands have historically grappled with finding creative ways to secure capital for community development purposes⁸³ because a Band's real or personal property may not be used as collateral in credit arrangements.

Essentially, the key mechanisms to secure corporate capital through debt and equity give Bands some flexibility. As it relates to debt financing, the corporation may secure assets by either entering into loan agreements with lenders, either through secured or unsecured means, or through issuing debt securities such as bonds, debentures or notes.⁸⁴ The debt incurred through this means is a claim on the corporation's assets.⁸⁵ On the other hand, a corporation might depend upon equity financing to raise money by issuing common, preferred, or other shares in its stock in exchange for money.⁸⁶ Equity, the shareholders' residual economic interest in the corporation's assets after all debts are satisfied, represents the financial claim created.⁸⁷

Another advantage of establishing a corporation is that, due to extensive regulation under provincial statute or the *Canada Business Corporations Act* (CBCA),⁸⁸ standard form incorporating documents are easily accessible. To reduce costs, the Band can use the standard form contracts that contain certain default rules to govern the relationship between the corporation and its shareholders.⁸⁹ This decreases the transaction costs of setting up a corporation and could increase the returns to shareholders.⁹⁰ Further, some Bands that hold reserve lands that cross the border of two provinces could register under the *CBCA* to operate extra-provincially.⁹¹ However, because a Band can register to conduct business in any province regardless of where they choose to operate, it is debateable whether the *CBCA* really offers an advantage in this regard.⁹² While being able to use the corporate name across Canada is certainly a benefit of registering under the *CBCA*, incorporating under local statute is more common for most private incorporators.⁹³ Practically speaking, in determining a statute to

⁸² *Indian Act*, *supra* note 11, s 89(1). See Anita Wandzura, "The Enforcement of Security Interests Against the Personal Property of First Nations Persons on a Reserve" (2008) 39:1 *Ottawa L Rev* 1 at 6–7; Shin Imai, *Annotated Aboriginal Law: The Constitution, Legislation and Treaties* (Toronto, ON: Thomson Reuters, 2020) at 327; Anna Lund, "Judgment Enforcement Law in Indigenous Communities—Reflections on the Indian Act and Crown Immunity from Execution" (2018) 83 *SCLR* (2d) at 279.

⁸³ Hanna, *supra* note 54 at 102–04.

⁸⁴ Christopher C Nicholls, *Corporate Finance and Canadian Law*, 2nd ed (Toronto: Thomson Reuters, 2013) at 11 [Nicholls, Corp Finance].

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at 19.

⁸⁷ *Ibid.*

⁸⁸ *CBCA*, *supra* note 77.

⁸⁹ See VanDuzer, *supra* note 63 at 126–7.

⁹⁰ *Ibid* at 126.

⁹¹ Such as Onion Lake First Nation that is located in and around the borders of both Alberta and Saskatchewan.

⁹² Nicholls, *supra* note 43 at 43.

⁹³ *Ibid.* Through mutually beneficial reciprocal arrangements, a Band can carry on business in any province nonetheless.

incorporate under Bands should consider the technical differences between the statutes.⁹⁴ These technical differences could be critical to a Band looking to meet its own strategic and practical objectives.

The perpetual nature of the corporate structure may also be particularly useful to Bands in so far as setting up a business where the primary focus is on increasing long-term wealth through, for example, resource development or procurement contracts. Given the more general Indigenous principle of making decisions with a view to the impact on the next seven generations of community members, the ability of a corporation to exist in perpetuity is appropriate. Coupled with this benefit, the relatively static nature of the management structure is also an advantage for Bands. The effect of the central role of the directors of the corporation is that a body of fluctuating shareholders delegate oversight of the company to a smaller group of committed directors (and subsequently appoint Officers to handle the day-to-day operations or delegate such responsibilities) and accountability is regulated through corporate legislation.⁹⁵

This central management structure effectively compartmentalizes Band businesses and allocates business resources, in effect keeping the businesses separate from politics.⁹⁶ Further, while a change in the membership of a corporation allows for the transfer of existing shareholder's shares in property, the company property is otherwise left intact, and property and realization of assets are not required to be split up.⁹⁷ Both the central management structure and the perpetual nature of a corporation accommodate the nature of the shifting Band leadership, and could be a stabilizing benefit to Indigenous business development at risk of changing circumstances of a Band when a new Council is elected every two to three years.

Some Bands incorporate under a not-for-profit corporate structure to facilitate its purposes. Similar to a for-profit corporation, a non-profit corporation must be incorporated either federally⁹⁸ or provincially.⁹⁹ These corporations are subject to special legislation because they are not required to pay income tax.¹⁰⁰ In fact, one of the key benefits of a non-profit corporation is that it qualifies for tax exemption under section 149(1)(l) of the *Tax Act*. However, this may be irrelevant because the Canada Revenue Agency has interpreted Bands to be public bodies

⁹⁴ Nicholls, *supra* note 43 at 42. A complete discussion on these technicalities is beyond the scope of this paper but they might include peculiarities such as where meetings must be held, whether par value shares may be issued, or how onerous the director liability provisions are.

⁹⁵ See Davies & Worthington, *supra* note 76 at 10; Yalden et al, *supra* note 13 at 18.

⁹⁶ Hanna, *supra* note 54 at 102. See also Jim Bennett, "Indigenous Economic Development Corporations – The ABCs" (27 June 2016), online (blog): *Indigenous Corporate Training Inc.* <www.ictinc.ca/blog/indigenous-economic-development-corporations-the-abcs>. In theory, this is a benefit of a Band corporation but that is not to say that politics do not sometimes interfere with decision-making in economic development corporations.

⁹⁷ See Davies & Worthington, *supra* note 76 at 35; Yalden et al, *supra* note 13 at 17.

⁹⁸ See *Canada Not-for-Profit Corporations Act*, SC 2009, c 23.

⁹⁹ See e.g. *Ontario Corporations Act*, RSO 1990, c 38 [*OCA*]. Note that the *OCA* will be replaced by Ontario's *Not-for-Profit Corporations Act*, SO 2010, c 15 [*ONCA*] as early as 2020. See <www.ontario.ca/page/guide-not-profit-corporations-act-2010> for commentary on the differences between the *OCA* and *ONCA*.

¹⁰⁰ Yalden et al, *supra* note 13 at 533.

performing a function of government in Canada.¹⁰¹ Therefore, a primary advantage of a Band corporation is that, provided Band income is not used for the profit of its members¹⁰² and the Band owns 90% of the capital of the corporation and conducts at least 90% of its business within its reserve territory, it will qualify for tax exemption, pursuant to section 149(1)(d.5) of the *Tax Act*.¹⁰³ Rather, if a non-profit corporation engages in a business activity with the intention to yield profits beyond that which is merely ancillary or incidental or beyond simple cost recovery, the Canada Revenue Agency is likely to find that the corporation's net profits will no longer be tax exempt.¹⁰⁴ For instance, any surplus must not be used for purposes that are unrelated to the organization's special objectives.¹⁰⁵ Social enterprise activities are therefore restricted by the *Tax Act* in that non-profit corporations are not able to engage in revenue generating activities.¹⁰⁶

Moreover, because a non-profit corporation is typically created to provide special benefits to the public or a segment of society, a special purpose is required to be included in the

¹⁰¹ Canadian Revenue Agency, Interpretation Bulletin IT-064503117, "Comments on Indian Act Bands as 149(1)(c) Entities" (27 July 2016).

¹⁰² See *Tax Act*, *supra* note 31, s 149(1)(l). Further, a non-profit corporation created to further certain exclusively charitable objects may also qualify for tax-exemption as a registered charity. As a registered charity, contributors to the organization are eligible to receive tax benefits for such contributions. Accordingly, offering tax benefits to charitable organizations encourages support for activities which are of "special benefit to the community." See *News to You Canada v Canada (National Revenue)*, 2011 FCA 192 at para 22; *Native Communications Society of British Columbia v Minister of National Revenue*, [1986] 3 FC 471 at para 5, 1986 CarswellNat 361; Sean Markey et al, *Social Enterprise Legal Structure: Options and Prospects for a 'Made in Canada' Solution*, (Burnaby: Centre for Sustainable Community Development, Faculty of the Environment, Simon Fraser University, 2011) at 12. A definition of charitable purpose is also found in Ontario's *Charities Accounting Act*, RSO 1990, c C10, s 7. See also Mark R Gillen & Faye Woodman, eds, *The Law of Trusts: A Contextual Approach*, 3rd ed (Toronto, Ontario: Emond Montgomery Publications, 2015) at 185–189 [Gillen & Woodman].

¹⁰³ See *Tax Act*, *supra* note 31, s 149(1) (d.5). d.5 subject to subsections (1.2) and (1.3), a corporation, commission or association not less than 90% of the capital of which was owned by one or more entities each of which is a municipality in Canada, or a municipal or public body performing a function of government in Canada, if the income for the period of the corporation, commission or association from activities carried on outside the geographical boundaries of the entities does not exceed 10% of its income for the period.

¹⁰⁴ Canada Revenue Agency, Interpretation Bulletin IT-496R, "Non-Profit Organizations" (2 August 2001) at para 9, referred to in Yalden et al, *supra* note 13 at 534. Factors that could determine whether a non-profit corporation has strayed from its not-for-profit purposes include: the organization's activities operate in a normal commercial manner; goods or services are more broadly available and not restricted to members and guests; operations are on a profit basis rather than a cost recovery basis; excesses are accumulated each year; or the organization's operations are in competition with taxable entities carrying on the same trade or business. See Donald J Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 3rd ed (Toronto, Ontario: LexisNexis, 2016) at 442 [Bourgeois].

¹⁰⁵ See Bourgeois, *supra* note 104 at 443–4. In fact, Bourgeois notes that any surplus should be justified by demonstrating that "the excess was accumulated from non-commercial activities; the level of excess is reasonable given the nature of the organization and its activities; and the organization has a plan on how to use the excess."

¹⁰⁶ See Robert B Hayhoe & Andrew Valentine, "Structural challenges for social enterprise in Canada" (2013) 19:6 *Trusts & Trustees* 519 at 522.

corporate constitution.¹⁰⁷ Special purposes include “social welfare, civic improvement, pleasure or recreation or for any other purpose *except profit*.”¹⁰⁸ To this end, a non-profit structure might be used when a Band is particularly interested in furthering special social objectives such as health care, education, or cultural development. As in the case of a for-profit corporation, this kind of structure benefits from the same limited liability protection critical to organizations carrying financial risk.¹⁰⁹ Contrary to a for-profit corporation, however, a Band non-profit corporation is not able to raise equity capital because such organizations cannot issue shares or distribute dividends.¹¹⁰ While some funding can be generated from corporate, governmental, and other donations, a further difficulty lies in the ability to grow the corporation after funding sources are exhausted.¹¹¹ This restriction on revenue generation and access to capital is therefore a considerable impediment for those Bands establishing non-profit corporations because source funding has historically been an issue for Bands.¹¹²

All factors combined, Bands typically require access to unique business models that will further their economic development and still maintain Indigenous cultural values.¹¹³ Indigenous peoples’ decision making is largely informed by Indigenous laws, and so it is critical that Indigenous communities make consistent and concerted efforts to “engage in economic development in accordance with their deeper teachings and traditions.”¹¹⁴ The next section will discuss how Bands might benefit from changes in Canadian corporate legislation that could enable both profit generation and social considerations that are relevant to Indigenous customs and traditions.

4. HYBRID CORPORATE MODELS

Bands that seek to advance their economies often find themselves thrust into a capitalist system that mainly flourishes under the participation of individuals or groups that are equipped

¹⁰⁷ See Davies & Worthington, *supra* note 76 at 7.

¹⁰⁸ *Tax Act*, *supra* note 31, s 149(1)(l) [emphasis added].

¹⁰⁹ See Davies & Worthington, *supra* note 76 at 7.

¹¹⁰ See *Gull Bay*, *supra* note 30 at para 17. However, as noted in the *Gull Bay* decision, a non-profit corporation is not barred from participating in ancillary business practices that unintentionally create profit. See also Yalden et al, *supra* note 13 at 534.

¹¹¹ See Carol Liao, *For-Profit, Non-Profit, and Hybrid: The Global Emergence of Legally ‘Good’ Corporations and the Canadian Experiment* (PhD Thesis, University of British Columbia, 2016) [unpublished] at 4; Canadian Council for Aboriginal Business, “Promise and Prosperity: The 2016 Aboriginal Business Survey” (2016) at 8, online (pdf): CCAB <www.ccab.com/wp-content/uploads/2016/10/CCAB-PP-Report-V2-SQ-Pages.pdf> [CCAB].

¹¹² Hanna, *supra* note 54 at 11.

¹¹³ Notably, only 27% of Indigenous businesses are incorporated in Canada, whether by Bands or individuals; although this profile is somewhat similar to non-Indigenous businesses, Indigenous businesses are less likely to be incorporated. Indigenous corporations also tend to be relatively small (less than 100 employees). Nonetheless, they have had some successes as longer-term, revenue-generating enterprises that are experiencing business growth. See CCAB, *supra* note 111 at 16.

¹¹⁴ John Borrows & Sarah Morales, “Challenge, Change and Development in Aboriginal Economies” in Joseph Eliot Magnet & Dwight A Dorey, eds, *Legal Aspects of Aboriginal Business Development* (Toronto, Ontario: LexisNexis, 2005) at 164 [Borrows & Morales].

to enter into commercial risk.¹¹⁵ Property and asset accumulation for private gain can be a driving force under such a system. However, in the pursuit to maximize profits in business, other values or ethics may be compromised.¹¹⁶ The motivation to purely attain profits may not align with the *sui generis* interests and the significant cultural considerations at stake for Indigenous peoples. In fact, it has been argued that focusing on the narrow objective of simply generating profits runs the risk of Indigenous corporations disconnecting from the broader influences economic development could have on language, the greater community, organizational change, and self-government.¹¹⁷ Although Indigenous societies have been impacted by the effects of colonization, Indigenous asset accumulation remains largely communally driven. The impetus for holding communal values is to advance social impact from within the community and beyond. In fact, growing social impact is particularly relevant to Indigenous communities seeking economic reconciliation in Canada.

Notably, due to the longstanding and well-documented social issues, discrimination and flagrant inequality Indigenous peoples have endured, Indigenous businesses in many respects engage in a kind of social entrepreneurship where business is used to create social change and address social injustice issues.¹¹⁸ While not unique to Indigenous peoples, social considerations drive the traditional and cultural values that underscore Indigenous business and innovation. A Band might be driven by social entrepreneur-like considerations where, in the end, business ventures are defined by activities and processes that are social reflections¹¹⁹ of Indigenous culture and values. From a policy perspective, the concept of social enterprise is part of a growing movement in Canada. In fact, the Government of Ontario undertook a social enterprise strategy and found that:

[s]ocial enterprises use business strategies to achieve a social or environmental impact. While generating revenues from the sale of goods and services, social enterprises also expressly intend to create positive outcomes, and they measure their results. As their business grows, the social impact grows.¹²⁰

¹¹⁵ Jennifer Lane Lee & Bryan Gladstone, “Ethics and Enterprise: The Role of the Company Director Disqualification Act” (1997) 4:3 *Small Bus Enterprise Development* 129 at 129.

¹¹⁶ See Henderson, CCC, *supra* note 36 at 211.

¹¹⁷ CCAB, *supra* note 111 at 14. In countering these impacts on economic development corporations organizations such as Transformation International: Social and Economic Development assist Indigenous communities, individuals, organizations and governments in increasing capacity while maintaining cultural values. Multi-disciplinary teams are developed to meet community, business, nation building, governance and organizational needs. Carol Anne Hilton, the CEO of Transformational International, is also the founder of the Indigenomics Institute, an Indigenous economic advisory for public governments, Indigenous communities and the private sector. See “Indigenomics Institute”, online: *Indigenomics Institute* <www.indigenomicsinstitute.com>.

¹¹⁸ The concept of “social entrepreneurship” is discussed in Filipe Santos, “A Positive Theory of Social Entrepreneurship” (2012) 111:3 *J Bus Ethics* 335 at 335; Shaker Zahra et al, “A Typology of Social Entrepreneurs: Motives, Search Processes and Ethical Challenges” (2009) 24:5 *J Bus Venturing* 519; John Elkington & Pamela Hartigan, *The Power of Unreasonable People: How Social Entrepreneurs Create Markets That Change the World* (Boston: Harvard Business Press, 2008).

¹¹⁹ Zahra et al, *supra* note 118 at 519.

¹²⁰ “Ontario’s Social Enterprise Strategy 2016–2021” (21 June 2016, last modified 12 March 2019), online: *Government of Ontario* <www.ontario.ca/page/ontarios-social-enterprise-strategy-2016-2021>. See also Sossin & Kapoor, *supra* note 36 at 1003.

While corporations may provide benefits in enabling Indigenous communities to improve their fiscal positions, to be sustainable they must also respect the *sui generis* nature of Indigenous culture, systems, and laws and their relevance within the Canadian economic landscape. For that reason, Bands that seek to merge both fiscal and social considerations have typically had to be creative in developing business structures.

A corporate hybrid, defined as a “corporate legal structure that blends traditional for-profit and nonprofit legal characteristics that enable—and at times, require—businesses to pursue both economic and social mandates,”¹²¹ may be a welcome alternative corporate structure. Hybrid corporate structures are new to business law in Canada and, as noted in section 2, to date such corporate provisions have only been established in British Columbia under the CCC, and in Nova Scotia under the CIC. However, some questions remain about whether localizing hybrid provisions within Canadian corporate law is even necessary given that the Court has ruled that, in assessing the overall “best interests of the corporation,” directors may take all stakeholder interests into account.¹²² This means that if a Band risks fiscal profit so the integrity of its environmental stewardship is maintained, and a stakeholder such as an equity investor were to challenge it, the Court could possibly rule in the Band’s favour. However, the debate may not be as simple as it first appears. The next section will discuss some of the overarching issues related to the stakeholder debate.

4.1. THE STAKEHOLDER DEBATE

There is no doubt that both economic and socio-economic theories inform how the law and policy of business organizations are analyzed.¹²³ The purpose of the corporation is largely interpreted through these theories. Yet certain assumptions—that business is primarily for wealth maximization and rational choice theory can predict market behaviour—linger in the economic analysis of law.¹²⁴ Opposing views on corporate governance situate the overarching

¹²¹ See Liao, *Benefit Corp.*, *supra* note 36 at 684.

¹²² *Peoples*, *supra* note 42 at para 42.

¹²³ For instance, on economic theories, see nexus of contracts theory in Frank E Easterbrook & Daniel R Fischel, “The Corporate Contract” (1989) 80:7 *Colum LR* 1416; Ian Ayres & Robert Gertner, “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules” (1989) 99:1 *Yale LJ* 87; see transaction cost theory in Oliver Williamson, “The Economics of Organization: The Transaction Cost Approach” (1981) 87:3 *Am J Sociology* 548; and see agency cost theory in Michael J Jensen & William Meckling, “Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure” (1976) 3:4 *Fin Econ* 305. On socio-economic theories see the communitarians’ approach in David Millon, “Communitarians, Contractarians, and the Crisis in Corporate Law” (1993) 50:4 *Wash & Lee L Rev* 1373; on corporate law as public law see Kent Greenfield, “Corporate Law as Public Law” in *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (Chicago and London: University of Chicago Press, 2006); on the nexus of contracts theory see Margaret M Blair & Lynn A Stout, “A Team Production Theory of Corporate Law” (1999) 85 *Va L Rev* 247; and on businesses as social institutions see Spencer Thompson, “Towards a Social Theory of the Firm: Worker Cooperatives Reconsidered” (2015) 3:1 *J Co-operative Organization & Management* 3. For a brief overview of each of these theories, see Yalden et al, *supra* note 13 at 590–617.

¹²⁴ See Richard A Posner, “Wealth Maximization Revisited” (1980) 2 *Notre Dame JL Ethics & Pub Pol’y* 85; Thomas S Ulen, “Rational Choice Theory in Law and Economics” (2000) 1 *Encyclopedia L & Econ* 790. Although there are certainly opposing views on this normative assumption. See Yalden et al, *supra*

public policy issue of “for whom should the corporation be governed.”¹²⁵ Whose interests should prevail when a collision of corporate interests occurs?

This issue was canvassed in two recent court decisions, *Peoples Department Stores Inc (Trustee of) v Wise*¹²⁶ and *BCE Inc. v 1976 Debentureholders*.¹²⁷ These decisions deal with the “specific substance” of the statutory duty owed under the *CBCA*¹²⁸ as to whom duties are owed within the corporation.¹²⁹ The Court grappled with the idea of the duties owed to both shareholders and other stakeholders within the corporation, particularly where competing interests could be at stake. In a thought-provoking debate, it has been argued that the shareholder primacy approach, wherein shareholder interests should be given deference, does not necessarily preclude other stakeholder interests from being considered. In fact, it has long been held that “considering non-shareholder stakeholder interests was an effective means of advancing shareholder wealth.”¹³⁰ Indeed, in *Peoples*, the Court found that directors, in exercising discretion, may account for other factors that are more generally in the best interests of the corporation.¹³¹

While economically, the “best interests of the corporation” could relate solely to increasing profits,¹³² the Court has now established that directors might consider, with impunity, other factors relevant to the best interests of the corporation, such as the interests of employees, suppliers, creditors, consumers, governments or the environment.¹³³ There is no doubt that

note 13 at 591, citing Jules Coleman, “Efficiency, Utility, and Wealth Maximization” (1980) 8 Hofstra L Rev 509 and Richard Dworkin, “Is Wealth a Value?” (1980) 9 L Leg Stud 191.

¹²⁵ Yalden et al, *supra* note 13 at 621.

¹²⁶ *Peoples*, *supra* note 42.

¹²⁷ *BCE*, *supra* note 42.

¹²⁸ *CBCA*, *supra* note 77.

¹²⁹ It has been argued that it is likely that the Court confused the statutory duty of loyalty and good faith with the common law duty (duty of care), hence the confusion as to whom duties are owed. See Ed Waitzer & Johnny Jaswal, “Peoples, BCE, and the Good Corporate ‘Citizen’” (2009) 47:3 Osgoode Hall LJ 439 at 442.

¹³⁰ Yalden et al, *supra* note 13 at 622. Also see R Edward Freeman & John McVea, “A Stakeholder Approach to Strategic Management” in Michael A Hitt, R Edward Freeman & Jeffrey S Harrison, eds, *The Blackwell Handbook for Strategic Management* (Oxford: Blackwell, 2006).

¹³¹ *Peoples*, *supra* note 42 at para 42.

¹³² E. M. Iacobucci, “Directors’ Duties in Insolvency: Clarifying What Is at Stake” (2004) 39:3 Can Bus LJ 398 at 400–01, cited in *Peoples*, *supra* note 42 at para 42.

¹³³ *Ibid* at para 42. See also *Teck Corp v Millar*, 33 DLR (3d) 288 at 314, 1972 CarswellBC 284 (BCSC) [*Teck Corp*]; *BCE*, *supra* note 42. In June 2019, section 122 of the *CBCA*, *supra* note 77, was also amended to permit directors, in considering the best interest of the corporation, to also consider other key stakeholders and interests, albeit, this Act applies to federally incorporated companies:

“122(1.1) When acting with a view to the best interests of the corporation under paragraph (1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors:

- (a) the interests of
 - (i) shareholders,
 - (ii) employees,

directors owe a statutory fiduciary duty to protect the best interests of the corporation.¹³⁴ The policy reasons for this duty stem from the fact that shareholders and creditors expect that, in transferring control of their interests to the corporation, the representative directors and officers will make reasonable business decisions that will be advantageous to the corporation.¹³⁵ That is, the “best interests of the corporation” should be at the forefront of the decision-making process of the managers of the company. While the best interests of the corporation have traditionally been interpreted as the best interests of the “collective shareholders,” the court in *Peoples* and *BCE* rejected this well-recognized principle.¹³⁶

Notably, one of the cases referred to in *Peoples* to support the Courts’ position that the “best interests of the corporation” does not simply mean the best “interests of the shareholder”¹³⁷ was *Teck Corp. Ltd v Millar*.¹³⁸ Scholars have argued that *Teck* is actually more consistent with the director’s duty to protect shareholders and not to deviate from the shareholder primacy principle. For instance, MacPherson argues that Berger, J., for the British Columbia Supreme Court (BCSC), is more likely grappling with the expansiveness of shareholder primacy as opposed to rejecting the principle outright.¹³⁹ He notes that Berger, J. indicated (albeit in obiter dicta) that the law should consider that the generation of wealth through the mobilization and development of resources as being key to defining the directors’ fiduciary duties.¹⁴⁰ Berger, J. went on to indicate that if directors were to consider the consequences of potential company policies, and then rejected that policy, they might still be found to have considered the interests of the shareholders.¹⁴¹ MacPherson argues that in discussing the concept of “fiduciary duty” Berger J. is focused on the interests of the shareholders, including how certain decisions might impact the community. MacPherson notes Berger, J.’s statement that a focus on other interests “lying beyond those of the company’s shareholders in the *strict sense*” indicates that it is more

(iii) retirees and pensioners,

(iv) creditors,

(v) consumers, and

(vi) governments;

(b) the environment; and

(c) the long-term interests of the corporation.”

¹³⁴ See *CBCA*, *supra* note 77, s 122(1); *OBCA*, *supra* note 73, s 134(1).

¹³⁵ See *Peoples*, *supra* note 42 at para 34.

¹³⁶ *Ibid* at para 42; *BCE*, *supra* note 42 at para 39.

¹³⁷ *Peoples*, *supra* note 42 at para 42.

¹³⁸ *Teck Corp*, *supra* note 133.

¹³⁹ Darcy L MacPherson, “Supreme Court Restates Directors’ Fiduciary Duty—A Comment on *Peoples Department Stores v Wise*” (2005) 43:2 *Alta L Rev* 383 at 390 [MacPherson]. For an opposing view, see Ian B Lee, “*Peoples Department Stores v Wise* and ‘The Best Interests of the Corporation’” (2005) 41 *Can Bus LJ* 212 at 214. MacPherson notes (at 392) that Lee rejects the more expansive interpretation. Also see Claudio R Rojas, “An Indeterminate Theory of Canadian Corporate Law” (2014) 47:1 *UBC L Rev* 59 [Rojas] for a discussion of how the Supreme Court of Canada develops in *BCE* a theory of corporate law that aims to mitigate the power differential between shareholders and other stakeholders.

¹⁴⁰ MacPherson, *supra* note 139 at 390 citing *Teck Corp*, *supra* note 133 at 314.

¹⁴¹ *Teck Corp*, *supra* note 133 at 314.

likely that the BCSC in *Teck* disagrees with the strict interpretation of the best interests of the shareholders and is merely searching for a more expansive view of shareholder primacy.¹⁴²

Regardless of whether the Court's interpretation of *Teck* in the *Peoples* decision was accurate, the court went on in *BCE* to expand the approach it had already set out. It affirmed the *Peoples* analysis that directors and officers are required to consider the interests of all corporate stakeholders, including "shareholders, employees, suppliers, creditors, consumers, governments and the environment."¹⁴³ However, deference was given to the business judgment rule,¹⁴⁴ which evidently signified that directors could take advantage of the freedom to favour certain stakeholder interests; as long as director decisions can be justified as "plausibly promoting the interests of the corporation and a minimum standard of fairness is observed in relation to all stakeholders," the directors could be considered as fulfilling their duty to the corporation.¹⁴⁵ As such, the Court found that where certain interests collide, the directors owe their duty to the corporation and not stakeholders:

People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.¹⁴⁶

The deviation from the "shareholder primacy" approach in *Peoples* and *BCE*, absent an appropriate and clear framework, is problematic.¹⁴⁷ In fact, in *BCE*, while the Court provided clear guidance on the framework for the application of the test for the oppression remedy under the *CBCA*, no guidance was provided as to the manner in which directors should deal with this more expansive view of the statutory fiduciary duty owed by them.¹⁴⁸ Since this departure represents a substantial change to the law, it is incumbent upon the Court to provide an explanation of how that which replaces the long held principle of shareholder primacy should be dealt with.¹⁴⁹ Absent comprehensive guidance on this new but incomplete recasting of corporate law principles regarding how corporate directors and officers should handle their

¹⁴² MacPherson, *supra* note 139 at 391 [emphasis added].

¹⁴³ *BCE*, *supra* note 42 at para 39 citing *Peoples*, *supra* note 42 at para 42.

¹⁴⁴ *BCE*, *supra* note 42 at para 87.

¹⁴⁵ See VanDuzer, *supra* note 63 at 207.

¹⁴⁶ *BCE*, *supra* note 42 at para 66.

¹⁴⁷ MacPherson, *supra* note 139 at 386; J Anthony Vanduzer, "BCE v. 1976 Debentureholders: The Supreme Court's Hits and Misses in Its Most Important Corporate Law Decision Since *Peoples*" (2010) 43:1 *UBC L Rev* 205 at 207 [Vanduzer, BCE]; Waitzer & Jaswal, *supra* note 130 at 442; See also Berle, *supra* note 40 and William W Bratton & Michael L Wachter, "Shareholder Primacy's Corporatist Origins: Adolf Berle and *The Modern Corporation*" (2008) 34:1 *J of Corporation L* 99.

¹⁴⁸ MacPherson, *supra* note 139 at 387; Vanduzer, BCE, *supra* note 147 at 206–207.

¹⁴⁹ MacPherson indicates that simply stating "directors are not to favour the interests of any one group of stakeholders and instead, they are to consider all relevant constituencies" does not provide enough guidance from the Court (MacPherson, *supra* note 139 at 386–387).

duties, they are left to their own means of interpreting what is required of them.¹⁵⁰ It could be argued then that a director “told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither. Faced with a demand from either group, the [director] can appeal to the interests of the other.”¹⁵¹

These Court decisions signify that the Court has created more uncertainty than it had likely intended. Arguably, without further direction on how directors are to proceed it is likely that the open debate means that Bands cannot predict how a collision of business values might be dealt with in Canadian corporate law. Due to the ambiguous interpretation of the phrase “best interests of the corporation,” Bands might benefit from its own corporate hybrid model to remove uncertainty in facilitating the dual pursuits of both commercial and community interests. In these structures, the amount shareholders receive is limited in exchange for the fulfillment of social objectives;¹⁵² that is, the social purpose that drives the organization takes precedence over mere accumulation of profit.¹⁵³ In some ways, investors should be prepared to limit the profit motive for starting the business.¹⁵⁴ The time may be ripe for Bands because, with the growth of social entrepreneurship, a significant shift in the business landscape is occurring as social entrepreneurs seek to facilitate socially focused business ventures in fresh and innovative ways.¹⁵⁵ This ripeness could allow Bands to engage economically on their own terms. The next section discusses some of the pragmatic differences between the Nova Scotia CIC and the British Columbia CCC and how these differences in technicalities should be accounted for before Bands consider taking advantage of either structure.

4.2. COMMUNITY INTEREST COMPANIES VERSUS COMMUNITY CONTRIBUTION COMPANIES

The *Community Interest Company Act (CICA)*¹⁵⁶ governs the establishment of a CIC in Nova Scotia, while the CCC in British Columbia is governed under the general *Business Corporations Act*.¹⁵⁷ The various nuances of these corporate structures are too many to comprehensively cover. However, some of the more notable ones will be discussed here, in particular how the provisions relate to Band structures.

¹⁵⁰ Vanduzer, BCE, *supra* note 147 at 207.

¹⁵¹ Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge: Harvard University Press, 1991) at 38. It has been argued that it is likely that the Court mischaracterized the content of the statutory duty of loyalty and good faith and duty of care, hence the confusion as to the scope of duties owed. See Waitzer & Jaswal, *supra* note 130 at 444–53; Nicholls, *supra* note 43 at 298–9.

¹⁵² See Liao, CSR, *supra* note 36 at 75; Henderson, CCC, *supra* note 36 at 212.

¹⁵³ Henderson, CCC, *supra* note 36 at 209.

¹⁵⁴ *Ibid* at 217.

¹⁵⁵ See Liao, Benefit Corp, *supra* note 36 at 684.

¹⁵⁶ See *CICA*, *supra* note 39.

¹⁵⁷ See *BCA BC*, *supra* note 38. Note that, as indicated at the beginning of the paper, Bands from any province can incorporate in these jurisdictions and still do business elsewhere so these models are available outside British Columbia and Nova Scotia (although it is preferable to incorporate in ones' own jurisdiction).

For a CIC, either at the time of incorporation or thereafter, a company must make an application to the Registrar of Community Interest Companies to be designated as a CIC.¹⁵⁸ The Registrar then determines if the company meets the requirements to be registered as such based upon the requirements set out in the *CICA*.¹⁵⁹ Several aspects of the CIC could present challenges for Bands. First, the memorandum of association *must* contain a statement of community purpose (and directors are required to act accordingly), including that the company has not been formed for a political purpose.¹⁶⁰

While establishing a community purpose is not problematic on its own and is to be expected, the definition of “community purpose” could be problematic for Bands in that it is not entirely clear how this clause could be interpreted as a purpose that must benefit either society at large or a segment of society that is broader than the group of persons related to the company.¹⁶¹ This could be an ambitious mandate for Bands that seek to impact their immediate communities. Indeed, social purposes for a Band may not extend to a broader “society at large” or even a segment of society that is broader than the group of persons associated with the company, as Bands typically create enterprise to benefit the community itself. Consequently, it has been argued that the definition of “community purpose” found in these structures is too restrictive for Bands.¹⁶² As the entire commitment of these structures revolves around the ability of a social enterprise to advance a social mandate, the unique position of Bands within Canadian society should be considered.

However, while some disagreement exists on whether a Band’s activities can fall within the narrow definition of “community purpose” found in either of these structures, the broader mandate of economic reconciliation should also be considered in interpreting a Band’s “community purpose.” Arguably, the benefits of these structures for Indigenous communities do extend to society at large. Removing the legal barriers that have historically constrained Indigenous economies, through the debilitating effects of a “welfare state,” is a necessary step

¹⁵⁸ *CICA*, *supra* note 39, ss 5, 6. The Registrar must also approve the amalgamation of two or more companies seeking to become a designated CIC, pursuant to s 7(4), *CICA*.

¹⁵⁹ For instance, the corporate name must end with either “Community Interest Company,” “société d’intérêt Communautaire” or abbreviations such as CIC, C.I.C., SIC or S.I.C and have no fewer than three directors (*CICA*, *supra* note 39, ss 5(3), 5(4)(d), 6(4), 6(5)(d), 10(1), 11–12); Similar requirements exist for the CCC (*BCA BC*, *supra* note 38, ss 51.921, 51.93).

¹⁶⁰ NS Reg 121/2016, s 3(2)(b) [Regulations].

¹⁶¹ See *CICA*, *supra* note 39, s 2(1)(c).

2(1)(c) “community purpose” means a purpose beneficial to

(i) society at large, or

(ii) a segment of society that is broader than the group of persons who are related to the community interest company,

and includes, without limiting the generality of the foregoing, a purpose of providing health, social, environmental, cultural, educational or other services, but does not include a political purpose or a prescribed purpose.

¹⁶² For a more fulsome discussion see Henderson, “Indigenous Entrepreneurship”, *supra* note 9 at 273 [emphasis added].

to building stable, mutually beneficial relationships¹⁶³ and an inclusive economy based upon respect and understanding.¹⁶⁴

Indeed, economic reconciliation encourages the development of reciprocal business relationships between Indigenous and non-Indigenous stakeholders, which, in turn, fosters “meaningful collaboration and mutual prosperity”¹⁶⁵ of *all* members of Canadian society. As such, a corporate community purpose related to Indigenous economies that promotes equity has far-reaching impacts upon the greater Canadian society and economy. In emphasizing that the recognition of Indigenous nationhood does not undermine the Canadian state, the Truth and Reconciliation Committee asserts that the Indigenous economy is critical to building a sustainable Canadian economy.¹⁶⁶

Further, recall the broad interpretation the Court applied in the *Gull Bay* decision in determining whether certain economic activities could still fall within the benevolent purposes in which the non-profit corporation was created. While the commercial logging activities were found to yield some profit, the operation was found to fall within the purposes in which the non-profit organization was created because the profit was used to promote the economic and social welfare of the community.¹⁶⁷ In taking guidance from this decision, a court could also be likely to go beyond a more narrow interpretation to find that a community purpose extends to “society at large” in that it advances economic reconciliation throughout the greater Canadian society.¹⁶⁸ However, it is not entirely clear how the definition of “community purpose” could be interpreted given that the *Gull Bay* decision related to receiving a non-profit tax exemption under section 149(1)(l) of the *Tax Act*, which more broadly indicates that the charity must be organized and operated exclusively for “social welfare, civic improvement, pleasure or recreation or for any other purpose except profit”.¹⁶⁹ As such, the definition of “community purpose” could still be restrictive as it relates to Bands.

Next, the CIC must also declare that the corporation is limited in its ability to pay dividends and distribute assets.¹⁷⁰ Understandably, the transfer of assets is restricted to those interests that align with the community purposes.¹⁷¹ The declaration of dividends must first be approved by members through special resolution,¹⁷² and be in accordance with the Community Interest

¹⁶³ For more on building mutually beneficial future relationships, see RCAP, *supra* note 17 at 656.

¹⁶⁴ CCAB Guidebook, *supra* note 18 at 10.

¹⁶⁵ *Ibid* at 10.

¹⁶⁶ RCAP, *supra* note 17 at 654.

¹⁶⁷ See *Gull Bay*, *supra* note 30 at para 26.

¹⁶⁸ In fact, one could also just as easily argue that given the sovereign nature of Indigenous Nations, this definition should be applied in the context of “Indigenous society” at large rather than “Canadian society” at large. However, under Canadian jurisprudence, Indigenous nations have not been legally recognized as sovereign states (although history certainly demonstrates the existence of Indian sovereignty)

¹⁶⁹ See *Tax Act*, *supra* note 31, s 149(1)(l).

¹⁷⁰ Notably, a CIC may also be forced to dissolve if the Registrar is no longer satisfied that the company meets the criteria for eligibility. See *CICA*, *supra* note 39, s 26. See *CICA*, *supra* note 39, s 9(1).

¹⁷¹ *Ibid*, s 13(1)(c).

¹⁷² Regulations, *supra* note 160, s 5(2)(b).

Company Regulations made under section 28 of the *CICA*.¹⁷³ To this end, the regulations contain asset lock provisions that limit the dividends declared each year to no greater than the total of 40% of the corporation's profit for the fiscal year and the unused cumulative dividend amount from any previous financial year.¹⁷⁴

On its face, the limited asset distributions do permit some financial flexibility. However, the inherent conflict between pursuing “profits” versus “community benefits,” especially since the noted asset lock provisions are based on forecasts rather than actual results, ostensibly prevents more inclusive decision making for Bands.¹⁷⁵ Because Bands have historically faced numerous economic barriers, such as the restrictions around land use and development or the ability of Bands to access credit, restricting a Band's ability to exercise discretion in asset distribution further impedes their autonomy, which prevents economic reconciliation. The CIC also cannot acquire property through a joint tenancy with another individual or company.¹⁷⁶ This negatively impacts Bands seeking to meet the demands of specific projects or opportunities by entering into land development contracts with third parties.¹⁷⁷

Finally, in addition to publishing the annual report (approved by the directors) to the shareholders before the annual general meeting, the CIC must file its Community Interest Report with the Registrar; this report should include a description of the ways in which the company benefited society or advanced the community purpose of the company.¹⁷⁸ Further to these additional requirements, a CIC Financial Report must also be provided to the Registrar that includes a summary of asset transfers as defined under section 2(1)(n),¹⁷⁹ as well as the purpose of those transfers.¹⁸⁰ Thus, incorporating under the *CICA* requires additional reporting requirements, which creates an unnecessary administrative burden for Bands that may already be dealing with capacity issues. Australia is dealing with this issue (discussed in the next section) so that smaller corporations have fewer reporting requirements than larger corporations.

The CCC, as distinguished from the CIC, is not required to apply for special status. Rather, a business automatically becomes a CCC if it adheres to the provisions of the *BC BCA*, most notably setting out a statement of community purpose in its notice of articles, and then conducting business as such. Similarly, the *BC BCA*'s definition of community purpose is also

¹⁷³ *CICA*, *supra* note 39, s 15(1)(a).

¹⁷⁴ Regulations, *supra* note 160, ss 5(1), 5(2)(c), 5(4).

¹⁷⁵ Henderson, “Indigenous Entrepreneurship”, *supra* note 9 at 276.

¹⁷⁶ See *CICA*, *supra* note 39, s 14(1).

¹⁷⁷ For example, the Tahltan Nation Development Corporation (“TNDC”), in Northwestern BC, works to advance diverse growth strategies to strengthen capacity within the community by providing job and leadership prospects to community members. One of the ways they do this is by forming partnerships with operating companies within Tahltan Territory that provide Tahltan members with employment and leadership opportunities to control and manage TNDC operations (Tahltan Nation Development Corporation, “About TNDC” (last visited 26 October 2020), online: *TNDC* <www.tndc.ca/about>). For a more complete discussion see Hanna, *supra* note 54 at 15–23.

¹⁷⁸ See *CICA*, *supra* note 39, s 21(1)(a).

¹⁷⁹ *Ibid*, s 2(1)(n).

¹⁸⁰ *Ibid*, s 21(1)(f).

restrictive; however, it is silent on whether a political purpose can be signified.¹⁸¹ As indicated, Bands may not be able to meet the mandate of benefiting “society at large” due to the narrow scope of focus on “community.”

Similar to the CIC, dividend and asset distribution restrictions are also integral to the CCC.¹⁸² The CCC regulations contain asset lock dividend distribution provisions, which restrict a Band’s autonomy.¹⁸³ Moreover, while Part 2.2 of the *BC BCA* on CCC’s does not explicitly address whether the CCC can enter into a joint tenancy in purchasing property, holding joint property is implied through section 51.95(4), which states that, on the dissolution of the company, any asset held as a joint tenant immediately before the dissolution will be entrusted to the other joint tenants if they are qualified entities.¹⁸⁴

The reporting requirements are less stringent for the CCC in that the filing of the Community Contribution Report follows the same requirements as the *BC BCA*. An annual report, approved by the directors, must only be published to shareholders before the annual general meeting. However, it too must contain an accurate account of its financial activities and the public benefit engaged.¹⁸⁵

It appears that the impetus for either the CCC or the CIC is that these structures assist in advancing an entity’s “community purpose” while maintaining some ability to distribute assets. Various provisions in the *CICA* and the *BC BCA* provide the means to work around the regular corporate form: directors and officers agree to conduct business with a view to conforming to the “community purpose” contained in the memorandum of association or the articles; directors are to adhere to the asset lock provisions that restrict the amount of possible shareholder distributions during operation and upon dissolution; and directors are required to provide annual reports demonstrating the noted benefit to society, the amount and use of assets transferred from the corporation, and the amount of dividends declared.¹⁸⁶ Nevertheless, these workarounds may not fit with the unique circumstances of Bands.

Though they are not ideal models, Indigenous-centric models in other jurisdictions could demonstrate that the Canadian hybrid examples (not specific to Bands) fall short of offering a corporate form open and inclusive of a mandate for “economic reconciliation.” Canadian lawmakers in consultation with Indigenous communities could take guidance from Australia and the US to develop an Indigenous-centric corporate business model. Just as in Canada, the US and Australian models typically have the essential components of the corporate form:

¹⁸¹ See *BCA BC*, *supra* note 38, s 51.911(1).

51.911 (1) A company is a community contribution company if its notice of articles contains the following statement:

This company is a community contribution company, and, as such, has purposes beneficial to society. This company is restricted, in accordance with Part 2.2 of the *Business Corporations Act*, in its ability to pay dividends and to distribute its assets on dissolution or otherwise.

¹⁸² *Ibid*, ss 51.911, 51.92, 51.94 & 51.95.

¹⁸³ BC Reg 63/2013, ss 4–8 [CCC Regulations].

¹⁸⁴ See *BCA BC*, *supra* note 38, s 51.95(4).

¹⁸⁵ *Ibid*, s 51.96.

¹⁸⁶ Henderson, “Indigenous Entrepreneurship”, *supra* note 9 at 273.

centralized management, limited liability, perpetuity, and the transferability of ownership interests.¹⁸⁷ Note, however, that the US model does permit the issuance of tax-exempt bonds, if the proceeds are used to finance essential government services, and shares, restricted to only members of the tribe.¹⁸⁸ Conversely, the Australian model does not permit the issuance of shares,¹⁸⁹ although it does allow for the distribution of profits to members. The differences between each of these corporations and how they might be applicable in Canada are covered in the following sections.

5. TAKING GUIDANCE FROM THE UNITED STATES AND AUSTRALIA

In the US, Indian tribes can be recognized under the *Indian Reorganization Act*, 1934¹⁹⁰ or independently under separate legislation in some cases.¹⁹¹ Ostensibly they are considered sovereign tribes, albeit sovereignty is dubiously equated with “domestic dependent nations.”¹⁹² Although the *Reorganization Act* signified a shift in Indian policy to provide a means for tribes to attain autonomy, economically and politically,¹⁹³ the Act is not entirely dissimilar to the *Indian Act* in that the US Bureau of Indian Affairs has assumed the responsibility for the administration of Indian lands. Nonetheless, section 16 of the *Reorganization Act* codified the ability of tribes to organize their own tribal governments by establishing federally recognized constitutions that govern the tribal community.¹⁹⁴ Tribes are also legally empowered and encouraged to engage in economic development through their ability to establish their own federally chartered corporations under section 17 of the *Reorganization Act*,¹⁹⁵ discussed in the next section.

¹⁸⁷ Graham Safty, “Federal Diversity Jurisdiction and American Indian Tribal Corporations” (2012) 79:4 U Chicago L Rev 1593 at 1596; Karen J Atkinson & Kathleen M Nilles, “Tribal Business Structure Handbook IV–1” (2008), online: *Internal Revenue Agency* <www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf> at III–1 [Tribal Business Handbook].

¹⁸⁸ US Department of the Interior, Assistant Secretary—Indian Affairs, Office of Indian Energy and Economic Development and Division of Economic Development, “Tribal Economic Development Principles at a Glance Series: Choosing a Tribal Business Structure” (last visited 26 October 2020) at 9, online (pdf): *U.S. Department of the Interior Indian Affairs* <www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf> [US Indian Affairs].

¹⁸⁹ Australian Government, “*The CATSI Act and the Corporations Act—some differences*” (June 2010), online (pdf): *Office of the Registrar of Indigenous Corporations* <www.oric.gov.au/s843.pdf> [Australian Government].

¹⁹⁰ 25 USC § 477 [*Reorganization Act*].

¹⁹¹ For instance, see Jason Hanna, “The Little Shell Tribe will be the newest Native American group recognized in the US” (December 18, 2019), online: *CNN* <www.cnn.com/2019/12/18/politics/montana-little-shell-tribe-recognition-trnd/index.html>.

¹⁹² See *Worcester v Georgia*, 31 US (6 Pet) 515 at 581–582 (1832) [*Worcester*]; Crepelle, *supra* note 10 at 426.

¹⁹³ Crepelle, *supra* note 10 at 438.

¹⁹⁴ *Reorganization Act*, *supra* note 190, s 16.

¹⁹⁵ *Ibid*, s 17; *Petitioning procedures for tribes reorganized under federal statute and other organized tribes*, 25 CFR §82 (2012) [25 CFR §82]; Crepelle, *supra* note 10 at 438. First the tribe must draft a charter, which operates much like the Articles of Incorporation in that it contains the corporation’s organizational framework, purpose and management details. If the tribal council approves the charter (this procedure is set by tribal law), the tribal council must submit the charter along with a petition expressing a desire to form a section 17 corporation to the Bureau of Indian Affairs. The Bureau reviews the charter to ensure it

5.1. UNITED STATES: SECTION 17 CORPORATIONS

Because tribes possess sovereign immunity, their ability to participate in economic development could be impeded¹⁹⁶ when business partners choose not to assume such risks. Nevertheless, a tribe is enabled to waive its sovereign immunity under this corporate structure.¹⁹⁷ Certain features could be advantageous to informing Band corporate structures in Canada.

First, because the section 17 corporation is tribal in nature, its purposes mirror those of the tribe.¹⁹⁸ Unlike the statutory business regimes in Canada, the statute authorizing section 17 corporations does not contain a definition of “community purpose.” Consequently, its purpose clause—usually more generally stating that the corporate mandate is to advance the economic development of the tribe—might be drafted more broadly to accommodate possible changes in the corporation’s forthcoming business activities.¹⁹⁹ This differs from the requirement of a more narrowly constructed purpose by both the Nova Scotia CIC and the British Columbia CCC in that a Band’s community purpose is required to fit within a more narrow organizational purpose. The Registrar in Nova Scotia could also potentially challenge an “evolving” CIC purpose that does not fit within the *CICA*’s definition of community purpose.

Next, tribes can issue shares to its members, albeit, only under certain conditions.²⁰⁰ Notably, shares cannot be devised to the general public. Nonetheless, there are otherwise no restrictions on asset distribution that constrains the tribe’s autonomy. The tribe may draft the charter of the corporation based upon its own unique circumstances provided that it is consistent with federal law. To this end, the corporate powers that may be conferred under its charter are set out in the *Reorganization Act*, with one notable exception applicable to the use of trust or reserve lands:

Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease

is consistent with federal law and, if approved, the tribal council must then ratify the charter prior to the section 17 corporation becoming operable. Tribes can also incorporate under state law just as any other corporation or establish tribally-chartered corporations under their own tribal codes (Tribal Business Handbook, *supra* note 187 at III–11, III–12; US Indian Affairs, *supra* note 188 at 5).

¹⁹⁶ Tribal Business Handbook, *supra* note 187 at III–10.

¹⁹⁷ 25 U.S.C. §477; *American Vantage v Table Mountain Rancheria*, 292 F (3d) 1091 at 1098 (9th Cir 2002) [*American Vantage*].

¹⁹⁸ Tribal Business Handbook, *supra* note 187 at III–16.

¹⁹⁹ 25 CFR §82, *supra* note 195; Tribal Business Handbook, *supra* note 187 at III–10–III–12.

²⁰⁰ 25 USC §464. 464 Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation[...]. See also "Choosing a Tribal Business Structure", online (pdf): *US Dep't of the Interior- Indian Affairs* <www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf>.

for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation.²⁰¹

Otherwise, little direction is provided on managing and distributing assets, other than that the Bureau has provided a model section 17 charter that provides some guidance to tribes.²⁰² Similar to general corporations, the proposed charter should explicitly state the corporate powers and limitations, the purpose of the business, details on business management, when and how meetings will occur, and other details regarding operations and reporting.²⁰³ To that end, reporting should be consistent with the reporting requirements set out in the charter when it was drafted. Bands might find that there is some merit to this kind of flexibility because the rules may be customized to suit each corporations' needs. This is similar to the *CATSI Act* corporation (discussed in the next section) whereby certain corporate form rules may be substituted for customized ones and reporting has flexible standards.

Nevertheless, the section 17 corporation does have certain shortcomings. As noted above, the powers established under the authority of 25 U.S.C. § 477, essentially one paragraph, provides little statutory guidance and no detailed requirements on establishing the corporate structure. Some tribes will have already created its own tribal code under section 16 of the *Reorganization Act*, which will provide guidance around establishing business structures. However, it is not necessary that a tribe establish itself under section 16 before it creates a section 17 corporation.²⁰⁴ A lack of structure can be a double-edged sword:²⁰⁵ it enables creativity and flexibility, but it could reduce the likelihood of business partners entering into contracts with the corporation.²⁰⁶ Aside from this drawback, the section 17 corporation must also be solely owned by the Indian tribe. As such, equity ownership by outside parties is not permitted. Thus, if this feature were applicable in Canada, a Band would be limited in certain kinds of business development opportunities with third parties, similar to the effect of the *CICA* in Nova Scotia.

Regardless, Canada could possibly adopt some of the more notable features of the section 17 corporation. While it is unclear in the shorter term whether the *Indian Act* will be repealed, or how long that process could take, the *Indian Act* could be amended to permit the establishment of a model akin to a section 17 corporation. The provisions could provide for flexibility in the manner in which a Band corporation is established by providing a Band with the power to create its own Indigenous-centric corporation that aligns with Indigenous values. Arguably, there are drawbacks here because the *Indian Act* has a long history of being a contentious and paternalistic structure. One could argue that simply establishing additional asset governance

²⁰¹ 25 USC § 477.

²⁰² See "Federal Charter of Incorporation Issued By the United States of America" (last visited 15 November 2020) online: *Bureau of Indian Affairs* <www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc-001806.pdf> (retrieved online January 7, 2020). See also Tribal Business Handbook, *supra* note 187 at III–14.

²⁰³ US Indian Affairs, *supra* note 188 at 5.

²⁰⁴ Tribal Business Handbook, *supra* note 187 at III–11.

²⁰⁵ The one way the section 17 corporation is inflexible is that once ratified by the tribal council, tribes cannot independently amend the corporate charter without approval from the Secretary of the Interior or terminate a section 17 corporation except through an act of Congress (Tribal Business Handbook, *supra* note 187 at III–11, 16).

²⁰⁶ US Indian Affairs, *supra* note 188 at 4.

powers within the *Indian Act* is still more of the same in terms of the government regulation of Indigenous affairs.

Further, while the concept is forward thinking, there is an insufficient framework for Canada to adopt a section 17 corporate model in its current form. While the model contains certain noted features for Canadian lawmakers to take guidance from, this model may not extend far enough to meet the goals of economic reconciliation for Bands. Alternatively, the Australian Aboriginal corporate model, discussed in the next section, may also provide guidance to Canadian law-makers insofar as providing a framework for an Indigenous-centric model.

5.2. AUSTRALIA: CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006

In Australia, while an Aboriginal community may incorporate under state or federal corporate laws, it may also incorporate under specific legislation established to suit the needs of Aboriginal and Torres Strait Islander communities, the *Corporations (Aboriginal and Torres Strait Islander) Act (CATSI Act)*.²⁰⁷ This framework was established to balance mainstream corporate law and Aboriginal-centric corporate structures, that is, to allow for flexibility in how Aboriginal communities create their business structures.²⁰⁸ *CATSI Act* corporations were intended to strike a compromise in Aboriginal business development by respecting both Aboriginal laws and ways of doing business and the Western legal system and business culture.²⁰⁹

The *CATSI Act* was created out of the awareness that governments needed to be sensitive to “Indigenous cultural views and practices and their relevance to corporate governance.”²¹⁰ Corporations established under this Act are considered a special measure for Aboriginal peoples and are regulated by an independent office holder, the Registrar of Indigenous Corporations, supported by the Office of the Registrar of Indigenous Corporations (ORIC).²¹¹ The *CATSI Act*, designed to replace the *Aboriginal Councils and Associations Act 1976*,²¹² is a means to provide a legally recognized business structure that bridges the gap between Indigenous culture and that of the broader Australian society in establishing contemporary Indigenous business models.²¹³

In establishing the corporation, the *CATSI Act* contains form rules that could be adopted by an Aboriginal nation or a corporation may customize its own rules.²¹⁴ In this regard, there is some flexibility. More conspicuously, there is no restrictive definition of “community

²⁰⁷ *Corporations (Aboriginal and Torres Strait Islander) Act, 2006/24 [CATSI Act]*.

²⁰⁸ Ian Murray, Joe Fardin & James O’Hara, “Co-designing Benefits Management Structures” (2019) at 21, online (pdf): *Centre for Mining, Energy and Natural Resources Law, UWA Law School* <research-repository.uwa.edu.au/en/publications/co-designing-benefits-management-structures> [Murray et al].

²⁰⁹ *Ibid.*

²¹⁰ *Ibid* at 22.

²¹¹ Australian Government, *supra* note 189.

²¹² *Aboriginal Councils and Associations Act 1976, 1976/186.*

²¹³ Murray et al, *supra* note 208 at 22.

²¹⁴ *CATSI Act, supra* note 207, s 57–1. For instance, the corporation’s rulebook must contain certain information such as the name of the corporation and its objectives, the frequency of directors’ meetings and the kind of processes to be engaged for resolving disputes.

purpose” in that the corporation is specifically established as a *CATSI Act* for-profit enterprise for the benefit of Aboriginal and Torres Strait Islanders in engaging business and economic development.

One of the key features of corporations created under the *CATSI Act* is that they have a lower administrative burden in that the reporting requirements are correlated with the size and nature of the relevant Indigenous corporation.²¹⁵ For example, a small corporation with less than \$100,000 in revenue will have fewer reporting requirements than a large corporation.²¹⁶ Recognizing the unique situations of Indigenous corporations, the *CATSI Act* also permits the modification of rules related to a variety of corporate matters including meetings and inadequate members and officers.²¹⁷ Assistance and training is available from the ORIC on drafting these rules and establishing effective corporate governance.²¹⁸ Otherwise, in the event that an Indigenous corporation is in trouble, the ORIC may provide regulatory oversight, especially for those corporations providing essential services, maintaining infrastructure, or holding land.²¹⁹ This could be a critical no-cost service for Bands that establish corporations and need cost-effective guidance in corporate governance. On the other hand, Bands would also want to balance the inherent contradiction between accountability and autonomy found under this kind of Act.²²⁰ One way to do this is to ensure that the regulatory body is composed of Indigenous members who are culturally sensitive to Indigenous processes. Currently, certain proposed amendments to the Act aspire to “increase accountability and transparency” while “simultaneously reducing the regulatory burden.”²²¹ In effect, these amendments could enhance flexibility and autonomy for Indigenous Nations,²²² thus resolving at least some aspects of the accountability–autonomy dichotomy.

Last, the *CATSI Act* does not contain asset lock provisions that restrict the distribution of assets (as it is not a hybrid structure). Members could therefore include rules in the corporate rulebook related to how corporate profits will be distributed.²²³ One of the major drawbacks of this kind of corporation, however, is that the *CATSI Act* does not permit the corporation to own or trade shares nor to issue debentures or other securities.²²⁴ This inevitably prevents

²¹⁵ *Ibid*, Part 7–3. Ostensibly, the rigid corporate design, audit, reporting, and corporate governance standards (such as directors’ duties and replaceable rules) was significantly more burdensome under the *ACA Act*. Additionally, these structures lacked protection for members and third parties, such as funding agencies. See Murray et al, *supra* note 208 at 22.

²¹⁶ Australian Government, *supra* note 189.

²¹⁷ See the list of replaceable rules at *CATSI Act*, *supra* note 207, s 57–5.

²¹⁸ Australian Govt., *supra* note 189; Murray et al, *supra* note 208 at 22–23.

²¹⁹ *CATSI Act*, *supra* note 207, s 490–1.

²²⁰ Murray et al, *supra* note 208 at 22.

²²¹ Murray et al, *supra* note 208 at 23 citing Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (Cth) (lapsed due to proroguing of Parliament for the 2019 election) and ORIC, “Proposed Amendments to the CATSI Act” (2018), online (pdf): ORIC <www.oric.gov.au/sites/default/files/Proposed-amendments-CATSI-Act-discussion-paper_v1.1.1.pdf>.

²²² *Ibid* at 24.

²²³ Australian Government, *supra* note 189.

²²⁴ *Ibid*.

the corporation from being able to access flexible corporate financing. This kind of restriction could be a detriment to Bands that are already constrained in accessing capital.

CATSI Act corporations, in the short term anyway, may not live up to their potential. This may be inevitable as it relates to Western legislative structures that regulate Indigenous business affairs. Nonetheless, as it stands currently, Australia does have a more comprehensive model that Canada might take guidance from. Adopting some of the attributes of the *CATSI Act* corporation including the flexible form and reporting requirements, the availability of a specific Indigenous friendly regulatory body to access governance support if required, the lack of the restrictive “community purpose” requirement, and the lack of asset lock provisions could assist in overcoming some of the issues in Canada.

Ostensibly, there are some notable advantages and disadvantages of the US, Australian, and Canadian models. While there is much to be worked out in all three jurisdictions, the Australian model demonstrates a more likely possibility of “economic reconciliation” vis-à-vis an Indigenous-centric corporate form in Canada. In fact, current shortcomings should not preclude Canada from considering an Indigenous-centric corporate model in that lessons learned from both Australia and the US could assist in mobilizing the legislature to, at the very least, initiate the process of creating relevant corporate models. To this end, one should not preclude the fact that establishing these kind of culturally appropriate corporate structures could also be a symbolic means of working toward reconciliation. I touch on this briefly in the next section.

5.3. THE EXPRESSIVE FUNCTION OF LAW

Aside from the corrective function of adopting either the US or Australian jurisdictional corporate models—that is, fixing possible defects in corporate law as an essential function of formal amendments²²⁵ to suit Indigenous peoples’ unique circumstances—the expressive function of law as a means of advancing economic reconciliation is worthy of consideration. Arguably, corporate law could serve an expressive function in that given the long history of Indigenous-Crown divide, and the need to obtain some middle ground when it comes to advancing Indigenous economies, the symbolism of Indigenous-centric corporations could serve as an important means to advance reconciliation.

For example, in constitutional law, it has been argued that while the formal amendment rules may provide a means to entrench certain defects in the written constitution, such rules might also function as a means of expressing constitutional values.²²⁶ Similarly, scholars have also argued that law serves an expressive function in that it “matters for what it says in addition for what it does.”²²⁷ That is, there are material and expressive consequences because laws shape social norms through their effect.²²⁸ Arguably, because the law expresses that which it values

²²⁵ Richard Albert, “The Expressive Function of Constitutional Amendment Rules” (2013) 59:2 McGill LJ 225 at 227.

²²⁶ *Ibid* for a more fulsome discussion.

²²⁷ Richard H McAdams, “An Attitudinal Theory of Expressive Law” (2000) 79 Or L Rev 339 at 373.

²²⁸ Cass R Sunstein, “On the Expressive Function of Law” (1996) 144 U Pa L Rev 2021 at 2024–2025.

through that which it authorizes,²²⁹ legislators could demonstrate an expressive desire to engage in economic reconciliation by establishing Indigenous-centric corporate structures. This could also send the message that Indigenous economics is here to stay.

Having said that, Canada could learn from both the best and worst characteristics of the US and Australian models, and the value of symbolism in advancing economic reconciliation. A Canadian model that suits the unique legal position of Bands could signal a willingness to push the limits of economic reconciliation by respecting the *sui generis* nature of Indigenous corporate governance in Canada.

6. CONCLUSION

Bands currently rely upon several corporate mainstream models—either for-profit or non-profit structures, depending on the Band's mandate and assets under management—to accomplish both social and fiscal goals. This paper argued that corporate forms shape the economic development opportunities Indigenous peoples can access on their path for economic sustainability. However, to also create cultural sustainability in business, constraints in corporate law as it relates to Bands, should be addressed. Historically, Indigenous cultures have been negatively impacted by governmental policies that sought to eradicate sovereign Indigenous societies through assimilation and legislation. As such, integrating Indigenous economies into the “mainstream economy” through mainstream corporate structures could undermine the significance of Indigenous culture and traditions. Blending non-profit and for-profit strategies could enable the generation of revenues, garnered from social enterprise, to advance significant social goals.²³⁰ Social enterprises are certainly important options that could warrant further research for Bands.

However, while on the one hand, the unconventional hybrid structure, available in British Columbia and Nova Scotia, may *prima facie* appear to be a viable solution for merging business enterprise and profit with the preservation of Indigenous traditions and values, this could still leave Bands in the position of choosing between profit and community purpose. Consequently, I argued that such structures are unlikely to effusively assist in achieving the goal of economic reconciliation. I argued that Canada could learn much from Australia on this front. In spite of its shortcomings, the *CATSI Act* corporation contains a more structured, yet adaptable, framework. Nonetheless, guidance could be taken from both the US and Australian models in establishing an Indigenous-centric model that is adaptable to Bands in Canada.

This would signal a desire for Canada to advance economic reconciliation in a meaningful area, Indigenous corporate governance. Nonetheless, it is unlikely that section 17 corporations go far enough to advance economic reconciliation in Canada. Rather, the *CATSI Act* corporations are more comprehensive and align more closely with the TRC objectives in Canada, which call upon the corporate sector to make room for Indigenous ways of doing business. While there are certainly pragmatic aspects of the *CATSI Act* provisions that address the unique considerations of Indigenous peoples in Australia, cultural recognition is also a significant component for effecting meaningful economic reconciliation. As I have argued throughout,

²²⁹ Richard H Pildes & Cass R Sunstein, “Reinventing the Regulatory State” (1995) 62:1 U Chicago L Rev 1 at 66.

²³⁰ See Sossin & Kapoor, *supra* note 36 at 1004.

establishing Indigenous economies through means that are consistent with Indigenous values and culture goes to the heart of “economic reconciliation.” In fact:

[S]ustainable reconciliation on the land involves realizing the economic potential of Indigenous communities in a fair, just and equitable manner that respects their right to self-determination. Economic reconciliation involves working in partnership with Indigenous peoples to ensure that lands and resources within their traditional territories are developed in *culturally respectful ways* that fully recognize Treaty and Aboriginal rights and title.²³¹

²³¹ Yalden et al, *supra* note 13 at 254 [emphasis added].