

Advising the Social Enterprise – Much Ado about Something

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Advising Charities, Not-For-Profits, and Social Enterprises

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Introduction

When a lawyer is consulted by charities and not-for-profit organizations and is presented with the facts of a “social enterprise” what considerations arise in giving advice? How does the notion of social enterprise currently fit in our legal system? This paper will canvass these questions and also consider the issues for individuals wanting to set up a social enterprise. One US observer comments that the lawyer’s task, “. . . is to provide social entrepreneurs and social enterprises with the best possible legal framework to help them try to succeed”.¹ But what exactly is social enterprise and what is best?

Before delving into the always present devilish details in an effort to confront these questions, observations on the nature of social enterprise are in order, after which the legal context can be given, including the nature of charities and non-profits under the Income Tax Act (the ITA).²

Social Enterprise – What Story Is Being Told?

In October 2013 Calgary was host to more than a thousand people from around the world for the Sixth Annual Social Enterprise World Forum. As one commenter observed:

*Phrases such as “social innovation”, “social entrepreneurship”, “corporate social innovation”, public sector innovation”, “social technology”, “social purpose business”, “social finance” and “impact investing” were all used in presentations. Indigenous social enterprise, touted by a former Prime Minister of Canada as a Canadian experience, was also a focal point of the conference.*³

So what is social enterprise? Perhaps having recently reached a tipping point - at least for discussion - the concept has a long history, now being extensively examined in the academic literature.⁴ While some trace the origins of social enterprise to the early 1970s and 1980s in the United States,⁵ others point back even further to Europe and the co-operative tradition.⁶

¹ Robert A. Wexler, *Effective Social Enterprise – A Menu of Legal Structures*, 63 *Exempt Org. Tax Rev.* 565, 565 (2009).

² While the organizational form of a charity or non-profit is important, it is secondary to ITA provisions. See later discussion.

³ C. Yvonne Chenier, Q.C., *Canadian Not For Profit News*, November 2013, Vol. 21 No. 11 – p. 81

⁴ For representative and useful references to start see: Marthe Nyssens, ed. (2006) *Social Enterprise: At the crossroads of market, public policies and civil society* Routledge; Janelle A. Kerlin, *Defining Social Enterprise Across Different Contexts: A Conceptual Framework Based on Institutional Factors*, *Non-profit and Voluntary Sector Quarterly*, 42(1) 84 –108; Defourny, J. and M. Nyssens (2010). *Social enterprise in Europe: At the crossroads of market, public*

In the United States it has been suggested there are two approaches. The "earned income" school of thought focuses on strategies for starting a business that would earn income in support of the social mission of a non-profit organisation and that could help diversify its funding base. The "social innovation" school puts the emphasis on the profile and behaviour of the social entrepreneurs in the non-profit sector who are "change makers" creating "new combinations" of ways to deliver services, enhance their quality services, establish new or enhanced methods of production, with new production factors and new forms of organisations and new markets. Here the emphasis is on with a belief in the need for systemic innovation and impact at a broad societal level.⁷

The EMES Network from Europe suggests three sets of criteria when examining social enterprise: its economic and entrepreneurial dimensions, its social dimensions, and considerations of participatory governance.⁸ Quite recently in a Communication from the European Commission to the European Parliament,⁹ the Commission adopted this formulation:

A social enterprise is an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders. It operates by

policies and third sector. *Policy and Society* 29(3): 231-242 and J. Defourny, M. Nyssens, The EMES approach of social enterprise in a comparative perspective *WP no. 12/03*, available from the EMES Network - www.emes.net. EMES is a European university network of research centres and researchers whose goal has been to build a body of theoretical and empirical knowledge, using a variety of disciplines and methodologies, around what they refer to as their "SE" concepts: social enterprise, social entrepreneurship, social economy and solidarity economy and for a useful overview of the concept in Canada see: Mendell, M. (2010). "Reflections on the evolving landscape of social enterprise in North America." *Policy and Society* 29(3): 243-256 which has a helpful overview of the concept in Canada.

⁵ J. Defourny, M. Nyssens, *WP no. 12/03*,

⁶ There are two old journals considering co-operatives, *Revue des Études Coopératives*, (founded 1921 and the *Annals of Public and Co-operative Economics*, (founded 1908). A related journal is *Economic Analysis and Workers' Management* (late 70s) and now *Economic Analysis* covers the economics of self-management and workers' co-operatives. The Mondragon Co-operatives centred in northern Basque region of Spain was started in the 1940s by a Catholic priest, José María Arizmendiarieta, who set up a technical college which became the centre of training managers, engineers and skilled labour a successful system of worker-owner co-operatives that continues to this day. The use of a co-operative is sometimes considered as a form of legal structure for social enterprise. But it is noted that this structure is predominantly suited to member-run initiatives, not the wider community of social ventures. See comments at MARS <http://www.marsdd.com/articles/co-operative-corporation-social-ventures/>. Also, Bridge, R. & Corriveau, S. (2009) *Legislative Innovations and Social Enterprise: Structural Lessons for Canada*. BC Centre for Social Enterprise. http://www.centreforsocialenterprise.com/f/Legislative_Innovations_and_Social_Enterprise_Structural_Lessons_for_Canada_Feb_2009.pdf (retrieved November 1, 2013) The co-operative form is not discussed? in this paper as a possible option.

⁷ Footnote 5 at p. 6-8

⁸ Footnote 5 at p. 11-14

⁹ European Commission, Brussels, 25.10.2011 *Com (2011) 682* Final Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee and The Committee Of The Regions Social Business Initiative - Creating A Favourable Climate For Social Enterprises, Key Stakeholders In The Social Economy And Innovation