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COULD COMMUNITY CONTRIBUTION COMPANIES IMPROVE ACCESS TO JUSTICE?

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The legal profession is engaged in two related debates: how to improve access to justice and whether to liberalize its rules of professional conduct to permit “alternative business structures” and non-lawyer ownership. The purpose of this article is to inform readers about the “community contribution company,” or C3—a new type of hybrid corporation introduced in British Columbia—and to examine the potential of C3s or similar corporate forms to respond to both of these challenges. A C3 is a for-profit entity, but profits are subordinated to the company’s chosen “community purpose.” In the UK, where alternative business structures and non-lawyer ownership are permitted, a similar type of corporation has been used to provide both low-cost legal services and as a potential source of funding to free legal clinics. Canadian provincial law societies could use C3s to test alternative business structures and non-lawyer ownership through a corporate structure that addresses some of the concerns typically raised in this debate.

La profession juridique est engagée dans deux débats connexes, lorsqu’il s’agit de se demander d’une part, comment améliorer l’accès à la justice et d’autre part, si les règles de déontologie devraient être assouplies pour autoriser la création de « structures d’entreprise alternatives » et permettre aux non-juristes d’en détenir des parts. Cet article a pour objet d’informer

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les lecteurs au sujet de l'« entreprise à contribution communautaire » (community contribution company) ou C3, un nouveau type de société hybride créé en Colombie-Britannique. L'auteure se penche, en outre, sur le potentiel que recèlent les C3 ou des formes d'entreprises similaires pour répondre à ces deux questions. Une C3 est une entité à but lucratif, mais dont les profits sont subordonnés au « but social » que s'est choisie la société. Au Royaume-Uni, où les structures d'entreprise alternatives et la propriété par les non-juristes sont permises, un genre de société similaire a été utilisé pour offrir des services juridiques à bas coût et une possible source de financement pour les cliniques juridiques gratuites. Au Canada, les barreaux provinciaux pourraient utiliser le modèle de la C3 pour essayer des structures d'entreprise alternatives et expérimenter la détention de parts dans ces entreprises par des non-juristes via une structure sociale qui répond à certaines des préoccupations généralement exprimées dans le cadre de ce débat.

1. Introduction

The Canadian legal profession appears poised on the brink of fundamental change.¹ A lack of access to legal advice and representation, frequently referred to by the shorthand “access to justice,” coincides with an ongoing debate within the profession regarding permissible forms of business organizations through which to practice law. Liberalizing the laws and regulations governing the profession to allow for incorporated law firms and non-lawyer ownership could help to lower the costs of legal services and improve access to justice.² A recent report of an initiative of the Canadian Bar Association (CBA) recommended allowing incorporation and non-lawyer ownership,³ but significant opposition to liberalization

¹ Gail J Cohen, “Don’t be afraid of change” (27 April 2016), *Can Lawyer & LT* (blog), online: <www.canadianlawyermag.com/legalfeeds/3236/don-t-be-afraid-of-change.html>

² Canadian Bar Association (CBA), *Futures: Transforming the Delivery of Legal Services in Canada* (Ottawa: CBA, 2014) at 33, online: <www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA_Legal_Futures_PDFs/Futures-Final-eng.pdf> [CBA Futures Report]: “regulatory constraints, [...] and reliance on old models of legal service delivery [...] [restrict] [...] the range of services and cost structures provided”; Law Society of British Columbia (LSBC), Independence and Self-Governance Advisory Committee, *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations* (Vancouver: LSBC, 2011) at 21, online: <www.lawsociety.bc.ca/docs/publications/reports/AlternativeBusinessStructures.pdf> [Law Society of BC]: “The current model does not seem to be working in a way that allows people who need to access legal advice to obtain it in an affordable way”.

³ CBA Futures Report, *ibid.* The recommendations have not yet been voted on by CBA members, so they do not represent official policy of the CBA at this time. See Tali Folkins, “Debate over ABS must continue: Headon” (6 August 2015), *Can Lawyer &*

among members of the bar remains.⁴ The Law Society of British Columbia has decided to adopt a “wait and see” approach.⁵ The Law Society of Upper Canada (LSUC) continues to explore the use of “alternative business structures” (ABS),⁶ albeit with a level of apprehension and skepticism.⁷ Similarly, a 2013 paper prepared for the Nova Scotia Barrister’s Society stated that “the jury is still out on the impact of ABS” on access to justice.⁸ Based on a November 2015 joint discussion paper, the Prairie Law Societies appear more open to liberalization.⁹

One of the main arguments against non-lawyer ownership is that it will create tensions between lawyers’ professional and ethical duties to their clients, on the one hand, and investors’ interest in maximizing profits, on the other.¹⁰ The legal profession is not unique in its concern that pressure to maximize profits can compromise other values or ethics. A growing number of entrepreneurs are interested in organizational forms that

LT (blog), online: <www.canadianlawyer.com/legalfeeds/2829/debate-over-abs-must-continue-headon.html> [Folkins].

⁴ See also Folkins, *ibid*: “[ABS] became one of the most contentious issues in the Law Society of Upper Canada’s bench elections this spring. Most of those voted in as benchers oppose the idea”.

⁵ Law Society of BC, *supra* note 2 at 20.

⁶ LSUC, Professional Regulation Committee, “Alternative Business Structures Working Group Report” in *Report to Convocation: September 24, 2015* (Toronto: LSUC, 24 September 2015) at para 60, online: <www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf> [LSUC, “ABS Working Group Report”] defines ABS as “any form of non-traditional business *structure*, as well as alternative means of delivering legal services”.

⁷ See LSUC, “ABS Working Group Report”, *ibid* at paras 56–57, 128 where the Alternative Business Structures Working Group decided not to investigate any further regarding majority or controlling non-licensee ownership for traditional law firms, although it has not ruled this out at some point in the future. The Working Group intends to continue to investigate “more limited non-licensee ownership models for traditional law firms” as well as “certain tailored ABS models”.

⁸ Nova Scotia Barristers’ Society (NSBS), *Transforming Regulation and Governance in the Public Interest*, by Victoria Rees (Halifax: NSBS, 15 October 2013) at 26, online: <www.nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>.

⁹ Prairie Law Societies (PLS), *Innovating Regulation: A Collaboration of the Prairie Law Societies*, by Cori Ghitter et al (PLS, November 2015) at 2, online: <www.lawsociety.ab.ca/docs/default-source/innovating-regulation/innovating-regulation-paper_v6.pdf> [Prairie Law Societies]: “given the pressures lawyers face to run their practices as businesses, regulatory restrictions around fee sharing, referral fees, and other limitations may no longer be appropriate. Further, a move towards allowing ABS has the potential to open the door to innovations, which may assist in addressing unmet legal needs”.

¹⁰ See e.g. Richard Devlin & Ora Morison, “Access to Justice and the Ethics and Politics of Alternative Business Structures” (2012) 91:3 Cdn Bar Rev 483 at 502, esp n 45 [Devlin & Morison].

expressly recognize, as objects of the organization, both profit generation and the promotion of sustainable development or other social values. There is also increasing demand among investors for “impact investing” opportunities, the purpose of which is to achieve a return on investment and a “defined positive social impact.”¹¹ On the other side of the profit/non-profit divide, charities and non-profit organizations are looking to for-profit social enterprises as new sources of funding.¹²

These interests of entrepreneurs, investors and non-profit organizations have led to a new corporate form that does not merely permit but rather *requires* managers or directors to pursue objects other than profits.¹³ These “hybrid corporations” go by different names—community interest companies, community contribution companies, public benefit corporations—but they all build into the corporate structure express limits on the pursuit of shareholder wealth in favour of other social goals “to enable the dual pursuit of economic and social interests.”¹⁴

This article builds on prior recent research on forms of business organization and access to justice,¹⁵ focusing on the possible use of “community contribution companies” (C3s). C3s are a form of hybrid corporation provided for in BC’s *Business Corporations Act*. Similar legislation for community interest companies (CICs) has recently come into

¹¹ Tania Carnegie, “Catalyzing impact investing: the opportunity for governments” [Carnegie] in Canada’s National Advisory Board to the G8 Social Impact Investment Task Force, *Mobilizing Private Capital for Public Good: Priorities for Canada* (Toronto: MaRS Centre for Impact Investing, September 2014) 24 at 24, online: <www.marsdd.com/wp-content/uploads/2014/09/MaRS-National_Advisory_Board_Report_EN.pdf> [*Mobilizing Private Capital*].

¹² See e.g. Sarah Doyle, “Rethinking the non-profit/for-profit divide” [Doyle] in *Mobilizing Private Capital*, *ibid* at 12–13; Adam Aptowitzer & Benjamin Dachis, “At the Crossroads: New Ideas for Charity Finance in Canada”, Commentary No 343 (Toronto: CD Howe Institute, 2012) at 3: Due to decreases in individual donations “charities have been looking to other sources of financing apart from individual donors” [Aptowitzer & Dachis].

¹³ See Roberta S Karmel, “Will Law Firms Go Public?” (2013) 35:2 U Pa J Intl L 487 at 530 [Karmel]: “[t]he benefit corporation commits its owners to pursue social or philanthropic objectives, although shareholder profits may also be pursued”.

¹⁴ Carol Liao, “The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise” (2013) 9:1 J Sustainable Development L & Policy 53 at 75: “a hybrid can be defined as a corporate legal structure that blends traditional for-profit and non-profit legal characteristics to enable the dual pursuit of economic and social interests” [Liao].

¹⁵ David Wiseman, “Poverty Law, the Future of Legal Services and Access to Justice: Towards ABS+” (2015) 3:1 Cdn J Poverty L 10 [Wiseman]; Andrew Pilliar, “Exploring a Law Firm Business Model to Improve Access to Justice” (2015) 32:1 Windsor YB Access Just 1 [Pilliar].

force in Nova Scotia.¹⁶ This new type of corporate form provides not only an alternative to the traditional forms of business organization, but also to the alternative business structures currently under consideration by Canadian law societies, which would allow lawyers to build into their business structure an explicit commitment to public service and social justice.¹⁷ C3s could provide an opportunity for law societies to test incorporation and non-lawyer ownership in a form of business organization that builds in protections against the concern that profits will trump professionalism.¹⁸ The analysis focuses on the United Kingdom, where “community interest companies” are being used to try to improve access to justice, and British Columbia’s C3 legislation, which has been in force since 2013. The article also discusses Nova Scotia’s *Community Interest Companies Act* (NS *CICA*), which received royal assent in December 2012 but was only recently declared in force as of 15 June 2016. Beyond the debates about access to justice and alternative business structures, the discussion of C3s and other types of hybrid corporations may be useful to lawyers who are not yet familiar with these new forms of business organization.

Part II briefly sets out the problem of access to justice in Canada. Part III provides an overview of the distinctive elements of hybrid corporations, focusing on BC C3 and UK legislation as well as referencing Nova Scotia’s new CIC laws. Part IV examines the potential of hybrid corporations to help alleviate gaps in the Canadian legal marketplace, including using the profits to fund free legal clinics, as is being explored in the UK. Part V discusses the barriers to using C3s to provide low-cost legal services found in the current rules on business structure and ownership of law firms and the existing opposition and ambivalence to ABS by law societies across Canada. Further, it explains how the corporate structure of C3s addresses these concerns. Part VI concludes that Canadian law societies should consider amendments to the laws and regulations governing the profession to allow law firms to operate as C3s with non-lawyer ownership.

¹⁶ SBC 2002, c 57, Part 2.2 [BC *BCA*]; *Community Interest Companies Act*, SNS 2012, c 38 [NS *CICA*].

¹⁷ This might fall under what David Wiseman has described as “ABS+” in Wiseman, *supra* note 15 at 11.

¹⁸ LSUC, “ABS Working Group Report”, *supra* note 6 at para 58 stated that it will continue to consider “whether there may be an opportunity to develop an access to justice focused ABS framework [...] to enable civil society organizations [...] to become owners of entities in order to facilitate access to legal services”.

2. *The Problem of Access to Justice: the Lack of Low-Cost Legal Services and the Crisis in Legal Aid Funding*

Law societies and bar associations across Canada are struggling with the problem of access to affordable legal advice and representation.¹⁹ There are two gaps in the system: (i) a lack of providers of low-cost legal services for low- and middle-income individuals, and (ii) the severe under-funding of legal aid and free legal services. LSUC describes the problem of access to justice as “a matter both of the costs of legal services currently being provided and of the legal needs that are not being served.”²⁰ The lack of access to legal representation is reflected in the “growing phenomenon” of self-represented litigants, which can increase the length, and thereby the costs, of trials for the litigants and for the justice system.²¹ The social impacts of this problem are felt beyond the courtroom: there is growing evidence suggesting a causal link between a lack of access to justice and health and social problems.²²

The cost of legal advice and representation can be “prohibitive not only for the poor but also for the middle class.”²³ This is an issue of broad social concern given the “pervasiveness” of civil justice problems in “the lives

¹⁹ See e.g. Prairie Law Societies, *supra* note 9 at 59: “[i]t has been well established that there is an access to justice problem in Canada”. See also Alison MacPhail, *Report of the Access to Legal Services Working Group* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2012) at 4, online: <[www.cfcj-fcjc.org/sites/default/files/docs/2013/Report of the Access to Legal Services Working Group.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Access%20to%20Legal%20Services%20Working%20Group.pdf)> for a definition of access to justice [MacPhail]

²⁰ LSUC, “ABS Working Group Report”, *supra* note 6 at para 82.

²¹ CBA Futures Report, *supra* note 2 at 19. See also University of Toronto Faculty of Law Middle Income Access to Civil Justice Initiative Steering Committee, *Background Paper* (Toronto: University of Toronto, 2011) at 9 [Middle Income Access to Civil Justice]; Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at 4 [Trebilcock, Duggan & Sossin]; Neil Etienne, “MAG, LSUC launch family law review”, *Law Times* (15 February 2016), online: <www.lawtimesnews.com>: “[s]tatistics from the Ministry of the Attorney General show that more than 57 per cent of Ontarians lacked legal representation in family court in 2014-2015”.

²² Middle Income Access to Civil Justice, *ibid* at 10; Robin L Nobleman, “Addressing Access to Justice as a Social Determinant of Health” (2014) 21 Health LJ 49 at 74; Devlin & Morison, *supra* note 10 at 487.

²³ MacPhail, *supra* note 19 at 3; Trebilcock, Duggan & Sossin, *supra* note 21 at ix; The Right Honourable Madam Chief Justice Beverley McLachlin, PC, (Keynote speech of the Access to Civil Justice for Middle Income Canadians Colloquium Keynote Speech delivered at the Munk School of Global Affairs, University of Toronto, 10 February 2011) [unpublished], online video

of Canadians.”²⁴ Individuals with lower incomes tend to experience more legal problems than higher income earners,²⁵ meaning that those individuals less able to afford the high cost of legal services are the ones more likely to need those services. Furthermore, legal issues disproportionately impact Aboriginal Canadians, visible minorities and people with disabilities, making access to affordable legal services an issue of both distributive justice and equality.²⁶ A lack of access to legal services for Canadians living in rural communities has also been identified.²⁷ There are few options for individuals who cannot afford a lawyer, but do not qualify for legal aid, and these other options generally offer only summary advice, not legal representation.²⁸ Cost is not the only factor that might inhibit access to legal advice and representation: lack of understanding of the value of legal services to solving a problem, a perception that legal services are overpriced for the value received, or dissatisfaction with services available may also play a role.²⁹

Today, legal aid funding is available only to “those of extremely modest means”³⁰ and may only cover a limited range of services for those who qualify.³¹ Past cuts to the availability of legal aid for family law matters have had a disproportionate impact on women.³² Of course, cuts to legal aid exacerbate the problem of the lack of affordable legal services: “Limited legal aid coverage means that a growing group of people do not meet the financial eligibility limits, yet cannot pay legal fees, especially for major

²⁴ Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) at 88 [Currie].

²⁵ ACAJCFM, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: ACAJCFM, October 2013) at 2 [ACAJCFM, *Roadmap for Change*].

²⁶ Currie, *supra* note 24 at 23–31.

²⁷ Middle Income Access to Civil Justice, *supra* note 21 at 65.

²⁸ *Infra* note 45.

²⁹ Noel Semple, “Access to justice: is legal services regulation blocking the path?” (2013) 20:3 *Intl J Leg Profession* 267 at 268 [Semple].

³⁰ ACAJCFM, *Roadmap for Change*, *supra* note 25 at 3. In BC, two out of three legal aid applicants are turned down, see The Canadian Press, “B.C.’s legal-aid lawyers threaten service withdrawal over government funding”, *The Huffington Post* (3 July 2014), online: <www.huffingtonpost.ca>.

³¹ ACAJCFM, *A Roadmap for Change*, *ibid*, at 4: “[m]ost people earn too much money to qualify for legal aid, but too little to afford the legal services necessary to meaningfully address any significant legal problem”. See also Leonard T Doust, QC, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia*, (Vancouver: Law Society of BC, 2011) at 6, online: <www.lawsociety.bc.ca/newsroom/pcla_report_03_08_11_1_.pdf>.

³² MacPhail, *supra* note 19 at 13: “[t]he problem is most severe in the family law area”; Laura Track, *Putting justice back on the map: The route to equal and accessible family justice* (Vancouver: West Coast LEAF, 2014) at 8.

cases.”³³ Pro bono efforts by the profession are unable to keep up with demand.³⁴ It appears unlikely that provincial governments will increase legal aid funding sufficiently to meet the demand anytime soon.³⁵

Legal advice and representation,³⁶ as well as public interest advocacy,³⁷ are provided by legal clinics. In BC, often these are organized as non-profit societies. They might receive funding from the Law Foundation of BC, a non-profit foundation which distributes the interest earned on lawyers’ pooled trust accounts,³⁸ as well as from donations by private individuals. Similarly, in Nova Scotia, a number of organizations that provide free legal information, advice and representation receive substantial grants from the Law Foundation of Nova Scotia.³⁹ In Ontario, community and specialty legal clinics “receive most of their funding from Legal Aid Ontario.”⁴⁰

There are things being done to combat the access to justice problem, by both the public and private sectors. The Law Society of Manitoba is running a pilot project in which it pays the bill of family law lawyers in exchange for lower rates; the client then pays the Law Society back over time.⁴¹ As of 21 January 2016, the Law Society of Manitoba website indicated that they were not currently accepting new applications for the program as it is “at capacity.”⁴² The Law Society of BC established the Rural Education and Access to Lawyers initiative to address the shortage of lawyers in rural practice. The initiative funds summer work placements for law students and helps to facilitate articling positions in rural practices.⁴³ The BC government recently established the Civil Resolution Tribunal, which will resolve

³³ MacPhail, *ibid* at 13.

³⁴ *Ibid* at 15–16.

³⁵ See e.g. Wiseman, *supra* note 15 at 43; CBA, BC Branch, “2015 BC Budget Disappoints” (17 February 2015), online: <www.cbabc.org/News-Media/Media-Releases/2015/2015-BC-Budget-Disappoints>.

³⁶ For example, the Community Legal Assistance Society (CLAS), online: <www.clasbc.net>.

³⁷ For example, the British Columbia Public Interest Advocacy Centre (BCPIAC), online: <www.bcpiac.com/about/>.

³⁸ See Law Foundation of BC’s website, online: <www.lawfoundationbc.org/>.

³⁹ Law Foundation of Nova Scotia (LFNS), *Annual Report 2015–2016* (Halifax: LFNS, 2016) at 10–11, online: <www.nslawfd.ca/AnnualReports/CurrentAnnRprt.pdf>.

⁴⁰ Legal Aid Ontario, “Community and speciality clinics”, online: <www.legalaid.on.ca/en/getting/type_civil-clinics.asp>; Nicholas Keung, “Ontario’s ethnocultural legal clinics get new funding”, *Toronto Star* (13 March 2015), online: <www.thestar.com/>.

⁴¹ MacPhail, *supra* note 19 at 13.

⁴² Law Society of Manitoba, “Family Law Access Centre”, online: <www.lawsociety.mb.ca/for-the-public/family-law-access-centre>.

⁴³ Law Society of BC, “Rural Education and Access to Lawyers (REAL) initiative”, online: <[www.lawsociety.bc.ca/page.cfm?cid=2577&t=Rural-Education-and-Access-to-Lawyers-\(REAL\)-initiative](http://www.lawsociety.bc.ca/page.cfm?cid=2577&t=Rural-Education-and-Access-to-Lawyers-(REAL)-initiative)>.

“small claims and strata property (condominium) disputes” online.⁴⁴ The Civil Resolution Tribunal is typical of many initiatives that seek to combat the problem of the cost of access to justice by diverting individuals with legal disputes away from the courts, rather than making court proceedings, including legal representation, more affordable. While many disputes may not require a hearing before a judge to reach a just resolution, this raises concerns about equal access to the courts and the ongoing development of the common law. Similarly, legal technology start-ups tend to focus on access to information, rather than on advice and representation, likely due to the monopoly on the practice of law granted to members of provincial law societies. For example, Small Claims Wizard, currently under development, would help small claims plaintiffs and defendants navigate the small claims court process in Ontario.⁴⁵ The extent to which digital innovations improve access to justice for low-income individuals may be limited by “the extent of access to the internet, the extent of ‘digital literacy’, the extent of traditional literacy, and the language in which the services are provided.”⁴⁶ There is a need, therefore, for other initiatives and innovations that reduce the cost of legal advice and representation as well as increase access to free legal representation for those who cannot pay.⁴⁷

3. *Hybrid Corporations: Subordinating Profit to a Social Purpose*

Hybrid corporations are a vehicle for “social enterprise”. The Canadian Task Force on Social Finance defines social enterprise as an “organization or business that uses the market-oriented production and sale of goods and/or services to pursue a public benefit mission.”⁴⁸ This type of business enterprise is possible because the entrepreneurs behind them “are prepared to limit one of their motivations”—the profit motive—for starting the business.⁴⁹ For this reason, social enterprises may be able to fill gaps in the market by providing goods and services that the traditional for-profit

⁴⁴ Civil Resolution Tribunal, “What is the CRT?”, online: <www.civilresolutionbc.ca/what-is-the-crt/>. See also MacPhail, *supra* note 19 at 15.

⁴⁵ See <www.smallclaimswizard.com/>, which is a venture of the MaRS LegalX Cluster, online: <www.marsdd.com/our-sectors/information-and-communications-technology/legalx-cluster/>.

⁴⁶ Wiseman, *supra* note 15 at 34.

⁴⁷ Semple, *supra* note 29 at 278, cites evidence from the UK that “surveys continue to find that clients are most satisfied with face-to-face advice”.

⁴⁸ Doyle, *supra* note 12 in *Mobilizing Private Capital*, *supra* note 11 at 11–12. See also Angela Lee, “Vague, Voluntary, and Void: A Critique of the British Columbia Community Contribution Company Hybrid Model” (2015) 48:1 UBC L Rev 179 at 188 [Lee].

⁴⁹ Aptowitz & Dachis, *supra* note 12 at 4.

business sector has decided are not profitable enough.⁵⁰ Hybrid corporations are similar to ordinary business corporations in that they have separate legal personality and limited liability of shareholders, but inherent to this form of business organization is an explicit rejection of profit *maximization* as the organization's objective.⁵¹ The term "hybrid" connotes that these corporate entities combine characteristics of for-profit and non-profit enterprises.⁵²

It is important to distinguish hybrid corporations as a form of business organization from certification as a "B Corp" by the non-profit organization B Lab. The former is a type of corporate entity provided for in legislation,⁵³ the latter is a "self-imposed and privately regulated" certification available to any corporation, partnership or sole proprietorship.⁵⁴ The two are not unrelated, however: B Lab actively lobbies US states to enact "benefit corporation" legislation⁵⁵ and a number of these statutes require benefit corporations to assess their performance against a third-party standard in their annual reports.⁵⁶ Some 1,300 companies in approximately 40 countries have been certified by B Lab.⁵⁷ There are a handful of law firms

⁵⁰ Lee, *supra* note 48 at 189, citing Stephen Ko, "Viability of Social Enterprise: The Spillover Effect" (2012) 8:3 Social Enterprise J 251 at 254.

⁵¹ Hybrid corporations are a type of social enterprise, the latter of which Aptowitz & Dachis, *supra* note 12 at 3, defines as "organizations that achieve social purposes – and potentially profit thereby".

⁵² Liao, *supra* note 14 at 75.

⁵³ See e.g. Pennsylvania Consolidated Statutes, Title 15—*Corporations and Unincorporated Associations, Chapter 33: Benefit Corporations*, Reg Sess, PA, 2012, ss 3302 and 3311: a "benefit corporation" is a corporation with articles of incorporation that identify, as one of the corporation's purposes, the creation of a "general public benefit" defined as "[a] material positive impact on society and the environment"; the articles also may identify a "specific public benefit", online: <www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=15&div=0&chpt=33> [*Pennsylvania Benefit Corporations Act*]; New York, 4692-A, 2011-12, Reg Sess, ss 1702(B) and 1706, online: <www.nysenate.gov/legislation/bills/2011/A4692A#accordion-3> [*NY Benefit Corporations Act*]; California, AB 361, *An act to add Part 13 (commencing with Section 14600) to Division 3 of Title 1 of the Corporations Code, relating to benefit corporations*, 2011-12, Reg Sess, Cal, 2011, ss 14601(c) and 14610(a), online: <[leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB361](http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201120120AB361)> [*California Business Corporations Act*].

⁵⁴ Liao, *supra* note 14 at 82.

⁵⁵ *Ibid* at 84; B Lab's Benefit Corporation, online: <www.benefitcorp.net/>, which includes model legislation and pages aimed at policymakers on why and how to pass benefit corporation legislation. See also Vanisha H Sukdeo, "What Is the Benefit of a 'Benefit Corporation'? Examining the Advantages and Detriment" (2015) 31:1 BFLR 89 at 101–02.

⁵⁶ See e.g. *Pennsylvania Benefit Corporations Act*, *supra* note 53, s 3331(a)(2); *NY Benefit Corporations Act*, *supra* note 53, s 1708(a)(2); *California Benefit Corporations Act*, *supra* note 53, s 14630(a)(2).

⁵⁷ According to B Lab, online: <www.bcorporation.net/>, accessed on 9 August 2015, the exact number of companies is 1,353 in 41 countries. Liao, *supra* note 14 at

in the US and elsewhere,⁵⁸ including one in Canada,⁵⁹ which have chosen to become certified as B Corps. Substantively, certification as a B Corp requires a commitment to “rigorous standards of social and environmental performance, accountability, and transparency,”⁶⁰ which is different from a commitment to further a particular community or social purpose that is required by UK and BC hybrid corporation legislation, discussed below.

To date, a number of jurisdictions have enacted hybrid corporation legislation. The UK introduced “community interest companies” (CICs) in 2005.⁶¹ CICs are intended primarily as a vehicle for non-profit organizations wishing to pursue a for-profit social enterprise.⁶² Examples of legal service CICs are discussed below. In Canada, only British Columbia and Nova Scotia have any kind of hybrid corporation legislation currently in force. Both provinces modelled their legislation on the UK CIC legislation.⁶³ The BC legislation on C3s, found in Part 2.2 of the BC *BCA*, came into force as of 29 July 2013, while the Nova Scotia legislation, originally passed in 2012, came into force as of 15 June 2016.⁶⁴ A review of the *Canada Business Corporations Act (CBCA)* undertaken by Industry Canada in

83, notes the “balance” between growth of the B Corp brand and B Lab’s relatively lax certification standards.

⁵⁸ Wendel Rosen Black & Dean LLP, a long-standing full service business law firm in Oakland, California became a B Corp in 2010 as part of its commitment to being a “green” law firm, and supporting green businesses and organizations focused on strengthening local community, online: Wendel Rosen <www.wendel.com/about-us/b-corp>. Clearpoint Counsel of Australia is an incorporated law firm specializing in providing “outsourced in-house services” to start-ups for a fixed fee retainer rather than at an hourly rate. It became a B Corp in 2014 to appeal to its social enterprise clients, including those already certified as B Corps or wanting to become certified, online: B Lab <www.bcorporation.net/community/clearpoint-counsel-pty-ltd>; Sophie Schroder, “First Australian law firm registered as a B Corp”, *Australasian Lawyer* (1 September 2014), online: <www.australasianlawyer.com.au>.

⁵⁹ Kent Employment Law, as of 18 January 2016, online: B Lab <www.bcorporation.net/community/kent-employment-law>.

⁶⁰ B Lab, “What are B Corps?”, online: <www.bcorporation.net/what-are-b-corps>.

⁶¹ *Companies (Audit, Investigations and Community Enterprise) Act 2004* (UK), c 27, online: <www.legislation.gov.uk/ukpga/2004/27/contents> [UK *Companies Act 2004*].

⁶² UK *Companies Act 2004*, *ibid*, “Part 2: Community Interest Companies” in Explanatory Notes at para 190. Even CICs formed for a “charitable” purpose are not to be treated as a charity (*ibid*, s 26(3)).

⁶³ Liao, *supra* note 14 at 79–80.

⁶⁴ BC *BCA*, *supra* note 16, proclaimed in force 29 July 2013, pursuant to BC Reg 314/2007 by Order in Council 95/2013 on 28 February 2013 in (2013) BC Gaz II, vol 56, no 4; NS *CICA*, *supra* note 16, proclaimed in force 24 June 2016, pursuant to NS Reg 113/2016 by Order in Council 2016-154 on 14 June 2016 in (2016) NS Gaz II, vol 40, no 13 at 637–38.

2013–2014 asked for comments on the incorporation of hybrid enterprises under the *BCA*.⁶⁵

In the US, social entrepreneurs can choose from at least two types of hybrid corporations: the public benefit corporation and the low-profit liability company (L3C). The former is a vehicle for for-profit enterprises that also seeks “to produce a public benefit”—in the form of either a positive effect or the reduction of negative effects—while “operat[ing] in a responsible and sustainable manner.”⁶⁶ Public benefit corporation legislation has been introduced in a number of US states, including Delaware.⁶⁷ The L3C is a flow-through entity, similar to a partnership, and is more narrowly focused on attracting “program related investment” from private foundations by pursuing a charitable, tax-exempt purpose as its primary purpose, while creating, in some cases, a return on investment.⁶⁸

The essential characteristic of a hybrid corporation, in particular of C3s and CICs, is that the incorporators must identify a community purpose in the corporation’s articles or memorandum of association. For BC’s C3s, the community purpose must be one of the “primary purposes” of the firm.⁶⁹ “Public benefit” or “community purpose” tend to be broadly defined. The UK legislation states that an object of a company is a community interest object “if a reasonable person might consider” that company activities in furtherance of the object are “for the benefit of the community.”⁷⁰

In both the BC *BCA* and NS *CICA* legislation, community purpose is defined as a purpose beneficial to society at large, or to a segment broader

⁶⁵ Industry Canada, “Consultation on the *Canada Business Corporations Act*”, (Ottawa: Industry Canada, 11 December 2013), online: <www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_c100867.html>.

⁶⁶ Delaware, Title 8 *Corporations*, Chapter 1: *General Corporation Law*, Subchapter XV: *Public Benefit Corporations*, s 362.

⁶⁷ *Ibid.* See e.g. Lee, *supra* note 48 at 193–94.

⁶⁸ Michael Blatchford & Margaret Mason, “Introducing the Community Contribution Company: A New Structure for Social Enterprise” (Paper delivered at the Advising Charities, Not-for-Profits, and Social Enterprises Seminar at the Legal Education Society of Alberta, November 2013) at 6, online: Bull, Housser & Tupper LLP <[www.bht.com/sites/default/files/LESA-C3 paper.pdf](http://www.bht.com/sites/default/files/LESA-C3%20paper.pdf)> [Blatchford & Mason]: See also John Tyler, “Negating the Legal Problem of Having “Two Masters”: A Framework for L3C Fiduciary Duties and Accountability” (2010) 35:1 Vt L Rev 117. See J William Callison & Allan W Vestal, “The L3C Illusion: Why Low-Profit Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures” (2010) 35:1 Vt L Rev 273 for a criticism of the L3Cs as an unnecessary variant of the LLC and not necessarily being in line with the rules in the tax code regarding tax-exempt investments.

⁶⁹ BC *BCA*, *supra* note 16, s 51.92; NS *CICA*, *supra* note 16, ss 5(4)(d), 9(1) requires that the company “has a community purpose”.

⁷⁰ UK *Companies Act 2004*, *supra* note 61, s 35(2).

than those related to the C3 or CIC;⁷¹ this can include such things as the provision of “health, social, environmental, cultural, educational or other services.”⁷² The language is similar to the definition of “public benefit” that charities must meet under the *Income Tax Act*,⁷³ although this has tended to be narrowly construed by the courts.⁷⁴ Unlike charities, hybrid corporations may provide benefits to private individuals, such as shareholders, subject to the restrictions discussed below. A C3 may transfer assets without restriction—including cash—to a “qualified entity”, including “community service co-operatives”, registered charities and “qualified donees” as defined by the *Income Tax Act*⁷⁵ or “in furtherance of the company’s community purposes.”⁷⁶

Generally, legislation providing for hybrid corporations contains three mechanisms to ensure the community purpose is being fulfilled. First, the board of directors is required to take into account the community purpose in exercising their decision-making authority over the corporation. Directors of UK CICs are obliged to comply with the duties of directors imposed by the common law and the UK *Companies Act, 2006*.⁷⁷ In British Columbia, directors of C3s must “act with a view to the community purposes of

⁷¹ The definition of “related” under the BC *BCA*, *supra* note 16, s 51.91(2) and the NS *CICA*, *supra* note 16 at s 2(2), includes directors, officers and shareholders of the C3/CIC or directors, and directors and officers of another corporation that is a shareholder of the C3/CIC.

⁷² BC *BCA*, *ibid*, s 51.91; NS *CICA*, *ibid*, s 2(1)(c).

⁷³ Doyle, *supra* note 12 in *Mobilizing Private Capital*, *supra* note 11 at 12, citing Canada Revenue Agency, “Guidelines for Registering a Charity: Meeting the Public Benefit Test” (Policy Statement No CPS-024, 10 March 2006), online: <www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-024-eng.html>: A charity “must be established for the benefit of the public or a sufficient segment of the public”, meaning that it must provide a “tangible benefit” to either the public-at-large or a sufficient segment of the public, determined by the charitable purpose being served, and may not otherwise provide benefits to private individuals, except where such benefits are “a minor and incidental by-product of the charitable purpose”.

⁷⁴ BC Ministry of Finance, “Questions and Answers: Community Contribution Companies (C3s)”, online: <www.fin.gov.bc.ca/prs/ccc/caq.htm> [BC Ministry of Finance, “Questions and Answers”].

⁷⁵ BC *BCA*, *supra* note 16, s 51.91(1); *Community Contribution Company Regulation*, BC Reg 63/2013, s 5 [*C3 Regs*]. See also *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*]; see also BC Ministry of Finance, “Question and Answers”, *ibid*, discussing the benefits for First Nations and Aboriginal groups. For Nova Scotia, see NS *CICA*, *supra* note 16, ss 2(1)(j), 13(1)(b).

⁷⁶ BC *BCA*, *ibid*, s 51.931(1)(c); NS *CICA*, *ibid*, s 13(1)(c).

⁷⁷ 2006, c 46, s 172(2) states that where a company’s purpose or purposes is other than to benefit its shareholders, a director has a duty to act in good faith in a way most likely to achieve its stated purpose [UK *Companies Act 2006*].

the company set out in its articles.”⁷⁸ The Nova Scotia *CICA* is slightly different, stating that directors and officers shall “act in accordance with the community purpose.”⁷⁹ The powers of the directors of a C3 cannot be transferred to another person, such as the shareholders.⁸⁰

Second, the C3 and CIC regimes include “asset lock” provisions, restricting the manner in which firms can pay dividends, buy back shares, transfer assets and distribute assets upon dissolution.⁸¹ The BC and Nova Scotia legislation provide that a C3 or CIC may pay out a maximum of 40% of its profits in a given year in the form of dividends.⁸² The cap does not apply to a class or series of shares if those shares can be held only by a qualified entity.⁸³ The 40% cap on dividends is more generous than the cap of 35% of annual profits imposed on UK CICs in the hopes of “increas[ing] investment by allowing for greater incentives.”⁸⁴ Upon dissolution, 60% of any distributable assets must be transferred to one or more “qualified entities.”⁸⁵ Taken together, these provisions stipulate that “[t]he bulk of a C3’s profits must go towards the C3’s community purposes (or be transferred to a qualified entity, such as a charity).”⁸⁶ Notice of these asset lock provisions must be set out in the articles.⁸⁷ As a means of ensuring compliance, C3s are not permitted to waive the requirement to provide financial statements to its shareholders,⁸⁸ and directors can be held personally liable if they approve a dividend or transfer in contravention of

⁷⁸ BC *BCA*, *supra* note 16, s 51.93. The duties of directors of C3s are discussed further in Part V, below.

⁷⁹ NS *CICA*, *supra* note 16, s 12.

⁸⁰ BC *BCA*, *supra* note 16, s 51.93(3).

⁸¹ UK *Companies Act, 2004*, *supra* note 61, ss 30–31; BC *BCA*, *ibid*, ss 51.931–51.95; NS *CICA*, *supra* note 16, ss 15–20; *Community Interest Companies Regulations*, NS Reg 121/2016, enacted by Order in Council, (2016) NS Gaz II, vol 40, no 13 (14 June 2016) at 640–45, ss 4–9 [*CIC Regs*].

⁸² BC *BCA*, *supra* note 16, s 51.94(1); *C3 Regs*, *supra* note 75, s 4, unless the company has an “unused dividend amount” from the year before, in which case this amount may be added to the 40% cap. See also *CIC Regs*, *ibid*, s 5(4).

⁸³ *C3 Regs*, *ibid*, s 5; *CIC Regs*, *ibid*, s 5(1).

⁸⁴ BC Ministry of Finance, “Questions and Answers”, *supra* note 74.

⁸⁵ BC *BCA*, *supra* note 16, s 51.95(2); *C3 Regs*, *supra* note 75, s 8: qualified entities includes “First Nations and aboriginal groups.” See also, BC Ministry of Finance, “Questions and Answers”, *ibid*.

⁸⁶ BC Ministry of Finance, “Questions and Answers”, *ibid*.

⁸⁷ BC *BCA*, *supra* note 16, s 51.911(1): “[t]his 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.”; UK *Companies Act 2004*, *supra* note 61, s 32(4)(a)–(b); NS *CICA*, *supra* note 16, s 9(1).

⁸⁸ BC *BCA*, *ibid*, s 51.951; Lee, *supra* note 48 at 192.

the asset lock provisions.⁸⁹ Although it is theoretically possible for a C3 to become a “distributing corporation”, these asset lock provisions are likely to limit demand for shares, making a public offering unlikely.

Third, CICs and C3s are required to report annually on how they have furthered their stated community purpose. UK CICs must prepare an annual “report about the company’s activities during the financial year.”⁹⁰ These reports must be sent to the CIC Regulator, discussed below.⁹¹ BC requires the publication of a “community contribution report” at or before its annual general meeting.⁹² The community contribution report must contain the following information: (i) a description of how its activities benefitted society; (ii) the assets transferred to further its community purposes and what the assets were used for; (iii) the amount of dividends declared that year; (iv) the amount spent on purchasing or redeeming shares; and (v) information regarding any other transfer of assets.⁹³ The *C3 Regs* set out further disclosure requirements, including information about remuneration of employees earning \$75,000 or more, information about the C3’s financial situation and more detailed information regarding dividends paid and unused dividend amounts.⁹⁴ This report must be approved and signed by the C3’s directors and posted on its website after publication.⁹⁵ Failure to post or publish a compliant report constitutes an offence under the BC *BCA*.⁹⁶ The Nova Scotia *CICA* contains similar requirements.⁹⁷

In the UK these rules are enforced by the CIC Regulator, whose role is “to maintain public confidence in the CIC model.”⁹⁸ The Regulator has the authority to decide whether a company can be formed as a CIC, based on whether the Regulator thinks the CIC will satisfy the community interest test. The Regulator also has authority to take measures against an existing CIC, including the removal of a director,⁹⁹ if the company is not

⁸⁹ BC *BCA*, *ibid*, s 154(1)(f); Lee, *ibid* at 193.

⁹⁰ UK *Companies Act 2004*, *supra* note 61, s 34(1).

⁹¹ *Ibid*, s 34(4). See also NS *CICA*, *supra* note 16, s 21(4).

⁹² BC *BCA*, *supra* note 16, s 51.96(2).

⁹³ *Ibid*, ss 51.96(2)(a)–(f).

⁹⁴ *Supra* note 75, s 9.

⁹⁵ BC *BCA*, *supra* note 16, ss 51.96(3)–(4).

⁹⁶ *Ibid*, s 426(1)(d.1); Lee, *supra* note 48 at 192.

⁹⁷ *Supra* note 16, s 21. There is no requirement to file on the website, since it must be filed with the Registrar (s 21(4)), nor are there disclosure requirements regarding remuneration.

⁹⁸ UK *Companies Act 2004*, *supra* note 61 in Explanatory Notes at para 189, also s 27. Section 41(1) of the Act further stipulates that the Regulator is to exercise their supervisory powers only when necessary for the public confidence purpose. Section 28 states decisions of the Regulator may be appealed to the Appeal Officer. See also Lee, *supra* note 48 at 197.

⁹⁹ UK *Companies Act 2004*, *ibid*, s 46.

satisfying the community interest test or not carrying on activities in pursuit of its stated community interest objective.¹⁰⁰ The NS *CICA* also provides for a CIC Registrar.¹⁰¹ There is no equivalent regulator in BC and none is being proposed, nor are C3s required to meet a third-party standard as US benefit corporations are in some states.¹⁰² The BC government states that “[a]ccountability for C3s will be achieved through an annual public report, and by monitoring by the company’s shareholders and customers.”¹⁰³ Like regular business corporations under the BC *BCA*, only the shareholders or directors of a C3 may seek leave to bring a derivative action against the directors of the company for breach of their duties to the C3, not members of the public or of the segment of the public to which the C3 has promised to provide a benefit; however, the segment promised a benefit might be considered an “appropriate person” to bring a compliance or restraining order under section 228.¹⁰⁴

In the UK, CICs have caught on with over 10,000 companies registered.¹⁰⁵ Carol Liao points to significant marketing support for CICs, as well as access to social financing solely for CICs.¹⁰⁶ Investors in Community Development Financial Institutions, a type of CIC, receive a tax credit, and these institutions in turn “commonly invest their funds in other CICs in the community.”¹⁰⁷ Without some kind of tax relief for investors or other support, C3s in BC may fail to take off in the same way. Only 35 have been incorporated as of January 2016.¹⁰⁸

¹⁰⁰ *Ibid*, ss 36(5)(b), 41(3). The Regulator also has the powers to investigate CICs, or appoint another person to conduct an investigation, and to require the CIC to be audited by a qualified auditor whom the Registrar may appoint, *ibid*, ss 42–43.

¹⁰¹ *Supra* note 16, s 4.

¹⁰² See *supra* note 56 and the accompanying text at 8, *above*.

¹⁰³ BC Ministry of Finance, “Questions and Answers”, *supra* note 74.

¹⁰⁴ BC *BCA*, *supra* note 16, ss 228, 232. Section 228 provides for an application to the court to make an order when a director, officer or employee of a company has contravened or is about to contravene a section of the *Act*, the regulations or the company’s articles. Blatchford & Mason, *supra* note 68 at 8–9, note that the BC Attorney General would also have standing to police the “community purpose” of C3s.

¹⁰⁵ Community Interest Companies Association, “About Us: What is a CIC?”, online: CIC Association <www.cicassociation.org.uk/about/what-is-a-cic>.

¹⁰⁶ *Supra* note 14 at 82. But see Blatchford & Mason, *supra* note 68 at 5, who note that “[t]angible incentives” to adopt CICs are “minimal”.

¹⁰⁷ Blatchford & Mason, *ibid*.

¹⁰⁸ Based on a search of the government website BC Registry Services for “Community Contribution Company” and “CCC”, online: <www.bcregistryservices.gov.bc.ca/>.

Restrictions on charities, foundations and non-profit organizations under provincial trust law and federal income tax law¹⁰⁹ also may present barriers to the growth of C3s. Canada's National Advisory Board to the G8 Social Impact Investing Task Force recommends amending provincial trust law to permit investments in social enterprises that might not generate market returns.¹¹⁰

Since C3s are a type of corporation, they may carry on business in another province by registering extra-provincially under the appropriate business corporations statutes.¹¹¹ At least one C3 was registered as an extra-provincial corporation in Nova Scotia, but its registration was later revoked for defaulting on the annual registration fee.¹¹² The C3, as an entity, would still be subject to the laws of their incorporating jurisdiction and so all of the requirements outlined above would apply to a C3 carrying on business outside of BC. Limits on a BC C3 operating as a law corporation in another province are discussed below.¹¹³

C3s and CICs are forms of incorporated business organizations that explicitly reject profit maximization as an object of the corporation, instead subordinating profit generation to furthering a community purpose. This hybrid or dual objective is enforced through modified directors' duties, asset lock provisions and reporting obligations. Although the asset lock provisions likely limits the appeal of C3s to many mainstream law firms,¹¹⁴ the next section explores the possible use of C3s as a vehicle through which

¹⁰⁹ Aptowitz & Dachis, *supra* note 12 at 9: "independent provincial attempts to allow for greater social enterprise will always be stymied by federal dominance over income tax".

¹¹⁰ Doyle, *supra* note 12 in *Mobilizing Private Capital*, *supra* note 11 at 18. See also Aptowitz & Dachis, *ibid* at 9–10.

¹¹¹ ee e.g. *Business Corporations Act*, RSA 2000, c B-9, s 1(i) [AB BCA] and *Business Corporations Regulation*, Alta Reg 118/2000, s 29(2); *Extra-Provincial Corporations Act*, RSO 1990, c E-27 s 1.1. See also Blatchford & Mason, *supra* note 68 at 14. See also Anne Field, "North Carolina Officially Abolishes The L3C", *Forbes* (11 January 2014), quoting Chicago attorney Marc Lane, online: <www.forbes.com>: It is apparently "common for an L3C to be organized in a state that has enacted enabling legislation and then registered at home as a 'foreign entity'".

¹¹² Nova Scotia Registry of Joint Stock Companies, "PROFILE—SOCIAL ENTERPRISE INSTITUTE CCC LTD" (20 September 2015), NS Gaz I, vol 225, no 23 at 882, online: Government of Nova Scotia <www.rjsc.gov.ns.ca/rjsc/search/viewProfile.do>.

¹¹³ *Infra* notes 174–75 and accompanying text at 21, *below*.

¹¹⁴ Jordan Furlong, "The Limited-Profit Law Firm" (9 March 2012), online: Law21 <www.law21.ca/2012/03/the-limited-profit-law-firm/> [Furlong].

to provide low-cost legal services, thereby helping to address the lack of access to affordable legal services, discussed above in Part II.¹¹⁵

4. How C3s Could Improve Access to Justice

1) Using C3s to Provide Low-Cost Legal Services

As explained above, C3s are required to include a “community purpose” in their articles of incorporation. Community purpose is defined as a purpose beneficial to society at large, or to a segment broader than those related to the C3, and can include such things as the provision of “health, social, environmental, cultural, educational or other services.”¹¹⁶ Providing affordable legal services to currently underserved communities or groups, including rural communities and low- and middle-income individuals, arguably fits within this definition of “community purpose.”¹¹⁷ Access to legal representation and advice benefit not only the individual client, but also “society as a whole” by helping to reduce the number of self-represented litigants and to protect the integrity of—and public confidence in—the justice system.¹¹⁸ Furthermore, increasing access to legal services may have knock on effects in terms of health and other social outcomes.¹¹⁹ Legal clinics that focus on public policy work in a particular area, such as environmental protection, would fall within this part of the definition in BC, but might be excluded in Nova Scotia, which excludes “political purpose” from its definition of community purpose.¹²⁰ Firms that target their services to a vulnerable group—seniors, victims of domestic violence,

¹¹⁵ Furlong, *ibid*, also suggests the possibility of the benefit corporation form for law firms seeking to serve “only clients in low- or middle-income brackets”.

¹¹⁶ BC *BCA*, *supra* note 16, s 51.91.

¹¹⁷ See Canada Revenue Agency, “Guidelines for registering a charity: meeting the public benefit test”, *supra* note 73, noting that “reasonable geographical restrictions” can define a segment of the public for the purpose of meeting the public benefit test for a registered charity. Woolley et al, in *Lawyers’ Ethics and Professional Regulation* (Markham, ON: LexisNexis, 2008) at 289 [Woolley et al] posit that limiting the cost of legal services and making “services available as widely as possible, especially in areas where legal services are not readily attainable” is already a professional obligation of all practicing lawyers. However, there is a difference between an individual lawyer doing what they can within the limits of their own practice, and the profession advocating and encouraging firms dedicated to serving an underserved community (Woolley et al, *ibid* at 485).

¹¹⁸ See Charles Falconer & Willy Bach, “The lack of access to justice is a national disgrace”, *The Guardian* (16 January 2016), online: <www.theguardian.com> discussing the connection between access to justice and citizens’ belief in the integrity of the justice system [Falconer & Bach]. See also MacPhail, *supra* note 19 at 4: “Not all problems can be resolved without assistance, particularly those situations where there may be significant power imbalance”.

¹¹⁹ *Supra* note 22 and accompanying text at 5, *above*.

¹²⁰ NS *CICA*, *supra* note 16, s 2(1)(c).

precarious workers—would also fit, since they are providing a benefit to a segment broader than those related to the C3. C3s, as a form of hybrid corporation and vehicle for social enterprise, are suited to providing low-cost legal services that may not be profitable enough for a traditional, purely for-profit business model. The community purpose aspect of C3s responds to the criticism that ABS necessarily will focus on “high-profit” areas of legal practice.¹²¹

C3s could allow lawyers seeking to provide low-cost legal services to seek capital funding from “impact investors”. The BC Ministry of Finance states that the government’s motivation for introducing C3s was “an emerging demand for socially focused investment options.”¹²² Impact investors seek some return on their investment but also seek a non-financial return in the form of a positive social impact.¹²³ The size of the existing impact investing market in Canada is estimated at \$2.2 billion, but is predicted to grow to \$30 billion.¹²⁴ Attracting equity from impact investors might give such legal practices a capital cushion that would make them less reliant on billings to cover costs in the start-up phase and therefore could allow them to offer new modes of billing, such as payment by installments.¹²⁵ Impact investors would also provide an alternative to debt financing. In his study of Pivot LLP—a law firm and social enterprise located in Vancouver’s Downtown Eastside—Andrew Pilliar identified debt load as one reason the firm folded after only four years, demonstrating the importance of alternative financing options for innovative law firms with a social justice mandate.¹²⁶ For lawyers who want to pursue this type of practice, a C3 could provide them with financial security in the form of a predictable salary—albeit likely a lower one than they could earn in a

¹²¹ See Prairie Law Societies, *supra* note 9 at 61, citing the Ontario Trial Lawyers Association.

¹²² BC Ministry of Finance, “Community Contribution Companies”, online: <www.fin.gov.bc.ca/prs/ccc/index.htm>. See also Lee, *supra* note 48 at 190–91, citing British Columbia, Legislative Assembly, *Official Report of Debate (Hansard)*, 39th Parl, 4th Sess, Vol 31, No 2 (5 March 2012) at 9712 (Hon Kevin Falcon).

¹²³ See e.g. Resilient Capital, managed by Vancity Credit Union, which allows depositors to make their long-term insured deposits available for loans to social enterprises, in return obtaining a fixed return on their deposits depending on term length, online: <www.resilientcapital.ca/>. Semple, *supra* note 29 at 5, notes that even market-driven investors likely would demand a much lower return on investment than lawyers buying in to a firm as equity partner.

¹²⁴ Carnegie, *supra* note 11, in *Mobilizing Private Capital*, *supra* note 11 at 25.

¹²⁵ MacPhail, *supra* note 19 at 13.

¹²⁶ Pilliar, *supra* note 15 at 11, 20: A former Pivot LLP partners indicated: “I think by the end we had it figured out [...] but by then our debt servicing costs were so high that we were unable to stay above water”.

traditional private practice—¹²⁷ allowing them to focus on client service and sustainably growing the business.

CICs are a permissible ABS under the UK *Legal Services Act 2007*.¹²⁸ Under the *LSA 2007*, an ABS is defined as “an organisation that is licensed to carry on one [or] more of the legal activities regulated by the Legal Services Act 2007 [sic] and whose owners and/or managers include individuals or entities who are not qualified lawyers.”¹²⁹ The *LSA 2007* permits non-lawyer ownership, subject to regulatory approval “based on the suitability of the proposed shareholders and the proposed activities of the ABS.”¹³⁰ The Solicitors Regulatory Authority has been licensing ABS since March 2012.¹³¹ CICs fall under this definition. Currently, “transitional protection” allows “non-commercial” or “special bodies”, including CICs, to engage in the provision of legal services without being licensed as an ABS, provided they do so through qualified legal practitioners.¹³² This exemption is expected to last through 2016 while arrangements for licensing are put in place.¹³³

There are examples of this kind of legal practice in the UK. Beneficent Law CIC was “established in 2008 as a low-cost alternative to commercially driven law firms” dealing with “non-contentious” wills and estates matters across England and Wales.¹³⁴ It provides advice primarily over email. Beneficent’s website identifies the provision of low-cost legal services as a “public benefit”, but it has also pledged to donate any profits generated to the Alzheimer’s Society.¹³⁵ The firm website expressly credits the UK *LSA* for “radically alter[ing] the way in which legal services” are provided, making it possible for “not-for-profit companies like Beneficent Law [to]

¹²⁷ Wiseman, *supra* note 15 at 32 noting that the potential for hybrid corporations such as CICs and C3s to have even a limited impact on access to justice “is dependent on there being Canadian lawyers willing [...] to forego a portion of personal remuneration.” Pilliar, *ibid* at 22, notes that lower salaries were *not* a reason for Pivot LLP’s folding.

¹²⁸ c 29, Part 5: Alternative Business Structures [*LSA 2007*]. For a general description of the UK reforms to the legal profession allowing ABS, see Karmel, *supra* note 13, esp 511–14.

¹²⁹ Elaine Campbell, “Regulating Clinic: Do UK Clinics Need to Become Alternative Business Structures Under the Legal Services Act 2007?” (2014) 20:1 Int’l J Clinical Legal Educ 519 at 523 [Campbell].

¹³⁰ Prairie Law Societies, *supra* note 9 at 44.

¹³¹ *Ibid* at 34.

¹³² *LSA 2007*, s 23. See also Bryony Sheldon, “Special bodies – stakeholder update” (27 November 2014), online: Legal Services Board (UK): <www.legalservicesboard.org.uk/about_us/board_meetings/pdf/20141126_26_November_2014/Paper_14_65_Special_Bodies_Stakeholder_Update.pdf>; Campbell, *supra* note 129 at 525.

¹³³ Campbell, *ibid* at 525.

¹³⁴ Beneficent Law, “About Us”, online: <www.beneficentlaw.co.uk/about-us.html>.

¹³⁵ *Ibid*.

compete directly with commercial law firms, giving greater choice to the public as consumers of legal services and lowering legal costs.”¹³⁶

In addition to providing stand-alone affordable legal services, C3s might also provide a source of funding for legal clinics providing free legal services. This is possible under provisions allowing C3s to transfer assets to further their stated community purpose.¹³⁷ This is being done in the UK using CICs and is discussed in the next section.

2) *Funding Free Legal Clinics with C3s*

The legal aid funding crisis, described briefly above, can be resolved only by meaningful increases in government funding. Unfortunately, even generous government funding is unlikely to meet demand. C3s might help to address the gap in legal aid funding by providing a source of revenue for legal aid clinics, as is being attempted in the UK with CICs.¹³⁸ Using the profits from a C3 could also provide an alternative to grants, government or otherwise, as a source of funding.¹³⁹ This kind of funding arrangement has been tried in Canada through a LLP business structure without success.¹⁴⁰ I discuss this case study briefly, following the description of the UK examples.

Castle Park Solicitors Community Interest Company (Castle Park), located in Leicester, is owned by a charity, Community Advice and Law Service (CALs), which has a long history of providing free legal services.¹⁴¹ Castle Park provides employment, immigration and family law advice to individuals on low- and middle- incomes.¹⁴² All of the money earned by Castle Park goes towards funding CALs. The CIC structure, therefore, allows Castle Park to fill a gap in the provision of legal services by offering “competitive fees”¹⁴³ and to use the fees earned to help fund CALs, making

¹³⁶ *Ibid.*

¹³⁷ BC *BCA*, *supra* note 16, s 51.931(1)(c), discussed further below.

¹³⁸ See Wiseman, *supra* note 15 at 29.

¹³⁹ Pilliar, *supra* note 15 at 7 describing the motivation for founding Pivot LLP to provide Pivot Legal Society with a source of “stable funding that was separate from granting agencies who had onerous reporting requirements, and separate from government so that the organization could maintain independence”.

¹⁴⁰ *Ibid.*

¹⁴¹ Castle Park Solicitors, “About Us”, online: <www.castlearksolicitors.co.uk/about-us.html> [Castle Park].

¹⁴² Catherine Baksi, “Charity sets up its own law practice”, *The Law Society Gazette* (5 August 2013), online: <www.lawgazette.co.uk> [Baksi].

¹⁴³ According to Castle Park, *supra* note 141, fees are set “at levels which are affordable to people of limited means and to those who may have been eligible to receive publicly-funded legal advice services prior to the reforms of the legal aid system in April 2013”.

the latter “less reliant on government funding and grants.”¹⁴⁴ A solicitor with Castle Park describes the firm as having “the same financial pressures that most law firms face today” but with “an ethical ethos” with respect to the fees charged.¹⁴⁵

Rochdale Legal Enterprise Community Interest Company (RLE), located in the Rochdale borough of Greater Manchester, is a CIC offering low cost “advice and representation in employment, immigration and asylum law from specialist solicitors and caseworkers.”¹⁴⁶ Any income not needed to cover the costs of operating the company are passed on to the Rochdale Law Centre, which aims to “promote access to justice and to serve the needs of traditionally oppressed groups and those whose access to the legal system is restricted” by providing free legal advice, representation and education, mainly in the areas of housing, immigration and asylum and community care.¹⁴⁷ RLE’s website notes that it “works closely with the Rochdale Law Centre.”¹⁴⁸

The purpose of both Castle Park and RLE is to help fill the gaps in legal aid, by providing both low cost legal advice and representation and a source of funding to pre-existing free legal clinics.¹⁴⁹ Castle Park and RLE provide examples of the kind of arrangements possible using a C3-type business structure. These arrangements provide not only a potential source of funding for the free legal clinic, but also somewhere to refer clients the clinics cannot assist. They may also help to reduce intake interviews at the free legal clinics, as community members who do not qualify for legal aid become aware of the availability of the low-cost service provider.

In a 2015 article, Andrew Pilliar presents a case study of Pivot LLP, a law firm expressly founded in 2006 “to provide a steady source of funding for PLS.”¹⁵⁰ PLS is Pivot Legal Society, which focuses on advancing public policy on issues relevant to residents of Vancouver’s Downtown Eastside, “including policing, housing, sex work, violence against women and drug policy”, occasionally using test case litigation.¹⁵¹ In addition to donating

¹⁴⁴ Neil Rose, “Exclusive: legal advice charity becomes first not-for-profit to set up an ABS”, *Legal Futures* (26 April 2013), online: <www.legalfutures.co.uk>.

¹⁴⁵ Baksi, *supra* note 142.

¹⁴⁶ Rochdale Legal Enterprise, “Home”, online: <www.rochdalelegalenterprise.co.uk/> [RLE].

¹⁴⁷ Rochdale Law Centre, “About Us”, online: <www.rochdalelawcentre.co.uk/about-us.html>.

¹⁴⁸ RLE, *supra* note 146, “Home”.

¹⁴⁹ Castle Park, *supra* note 141; Baksi, *supra* note 142; RLE, “About”, *supra* note 146.

¹⁵⁰ Pilliar, *supra* note 15 at 6.

¹⁵¹ *Ibid.*

some of their profits to PLS, Pivot LLP sought to, and did, provide legal services at a lower cost than the average Vancouver law firm.¹⁵² The original form of business organization for the law firm was a cooperative owned and managed by lawyers and staff, but the prohibitions on non-lawyer ownership, discussed further in Part V below, prevented this and so it was organized as a limited liability partnership instead.¹⁵³ The firm grew rapidly, from three founding partners to twelve lawyers in two years and won a social enterprise award, but ultimately folded in 2010, unable to generate sufficient revenues to cover its expenses. It never provided funding to PLS.¹⁵⁴ Based on interviews with former partners, associates, staff and external advisors, as well as a review of the firm's business records, Pilliar cites significant expenses—namely high rent and debt payment—and revenues below expectations among the causes of the firm's failure. The failure to meet revenue expectations was due, in part, to the firm failing to attract enough business from paying clients.

Pilliar concludes that another social justice-focused firm could succeed where Pivot LLP failed, but by choosing between providing a source of funding to an organization like PLS or by providing low-cost legal services, rather than trying to do both.¹⁵⁵ The experience of the UK CICs is inconclusive, but may support Pilliar's conclusion. The annual CIC report of RLE for the year ending 31 March 2015 simply states that “[t]he company has contributed to the sustainability of the charity Rochdale Law Centre to maintain its free advice service to those in need.”¹⁵⁶ The 2015 annual report for Castle Park, the company's second year of operation, states that “[i]t is the intention to gift any profits to Community Advice and Law Services Limited [...] when profits occur.”¹⁵⁷

As noted above, Part 2.2 of the BC *BCA* appears to allow for the kind of funding arrangements described above. Under section 51.931(1)(c), C3s may transfer money or assets “in furtherance of the company's community

¹⁵² *Ibid* at 9, 11.

¹⁵³ *Ibid* at 9.

¹⁵⁴ *Ibid* at 11.

¹⁵⁵ *Ibid* at 21.

¹⁵⁶ Rochdale Legal Enterprise Community Interest Company, *Community Interest Company Report: Abbreviated Accounts, Year Ended 31 March 2015* (22 Dec 2015), Part 1, online: UK Companies House Registry <beta.companieshouse.gov.uk/company/07711092/filing-history>

¹⁵⁷ Castle Park Solicitors *Community Interest Company, Community Interest Company Report: Abbreviated Accounts for the Year Ended 31 March 2015* (18 Dec 2015), Part 1, online: UK Companies House Registry <www.beta.companieshouse.gov.uk/company/08045668/filing-history>.

purpose,”¹⁵⁸ which could include the provision of legal services. A legal clinic organized as a non-profit society or a registered charity could incorporate a C3 as a subsidiary, subject to following certain procedural requirements.¹⁵⁹ The creation of a subsidiary potentially allows registered charities to avoid having to meet the requirements for a “related business” under the *Income Tax Act*,¹⁶⁰ and non-profit organizations to avoid the prohibition on generating profits other than “inadvertently.” The profits generated by the C3, however, will not be tax exempt, even though they are being transferred to a tax-exempt entity.¹⁶¹

The significant regulatory barrier with respect to both stand-alone low-cost providers—discussed in Section 4(1) above—and using C3s as a source of funding for free legal clinics is the current laws and regulations governing the profession in BC, and generally across Canada, that prohibit non-lawyer ownership of law firms. These rules prevent the kind of innovations in business structure, such as the use of C3s, which could help to address the problem of access to justice. In Part V, I review the arguments made against permitting incorporated law firms and non-lawyer ownership, and show how C3s either do not raise, or are able to address, these concerns.

¹⁵⁸ For Nova Scotia, see NS *CICA*, *supra* note 16, s 13(1)(c). C3s may also transfer money or assets to a “qualified entity”, which includes a community service cooperative, a registered charity, or a “qualified donee” as defined by section 149.1(1) of the *ITA*, *supra* note 75: “Qualified donee” includes registered charities, governments and “Canadian housing corporations set up exclusively to provide low-cost housing for the elderly.” See also Paula Ideias, *Canadian Tax Compliance Guide for Registered Charities and Non-Profit Organizations* (Toronto: Carswell, 2009) at 179 [Ideias].

¹⁵⁹ Blatchford & Mason, *supra* note 68 at 19. For example, under the *Society Act*, RSBC 1996, c 433, s 34 a non-profit society would require authorization of its members by special resolution to incorporate a subsidiary C3.

¹⁶⁰ See Ideias, *supra* note 158 at 6: A related business is either “a commercial activity [...] that is related to a charity’s purpose and subordinate to that purpose, or that is substantially run (90% or more) by volunteers”; *ITA*, *supra* note 75, s 149.1(1). A community purpose similar to Castle Park might qualify as “related” to the provision of free legal services, but the law is unclear. For example, would a C3 offering low-cost wills count as “related” to the purpose of the BC Centre for Elder Advocacy and Support, which is a registered charity? Aptowitz & Dachis, *supra* note 12 at 6 note that, in contrast to the UK, the Canadian Federal Court has rejected a “destination test” under which a business would be considered related so long as all of the profits were paid to the charity.

¹⁶¹ Canadian Tax Foundation Roundtable 2010-0386301C6—NPO Carrying on Business for Profit (28 November 2010), Question 11, online: <www.taxinterpretations.com/content/362585>: “[i]f an entity wishes to carry on a for-profit business for the purpose of providing funds to an NPO, the business should be carried on through a taxable entity and the funds provided to the NPO on an after-tax basis”.

5. C3s and the Debate over “Alternative Business Structures” in Law

Traditionally, lawyers have practiced as sole practitioners or partnerships. The reason was to assure members of the public that the lawyer remained liable for his or her negligence, and, in the case of a partnership, the negligence of his or her partners. Since the late 1990s, however, lawyers have been able to provide legal services through “limited liability partnerships” (LLPs) under which they generally are not liable for the decisions of their partners, nor the debts and liabilities of the partnership.¹⁶²

In all provinces, lawyers are permitted to practice through a professional law corporation, but these do not confer all of the benefits of general incorporation; in particular, shareholders remain personally liable for their own negligence.¹⁶³ The BC *Legal Profession Act* (BC *LPA*) states that a permit must be issued to “a company, as defined by the *Business Corporations Act*,” so long as specified requirements are met.¹⁶⁴ The definition of “company” under the latter statute appears to include C3s, since “community contribution company” is defined as “a *company* that has, in its notice of articles, the statement referred to in section 51.911(1).”¹⁶⁵ The question is whether a C3 could comply with the other requirements of a province’s *Legal Profession Act*.

First, to comply with the BC *LPA*, the company must include “law corporation” in its name.¹⁶⁶ There does not appear to be any reason a name such as “Henderson Law Corporation CCC” could not be used to conform to the naming requirements under Part 2.2 of the BC *BCA* and Part 9 of the BC *LPA*. Second, the C3 would be limited to the activity of providing legal services.¹⁶⁷ While this might prevent some potential useful synergies with other services, providing low-cost legal services or providing affordable legal services to a currently under-served group or geographic area would

¹⁶² See e.g. *Partnership Act*, RSBC 1996, c 348, s 104. Limited liability partnerships for lawyers are authorized by s 83.1 of the *Legal Profession Act*, SBC 1998, c 9 [BC *LPA*].

¹⁶³ See e.g. BC *LPA*, *ibid*, s 84(1)(a); Ontario *Business Corporations Act*, RSO 1990, c B.16, s 3.4 [ON *BCA*]; Nova Scotia *Legal Profession Act*, SNS 2004, c 28, s 22(5) [NS *LPA*].

¹⁶⁴ *Ibid*, s 82(1). The permit form requires a declaration that the “company is incorporated, continued or registered under the *Business Corporations Act*”.

¹⁶⁵ BC *BCA*, *supra* note 16, s 1(1) [emphasis added].

¹⁶⁶ *Supra* note 162, s 82(1)(b); *Law Society Rules 2015*, s 9-1. In Ontario, it must include “professional corporation” according to the ON *BCA*, *supra* note 163, s 3.2(2). For Nova Scotia naming rules, see *Regulations made pursuant to the Legal Profession Act*, SNS 2004, c 28, ss 7.5.10–7.5.13 [NS *LPA Regs*].

¹⁶⁷ BC *LPA*, *ibid*, s 81(4), which reads: “or services directly associated with the provision of legal services”; Ontario *Law Society Act*, RSO 1990, c L.8, s 61.0.1(5) [ON *LSA*].

constitute a community purpose, so a company providing only legal services could still qualify as a C3. Third, all of the directors and the president of the corporation must be practicing lawyers.¹⁶⁸ Again, while this would prevent the C3 from benefitting from having the expertise of non-lawyers among its directors and officers,¹⁶⁹ this requirement would not prevent the company from qualifying as a C3 so long as there are at least three directors.¹⁷⁰ Finally, the *Legal Profession Act* in British Columbia, Ontario and Nova Scotia all stipulate that a law corporation owes the same fiduciary, ethical and confidentiality duties to its clients as between any lawyer and client.¹⁷¹ How this would apply to C3s is discussed below.

It appears, in theory at least, that a BC C3 could be granted a permit to provide legal services under the BC *LPA*.¹⁷² Similarly, it appears that a CIC could be granted a permit to provide legal services in Nova Scotia.¹⁷³ Under the current rules, however, a C3 could not provide legal services in other provinces because a professional corporation must be “incorporated or continued” under the business corporations statutes of the province that the C3 would be operating in.¹⁷⁴ This is in contrast with BC, the only province which expressly allows an extra-provincial company to apply for a law corporation permit.¹⁷⁵ Thus, for provincial law societies to test run the use of C3 or CIC ABS, other provinces must amend their rules to allow for extra-provincial law corporations in this form.

The other problem is that in most provinces a C3 providing legal services would be unable to access funding from social impact and other investors who are not also lawyers, since shareholders are restricted to lawyers and their immediate family members.¹⁷⁶ For the same reason, a charity or non-

¹⁶⁸ BC *LPA*, *ibid*, s 82(1)(e); NS *LPA*, *supra* note 163, s 22(1).

¹⁶⁹ Prairie Law Societies, *supra* note 9 at 62.

¹⁷⁰ BC *BCA*, *supra* note 16, s 51.93(1). See also NS *CICA*, *supra* note 16, s 5(4)(c).

¹⁷¹ BC *LPA*, *supra* note 162, s 84(4). See also ON *LSA*, *supra* note 167, s 61.0.5(1); NS *LPA*, *supra* note 163, s 23.

¹⁷² Alternatively, a law corporation could attempt to replicate a hybrid structure in its articles of incorporation and by-laws, but this might be less efficient in terms of transaction costs and these would always be subject to amendment by the shareholders.

¹⁷³ NS *LPA Regs*, *supra* note 166, s 7.5.3(a).

¹⁷⁴ See e.g. *Legal Profession Act*, RSA 2000, c L-8, s 131(3)(c); *Legal Profession Act*, CCSM, c L107, s 32(1)(a); ON *BCA*, *supra* note 163, s 3.1.

¹⁷⁵ BC *LPA*, *supra* note 162, s 82(1); Law Society of BC, Law Corporation Permit, online: <www.lawsociety.bc.ca/docs/forms/MS-misc/lawcorp-permit-app.pdf>.

¹⁷⁶ The BC *LPA*, *ibid* at 82(1)(d)(3) permits “a person who is a relative of or resides with a practising lawyer” to hold non-voting shares. Only individuals licensed to practice law are permitted to exercise voting rights within the corporation (s 82(1)(c): “each voting share is legally and beneficially owned by a practising lawyer or by a law corporation” and s 81(6) prohibits voting trust agreements). This same limitation on share ownership for law corporations applies in Alberta, Saskatchewan and Manitoba, see Prairie Law Societies,

profit could not own or invest in a C3. This would defeat one of the BC government's stated purposes for introducing C3 legislation, which is "to encourage private investment in social enterprise," including attracting "philanthropic investors who still expect some financial return."¹⁷⁷ A law firm organized as a C3 might comply with this rule by seeking investment only from practicing lawyers, but this would severely limit the pool of potential investors. A Nova Scotia CIC is able to issue non-voting shares to "any person,"¹⁷⁸ but it is questionable that investors who are already subject to asset-lock provisions would also give up having any voting power over management. So, while a C3 or CIC could operate in BC or Nova Scotia within the rules governing the profession, these rules undermine the ability of the C3 or CIC to attract equity investment, which might, in turn, limit their capacity to improve access to justice.¹⁷⁹

The concerns used to justify and defend the current prohibition on non-lawyer ownership apply with less force to a C3. The primary concern with non-lawyer equity ownership is that non-lawyers "may not have the same understanding of a lawyer's sense of ethical responsibilities"¹⁸⁰ and that the lawyer's independent judgment might be compromised as a result.¹⁸¹ The CBA Futures Initiative reported that during consultations with the profession lawyers questioned "whether it was possible to have a dual loyalty to clients and shareholders."¹⁸² The presumption is that non-lawyer shareholders would put pressure on law firms to maximize profits at the expense of independent judgment and professional ethics.¹⁸³

supra note 9 at 43. Under the ON *LSA*, *supra* note 167, s 61.0.1(4), Ontario permits only persons licensed to practise law or to provide legal services to own shares in a law corporation. Québec and New Brunswick permit voting share ownership by non-lawyers, so long as a majority of voting shares are held by members of the bar, see *Regulation respecting the practice of the profession to advocate within a limited partnership or joint-stock company and its multidisciplinary*, RRQ, c B-1, r 9 and *Law Society Act, 1996*, SNB 1996, c 89, s 37(4)(b).

¹⁷⁷ BC Ministry of Finance, "Questions and Answers", *supra* note 74.

¹⁷⁸ NS *LPA*, *supra* note 163, s 21(2); NS *LPA Regs*, *supra* note 166, s 7.1.2.

¹⁷⁹ See Prairie Law Societies, *supra* note 9 at 43: "[e]ntrepreneurial lawyers with novel ideas for the delivery of legal services have very few options to finance new ventures, and thus innovation is often hampered. Without the ability to innovate, the cost of delivering legal services and, in turn, the cost of accessing legal services remains high".

¹⁸⁰ Edward M Iacobucci & Michael J Trebilcock, *An Economic Analysis of Alternative Business Structures for the Practice of Law* (Law Society of Upper Canada, 2013) at 52.

¹⁸¹ Prairie Law Societies, *supra* note 9 at 43–44: "[t]he traditional prohibition against non-lawyer ownership of law firms is entrenched in statute and rooted in the ideology that lawyers must be isolated from non-lawyers in order to maintain their professionalism and independence and remain free from outside influence".

¹⁸² CBA Futures Report, *supra* note 2 at 34.

¹⁸³ LSUC, "ABS Working Group Report", *supra* note 6 at para 76; Wiseman, *supra* note 15 at 15.

Putting aside the possibility that pressure to maximize profits might apply with equal force to lawyers working in a traditional partnership,¹⁸⁴ the purpose of operating as a C3 rather than an ordinary business corporation is to make clear that profits are not the sole primary purpose of the company; the community purpose must be *a* primary purpose.¹⁸⁵ Furthermore, the asset lock provisions, coupled with the explicit community purpose, mean that C3s are not an attractive investment vehicle for shareholders seeking only to maximize profits, and who therefore might put pressure on management to focus on profits at the expense of client service.¹⁸⁶ As noted in Section 3, above, it seems unlikely that a C3 would seek to distribute shares to the public.

Rather than detract from a focus on independent judgment and professional ethics, operating as a C3 may serve to reinforce them. The CBA Futures Report suggests that lawyers' professional obligations "[a]t their core, require [lawyers] to subordinate their personal interests in the interests of their clients and in the interests of society as a whole."¹⁸⁷ C3s would allow lawyers to build these professional obligations into the very form of business organization of the firm.

Another concern raised in the ABS debate is that the duty of loyalty of a corporation's directors will conflict with duties to the client and the courts.¹⁸⁸ In analyzing whether such a conflict exists, it is important to be precise about the duties of the directors of a C3. The BC *BCA* states that the duty of directors of a C3 to "act with a view to the community purposes [...] set out in the articles" does not limit the duty of directors in section 142(1).¹⁸⁹ The wording of section 142(1) is similar to the equivalent provision in the *CBCA* and other provincial corporations statutes, requiring directors to "act honestly and in good faith with a view to the best interests

¹⁸⁴ Prairie Law Societies, *supra* note 9 at 1: "[I]aw firms are profit-driven businesses with expanding global scope and high overhead," also discussing the incentives created by hourly billing (at 52) and discussing the relationship between associates and partners (at 54).

¹⁸⁵ BC *BCA*, *supra* note 69 and accompanying text at 10, *above*; see also *infra* note 193.

¹⁸⁶ For example, Royal Bank of Canada's social impact fund, RBC Generator, which focuses on investments related to environmental sustainability, seeks investments that are likely to generate "market, or *near market*, returns", as opposed to market or above market returns, see RBC, "About RBC: Investing for Impact", online: <www.rbc.com/community-sustainability/rbc-social-finance-initiative/investing-for-impact.html> [emphasis added].

¹⁸⁷ CBA Futures Report, *supra* note 2 at 40. See also Law Society of BC, *supra* note 2 at 10.

¹⁸⁸ See e.g. Law Society of BC, *ibid* at 11.

¹⁸⁹ *Supra* note 16, s 51.93(2). The NS *CICA*, *supra* note 16, does not contain a similar provision, because the Nova Scotia *Companies Act*, RSNS 1989, c 81 does not contain a general duty of directors to act in the company's best interests

of the company.”¹⁹⁰ While this might raise the appearance of conflicting duties, it is difficult to see how actual conflicts will result.

With respect to individual lawyers practicing in the firm who are also directors, the duty to act with a view to the best interests of the company applies specifically “when exercising the powers and performing the functions of a director or officer of the company.”¹⁹¹ This would mean that in making decisions regarding the management of the firm—in setting fees, for example—the director of a C3 would have a duty to act with a view to the best interests of the company *and* to its community purpose. But the statutory duties imposed on a director of a C3 do not require that the interests of the company and the community purpose should count in making strategic decisions about a particular client file. What the statutory, as well as common law, duties require is that directors not benefit personally from their position at the corporation’s expense by misappropriating assets, taking for themselves a business opportunity that belongs to the corporation, or benefitting from a transaction with the corporation without disclosing a conflict of interest. In other words, the purpose of the duty of loyalty to the corporation is to ensure that directors do not put their own personal interests ahead of those of the corporation, rather than an absolute duty to put the interests of the corporation ahead of all other possible interests.

Finally, it clearly is in the best interests of an incorporated law firm to comply with ethical and professional responsibilities as the best way to protect against reputational and compliance risk. In *BCE v 1976 Debentureholders*, the Supreme Court of Canada noted that determining what is in the best interests of the corporation, “viewed as a good corporate citizen,” often will require considering the interests of stakeholders including, in this case, clients of the firm and the *long-term* interests of the firm.¹⁹² The best interests of an incorporated law firm include compliance with professional duties to clients and the courts. Although one can imagine possible conflicts between the short-term interests of the firm and the best interests of the client, it would be extremely difficult to defend a breach of professional obligations on the basis of the company’s best interests, particularly for a C3. As the *Code of Professional Conduct for British Columbia* states, “[a] lawyer’s best advertisement is the establishment of a well-merited reputation for competence and trustworthiness.”¹⁹³ For additional clarity, the articles of incorporation of a C3 providing legal

¹⁹⁰ BC *BCA*, *supra* note 16, s 142(1)(a). See *Canada Business Corporations Act*, RSC 1985, c C-44, s 122(1) [*CBCA*]; AB *BCA*, *supra* note 111, s 122(1).

¹⁹¹ BC *BCA*, *ibid*, s 142(1)(a).

¹⁹² 008 SCC 69 at paras 38–39, 81 [emphasis added].

¹⁹³ The Law Society of British Columbia, *Code of Professional Conduct for British Columbia (“the BC Code”)* (Vancouver: Law Society of British Columbia, 2013) rule 2.1-5(c) [*BC Code*]. See also Prairie Law Societies, *supra* note 9 at 54: “[f]or the most part, the

services, in addition to setting out the company's community purposes, could state that compliance with the highest standards of professional ethics and responsibility is considered to be in the best long-term interests of the company.¹⁹⁴

The duty of directors of a C3 to "act with a view to the community purposes of the company"¹⁹⁵ also does not necessarily conflict with lawyers' professional responsibilities. The BC *BCA* requires that "[o]ne or more of the primary purposes of a community contribution company must be community purposes."¹⁹⁶ It does not require that the community purpose rank ahead of all other potential purposes. While the asset lock provisions are there to prevent directors and officers of a C3 from putting profits ahead of the community purpose, there are no provisions preventing the directors and officers of a C3 law firm from prioritizing compliance with the ethical and professional responsibilities imposed by the Law Society of BC. Again, the legislation does not require that directors put the community purpose above all other considerations, such as reputational risks to which breaches of professional responsibility would give rise. Even if the community purpose comes first, if that purpose is to provide legal services, prioritizing professional responsibility is obviously consistent with that community purpose.

The other specific objection to non-lawyer equity ownership is that it poses a threat to long-standing rules regarding conflicts of interest and client confidentiality.¹⁹⁷ With respect to conflicts of interest, the Commentary to the Federation of Law Societies of Canada's *Model Code of Professional Conduct (FLSC Model Code)*, Rule 3.4-1 prohibits a lawyer from acting for a client when a conflict of interest exists, stating that "the lawyer or law firm will [...] be prevented from acting if [...] the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."¹⁹⁸ As explained above, the statutory duties of

lawyers that will be the most successful, both with respect to wealth and respect, are those who live up to their professional obligations".

¹⁹⁴ See Blatchford & Mason, *supra* note 68 at 8: "A C3 [...] may have purposes in its articles which would not qualify as community purposes, so long as one of its primary purposes, set out in the articles, is a community purpose".

¹⁹⁵ BC *BCA*, *supra* note 16, s 51.93(2).

¹⁹⁶ *Ibid*, s 51.92.

¹⁹⁷ LSUC, "ABS Working Group Report", *supra* note 6 at para 76: "[d]ifficulties preserving client confidentiality and solicitor-client privilege due to pressure by non-licensure owners to learn about the firm's cases"; Prairie Law Societies, *supra* note 9 at 54.

¹⁹⁸ Federation of Law Societies of Canada (FLSC), *Model Code of Professional Conduct* (Ottawa: FLSC, 2014) [FLSC *Model Code*]. See also *BC Code*, *supra* note 193, Rules 1.1-1, 3.4-1.

directors of a C3 do not create a conflict with lawyers' professional duties to clients and the courts. It still could be argued that lawyers providing legal services through an incorporated law firm may be affected by the potentially conflicting interests of the shareholders.¹⁹⁹ Yet, again, this type of conflict of interest seems less likely to arise in a C3 in which shareholders understand that profit maximization is not the objective of the corporation. The mere potential for conflict of interest is insufficient to justify an outright prohibition on non-lawyer ownership in the context of providing legal services through a C3.

One concern that might arise from the use of C3s is whether reporting obligations regarding how well a C3 is fulfilling its "community purposes" would conflict with client confidentiality.²⁰⁰ The FLSC *Model Code* rule on confidentiality is broad: "A lawyer must at all times hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship."²⁰¹ Furthermore, confidential information cannot be used "for the benefit of the lawyer or a third person without the consent of the client or former client."²⁰² The Commentary does not address the use of confidential information for organizational reporting purposes, but legal clinics currently produce annual reports on their activities without violating client confidentiality. For example, the Community Legal Assistance Society *Annual Report 2014/15* complies with this rule by changing names and omitting identifying information when reporting on specific files.²⁰³

6. Conclusion

As the CBA Futures Report notes, the need to increase access to justice will drive change to existing modes of delivery and "[i]f the Canadian legal profession cannot ensure that low- and middle-income Canadians have access to affordable, regional, and culturally competent legal services, someone else will."²⁰⁴ C3s are not *the* answer to the problem of access to justice; the use of CICs to provide legal services in the UK has not solved

¹⁹⁹ LSUC, "ABS Working Group Report", *supra* note 6 at para 99: "[a]n inherent conflict could arise even from a minority interest in the law firm".

²⁰⁰ *Supra* notes 92–97 and accompanying text at 12, *above*. The Law Society of BC, *supra* note 2 at 11, raised this concern with respect to reporting obligations of publicly-listed firms.

²⁰¹ FLSC *Model Code*, *supra* note 198, Rule 3.3-1; *BC Code*, *supra* note 193, s 3.3-1.

²⁰² *BC Code*, *ibid*, s 3.3-2.

²⁰³ See e.g. (Vancouver: Community Legal Assistance Society, 2015) at 6, 8, 12, online: <d3n8a8pro7vhmx.cloudfront.net/clastest/pages/110/attachments/original/1444064486/CLAS_AnnualReport14-15.pdf>.

²⁰⁴ *Supra* note 2 at 25.

its access to justice problem.²⁰⁵ The community purpose aspect and asset lock provisions may limit the appeal of C3s to entrepreneurs interested in coming up with mass-market legal solutions. That said, C3s offer a form of business organization uniquely suited to providing legal services to communities and groups not well served in today's legal services market and potentially offer an additional source of funding for free or low-cost legal clinics. They also represent an opportunity for the provincial law societies, in particular the Law Society of BC and the Nova Scotia Barristers' Society, to implement a pilot project permitting and monitoring incorporated law firms with non-lawyer investors through a vehicle that represents a truly "alternative" business structure that mitigates concerns about profit maximization trumping professionalism and ethics.²⁰⁶ Although the appeal of C3s to mainstream legal practice is likely limited, C3s provide a clear example of an ABS that has the potential to offer "public value" beyond "enrich[ing] the legal profession or those who invest in it."²⁰⁷ Finally, it also provides an opportunity for law societies to serve the public interest by helping to develop and encourage a legislative innovation in the forms of business organizations able to provide a public benefit. As the Law Society of BC rightly noted: "[a]ny innovations that improve access to legal services or present opportunities to increase the ethical or professional responsibilities of the deliverers of legal services cannot be ignored and need to be considered seriously."²⁰⁸ This article has argued that C3s are one such possible innovation.

²⁰⁵ Falconer & Bach, *supra* note 118.

²⁰⁶ See also Wiseman, *supra* note 15 at 41.

²⁰⁷ Law Society of BC, *supra* note 2 at 1–2.

²⁰⁸ *Ibid* at 12. See also Wiseman, *supra* note 15 at 38: "provincial self-regulators all have an implicit or explicit duty to facilitate access to justice in their regulatory activities"