

Social Enterprise, Law & Legal Education

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Social Enterprise, Law & Legal Education

Abstract

This article examines the relationship between law and social enterprise. More specifically, it explores ways in which the law and the law school can serve to refine and promote the development of social enterprise. The article begins by canvassing the existing conceptions of social enterprise to provide a basis for understanding and to identify points of access for legal intervention. At the end of this analysis, we arrive at a working definition of social enterprise: A legal entity engaged in socially responsible economic activity for the purpose of generating revenue that is to be used to advance a social mission. Building on the notion that a legal structure is integral to the concept, the article proceeds to explore the ways that the law may change to further promote social enterprise. Finally, the article shifts to examine the impact legal education and law schools have as catalysts for thought leadership and capacity-building for social enterprise.

Cover Page Footnote

Special thanks to Anita Anand, Stephanie Ben-Ishai, Cristie Ford, Poonam Puri, Edward J Waitzer, and Victoria Watkins for their thoughtful and helpful comments on an earlier draft.

Special Issue

Creating Opportunities: A Vision for the Future

Social Enterprise, Law & Legal Education*

LORNE SOSSIN & DEVON KAPOOR[†]

This article examines the relationship between law and social enterprise. More specifically, it explores ways in which the law and the law school can serve to refine and promote the development of social enterprise. The article begins by canvassing the existing conceptions of social enterprise to provide a basis for understanding and to identify points of access for legal intervention. At the end of this analysis, we arrive at a working definition of social enterprise: A legal entity engaged in socially responsible economic activity for the purpose of generating revenue that is to be used to advance a social mission. Building on the notion that a legal structure is integral to the concept, the article proceeds to explore the ways that the law may change to further promote social enterprise. Finally, the article shifts to examine the impact legal education and law schools have as catalysts for thought leadership and capacity-building for social enterprise.

Cet article examine le lien entre le droit et les entreprises sociales. Il se penche notamment sur la façon dont le droit et la faculté de droit peuvent contribuer à améliorer et à promouvoir le développement des entreprises sociales. Dans un premier temps, l'article

* An earlier version of this article was discussed at the Creating Opportunities Summit. The Summit took place on 26-27 January 2017 at Osgoode Hall Law School, York University, Toronto.

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décrit les conceptions existantes de l'entreprise sociale pour en permettre une meilleure compréhension et cerner les points d'accès de l'intervention juridique. À la fin de cette analyse, nous proposons une définition fonctionnelle de l'entreprise sociale, à savoir une entité juridique exerçant une activité économique socialement responsable dans le but de générer des recettes qui serviront à faire avancer une mission sociale. S'appuyant sur l'idée que la structure juridique fait partie intégrante du concept, l'article analyse ensuite comment le droit peut évoluer pour promouvoir davantage les entreprises sociales. Enfin, dans un dernier temps, il examine l'impact de l'enseignement juridique et des facultés de droit sur le leadership éclairé et le renforcement des capacités des entreprises sociales.

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IN THIS BRIEF ARTICLE, we explore the relationship between law and social enterprise. Is social enterprise, like the corporation, a legal construct, or is it a term used to capture an emerging set of practices by existing entities—for example, where registered charities set up a separate structure to generate revenues that then fund the charitable activities? An organization that has undertaken such practices is the well-known Canadian charity, “Me to We,” which, while focused on development activities in sub-Saharan Africa, also has a revenue generating operation selling fair trade T-shirts and other goods. In describing this relationship, Me to We’s website declares:

ME to WE social enterprise combines best business practices with increasing social awareness. Our commitment to help improve cultural, community, economic and environmental outcomes is at the centre of our business. Every ME to WE product sold makes a direct, measurable impact in a WE Charity community overseas, empowering them to build a better future.¹

1. Me to We, “About Us” (2017), online: <www.metowe.com/about-us/social-enterprise-model>.

Other approaches to social enterprise suggest a new legal hybrid is emerging, which combines elements of for-profit business with elements of social purposes. Whether a new legal structure emerges or existing structures are adapted, a host of important legal questions follow. As designation as a social enterprise may have tax and regulatory implications, how is social enterprise to be defined? What counts as a social enterprise and why, when social enterprises receive public benefits, such as Ontario's "Social Enterprise Strategy" and "Social Enterprise Demonstration Fund," which boasts a population of 10,000 Social Enterprises in the province?² Is this jurisdictional boundary a function of statutory interpretation, policy, or the operational discretion of a public agency or funding body?

The premise of this article is not only that law is an essential element of what creates and shapes social enterprise, but also that legal education generally, and university-based law schools in particular, have a generative role to play in the evolution and growth of the sector. Law-school-based incubators, innovation and start-up clinics, and pro-bono activities in support of social enterprise all play a critical role both in capacity-building for social enterprise and in seeding a new group of leaders, thinkers, and disruptors focused on the potential (and limits) of social enterprise. This article builds on previous studies that have explored the catalytic role law schools can play (and have played) in the broader terrain of social innovation.³

In Part I, we briefly canvass a series of definitions of social enterprise from various sources—statutory, policy-based, institutional, and academic—in order to grasp the current understanding of the concept. Although collectively somewhat inconsistent and imprecise, these definitions lead us to conclude that social enterprise has two fundamental aspects: First, it must have a legal structure; and second, it must take some form of economic risk to generate revenue for a socially beneficial cause. Building on the notion that a legal structure is integral to social enterprise, Part II examines the various ways that the law may foster and refine social enterprise. Finally, in Part III, the focus shifts to legal education and the impact law schools have as catalysts for thought leadership and capacity building for social enterprise.

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2. According to the Social Enterprise Unit at the Ontario Ministry of Economic Development, the 10,000 figure was determined by consulting various reports and speaking with industry experts. These reports include the 2013 CCEDNet Social Enterprise Survey of Ontario, the 2010 MaRS Ontario Social Finance Survey, and the 2015 Social Enterprise Survey for Ontario. A separate source, the Toronto Enterprise Fund, estimates that there are 25,000 social enterprises across Canada. On a per capita basis, the 10,000 figure estimated by the Ontario government is roughly in line with this estimate.
 3. See Lorne Sossin, "Law School as Social Innovation" NZJL [forthcoming in 2017].

I. DEFINING SOCIAL ENTERPRISE

In this article we investigate the role of law and the law school in defining and promoting social enterprise. It seems prudent to begin by examining existing definitions of social enterprise in order to identify points of access for legal intervention. Further, we believe it is important to define social enterprise because law schools, universities, and other institutions and governmental organizations are working to explore potential ways of fostering social enterprise as an innovative alternative to the traditional business model. It is important that we have a coherent understanding of what exactly we are seeking to build.

However, what we have found, and as you will see through the following exposition, is that there is no single, authoritative definition of social enterprise, either in Canada or globally. As such, Parts I(B)-(D) provide a glimpse into the various attempts to articulate such a definition. Looking to statutory, policy-based, institutional, and academic perspectives, we have gleaned what we take to be the collective insights from each and formulated them into our own working definition. It is from this point that we are then able to raise questions about the role of the law and the law school in fostering and promoting social enterprise.

A. SOCIAL ENTERPRISE AS SOCIAL INNOVATION

To situate and understand social enterprise, we must first examine the larger, similarly fluid notion of social innovation. This is an important starting point as it helps to underlie the fact that social enterprise is part of a growing movement to rethink the way in which we approach problems, particularly those with social implications. In other words, it is important to begin our discussion of social enterprise by recognizing that it stems from a broader, more expansive attempt to reimagine the way we interact with the world.

So, what is social innovation? At its base, social innovation seeks to address the world's social challenges through innovative means. Such problems can be "as large-scale as fighting global climate change or reducing poverty, or as small-scale as creating a community garden."⁴ More specifically, social innovation is any "novel solution to a social problem that is more effective, efficient, sustainable, or just than existing solutions and for which the value created accrues primarily to society as a whole rather than private individuals."⁵ A social innovation "can be a

4. Mark Goldenberg et al, "Social Innovation in Canada: An Update" (2009) Canadian Pol'y Research Networks 1 at 5.

5. James A Phills Jr, Kriss Deiglmeier, & Dale T Miller, "Rediscovering Social Innovation" (2008) 6:4 Stan Soc Innovation Rev 34 at 39.

product, production process, or technology, but it can also be a principle, an idea, a piece of legislation, a social movement, an intervention, or some combination of them.”⁶ For instance, one of the most famous and important social innovations has been microfinancing, which enables people otherwise unable to access banking and other financial services to create sustainable businesses and grow their communities.

Social enterprise is a creation of this movement. As we move on to define social enterprise, it is important to keep this larger framework in mind so as to understand it both as a specific and unique concept, and as a creation in a larger movement for social improvement.

B. STATUTORY DEFINITIONS

Interested in the law’s role in defining social enterprise, as well as the legal implications of its definition, we first look to legislative texts for an authoritative perspective. While there has yet to be a statute in Canada that explicitly defines the term,⁷ the most direct example of an attempt to give legislative expression to the terrain of social enterprise is Quebec’s *Social Economy Act*.⁸ The Act defines “social economy” as “all the economic activities with a social purpose carried out by

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6. *Ibid.* There are many other useful definitions of social innovation. For instance, Mark Goldenberg defined social innovation as “the development and application of new or improved activities, initiatives, services, process, or products designed to address social and economic challenges faced by individuals and communities.” Goldenberg, *supra* note 4 at 3. Another definition, offered by the Skoll Centre for Social Entrepreneurship, is that social innovation refers to “innovative activities and services that are motivated by the goal of meeting a social need and that are predominantly developed and diffused through organizations whose primary purposes are social.” Geoff Mulgan, “Social Innovation: What It Is, Why It Matters And How It Can Be Accelerated” (2007) Skoll Centre for Social Entrepreneurship 4 at 8. Similarly, the Canadian innovation cluster, MaRS, uses social innovation to refer “to a new set of creative solutions to unmet social needs – from environmental degradation and homelessness to global poverty.” MaRS, “MaRS names community advocate to lead new social innovation initiative” (2007), online: <www.marsdd.com/media-centre/ses-12042007-2>.
 7. In the US, a number of states have enacted legislation related to benefit corporations, which are “for-profit companies certified by the nonprofit B Lab to meet rigorous standards of social and environmental performance, accountability, and transparency.” “What are B Corps?”, online: <www.bcorporation.net/what-are-b-corps>. In our view, however, while B Corps suggest greater consciousness around social values and social responsibility among for-profit businesses, these types of certifications are not synonymous with social enterprise as we have defined the term. Rather, the concept is more relevant to discussions of Corporate Social Responsibility and the evolution of business enterprise more broadly.
 8. *Social Economy Act*, SQ 2013, c 22, s 2(6). This legislation comes closest to expressly addressing the category of social enterprise.

enterprises whose activities consist, in particular, in the sale or exchange of goods or services, and which are operated in accordance with the following principles”:

- 1) [T]he purpose of the enterprise is to meet the needs of its members or the community; 2) the enterprise is not under the decision-making authority of a public body; 3) the rules applicable to the enterprise provide for democratic governance by its members; 4) the enterprise aspires to economic viability; 5) the rules applicable to the enterprise prohibit the distribution of surplus earnings; and 6) the rules applicable to a legal person operating the enterprise provide that in the event of its dissolution, the enterprise’s remaining assets must devolve to another legal person sharing similar objectives.⁹

Here it seems clear that for an entity to be deemed a social enterprise, there are many factors at play, including its purpose, governance structure, and decision-making policies. Other jurisdictions have opted for different terminology though covering similar kinds of requirements. For example, the British Columbia (BC) *Business Corporations Act* defines “Community Contribution Companies”¹⁰ as being any company that meets the following criteria:

- 1) its memorandum of association includes a statement confirming its community purpose—meaning a purpose beneficial to society at large or a segment of society broader than the company itself, and includes providing health, social, environmental, educational, or other services—and the restrictions associated with such purpose; 2) it has at least three directors; 3) its name includes the words “Community Contribution Company” or the abbreviation “CCC”; and 4) the Registrar agrees that the company has a community purpose.¹¹

Nova Scotia has adopted a similar definition to a new special purpose corporate category, the “Community Interest Company,” under its *Community Interest Companies Act*.¹² While these definitions do not explicitly mention “social enterprise,” the BC Government, the BC Centre for Social Enterprise, and the Nova Scotia Government hold that these legal structures were created as

9. *Ibid.*

10. *Business Corporations Act*, SBC 2002, c 57, s 51.911-51.93.

11. *Ibid.*

12. SNS 2012, c 38. See also, Miller Thomson Social Impact Newsletter, “An In-depth Look at Nova Scotia’s New Community Interest Companies” (2016), online: <www.millert Thomson.com/en/publications/communiqués-and-updates/social-impact-newsletter-formerly-the/july-6-2016/an-in-depth-look-at-nova-scotias-new>.

“container[s]” for social enterprise.¹³ These new hybrid legal structures serve to help organizations combine certain characteristics of for-profit businesses with the social purpose nature of nonprofit entities.

Overall, the statutory definitions suggest some common elements, such as commercial activity and a social or community purpose, but there is no widely shared, authoritative legal meaning to the term “social enterprise.” For this reason, it is helpful to look further afield to how governments and public bodies have defined social enterprise for purposes of funding programs and other policies.

C. POLICY DEFINITIONS

Beyond statutory references either to social enterprise or to other categories that appear to mirror or overlap with social enterprise, there are also a number of public policy initiatives which turn on government defining what constitutes social enterprise. For example, the Government of Ontario, in undertaking its social enterprise strategy, stated that, “[s]ocial enterprises use business strategies to achieve a social or environmental impact. While generating revenues from the sale of goods and services, social enterprises also expressly intend to create positive outcomes, and they measure their results. As their business grows, the social impact grows.”¹⁴ More specifically, the Ontario Social Enterprise Demonstration Fund, which provides growth funding to Ontario-based social enterprises and was established pursuant to the provincial strategy, holds that “[s]ocial enterprises may take the form of enterprising not-for-profit organizations, social-purpose cooperatives, or for-profit corporations with a social mission.”¹⁵ Further, the fund identified the following core principles as the defining characteristics of social enterprise:

- 1) the organization derives a substantial portion of its income from the sale of goods and services; 2) the organization intends to create a social or environmental impact

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13. BC Government, “Social Enterprise” (2014), online: <www2.gov.bc.ca/gov/content/employment-business/business/social-innovation/social-enterprise> [“Social Enterprise”]; BC Centre for Social Enterprise, “What is Social Enterprise” online: <www.centreforsocialenterprise.com/what-is-social-enterprise> [“What is Social”]; Nova Scotia Government, “Advancing Social Enterprise in Nova Scotia” (2017), online: <novascotia.ca/business/docs/social-enterprise-framework.pdf> [“Advancing Social”].
 14. Ontario Government, “Ontario’s Social Enterprise Strategy 2016-2021” (2016), online: <www.ontario.ca/page/ontarios-social-enterprise-strategy-2016-2021>.
 15. Ontario Government, “Central Forms Repository: Social Enterprise Demonstration Fund” (2016), online: <www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/FormDetail?OpenForm&ACT=RDR&TAB=PROFILE&SRCH=&ENV=WWE&TIT=009-0058&NO=009-0058E>.

through its business activities, and the impact is not an unintended by-product of business operations; 3) the organization measures and reports on its social/environmental impact; and 4) the organization has a blended business model, with social impact as a defining element of its business model. The social/environmental impact of the social enterprise grows in lockstep with its business growth.¹⁶

Similarly, the Government of Nova Scotia envisions social enterprise as advancing “social, environmental, health, cultural, economic, and other community goals.”¹⁷ Beyond this, however, Nova Scotia emphasizes the notion of “buy[ing] local” and the dual focus of “providing a livelihood while also contributing to the common good.”¹⁸

As such, the policy definitions assist in distinguishing social enterprise from for-profit enterprise by highlighting that revenues or profits from social enterprise are used for community or social ends. Thus, it would appear that in the context of government policy, social enterprise may be characterized most strongly by how revenues or profits are spent, rather than how they are earned. However, the focus on how revenues are raised has been explored in more detail institutionally, as we examine below.

D. INSTITUTIONAL DEFINITIONS

Although quite a new area of academic inquiry, social enterprises have existed for some time. Consequently, a large group of institutions and other organizations relate to social enterprise and include as part of their mandate, mission, or activities, their own definition of social enterprise. For example, the BC Centre for Social Enterprise defines social enterprise in the following expansive terms:

Social enterprises are revenue-generating businesses with a twist. Whether operated by a non-profit organization or by a for-profit company, a social enterprise has two goals: to achieve social, cultural, community economic and/or environmental outcomes; and, to earn revenue. On the surface, many social enterprises look, feel, and even operate like traditional businesses. But looking more deeply, one discovers the defining characteristics of the social enterprise: mission is at the centre

16. *Ibid.* British Columbia’s social enterprise policy is similar to Ontario’s and defines social enterprise as those entities which, “use business strategies to increase their social or environmental impact. Like any other business, a social enterprise aims to create revenue. It is how the business uses their revenue that sets it apart. There are many different types of social enterprise. For example, they can be for-profit companies, non-profit companies, cooperatives, credit unions, or community contribution companies.” “Social Enterprise,” *supra* note 13.

17. “Advancing Social,” *supra* note 13.

18. *Ibid.*

of business, with income generating playing an important supporting role (from The Centre for Community Enterprise).¹⁹

The Centre also offers a simple test to help nonprofits, charities, and traditional businesses determine whether they are a social enterprise. For nonprofits and charities, the Centre suggests asking whether or not the organization is selling a good or service into the marketplace. According to the Centre, if the answer here is no, then they are not running a business and therefore are not a social enterprise, although they may be running a social program. For traditional businesses, the Centre suggests asking to what degree social or environmental goals steer their ships. If profit is paramount, they are not operating a social enterprise, although they may be engaging in socially conscious purchasing or corporate social responsibility. Here, the test illustrates that while traditional nonprofits and charities have social missions and traditional businesses are engaged in a marketplace, the hallmark of social enterprise is the combination of the two.

Another valuable insight from social enterprise institutions is that “[a]n equally noble goal of social enterprise” is to provide training and employment opportunities for people who are typically excluded from the mainstream economy.²⁰ From this perspective then, a for-profit organization can be a social

19. “What is Social,” *supra* note 13. There are numerous other organizations that offer valuable definitions of social enterprise. According to Sean McKinnon of the Carleton Centre for Community Innovation, for example, social enterprises can be broadly defined as “any organization or business that uses market-oriented production and sale of goods and/or services to pursue a public benefit mission.” For McKinnon, this definition is wide ranging and covers various organizational forms such as enterprising charities, non-profits, cooperatives, and social purpose businesses. “What Does it Mean to Start a Social Enterprise” (2011) Carleton Centre for Community Innovation at 1. The Social Enterprise Network of Nova Scotia describes “social enterprise [a]s a business or organization operated for the purpose of addressing social, cultural or environmental challenges. The majority of profits and surpluses are reinvested to support community needs.” “About,” online: <senns.ca/about-1>. The Canadian CED Network, Simon Fraser University, and Mount Royal University link social enterprise with nonprofit entities: “a business venture owned or operated by a non-profit organization that sells goods or provides services in the market for the purpose of creating a blended return on investment, both financial and social/environmental/cultural.” Paul Chamberlain et al, “Inspiring Innovation: The Size, Scope and Socioeconomic Impact of Nonprofit Social Enterprise in Ontario” (The Canadian Community Economic Development Network, Simon Fraser University, and the Institute for Nonprofit Studies, Mount Royal University, 2013) i at iv. The Social Enterprise Alliance defines social enterprise as “[b]usinesses whose primary purpose is the common good. They use the methods and disciplines of business and the power of the marketplace to advance their social, environmental and human justice agendas.” Alina S Ball, “Social Enterprise Governance” (2015) 18:4 U Pa J Bus L 919 at 927.

20. “What is Social,” *supra* note 13.

enterprise based on the fact that its mission is to employ individuals otherwise unable to find employment and thus to create a social benefit.

As these institutional definitions clarify, social enterprise may be distinguished not only by how revenues or profits are spent, but how they are earned—whether in the sense of who a social enterprise employs, how it conducts business, or its operating rationales.

E. ACADEMIC DEFINITIONS

Academics working in the sphere of social enterprise have developed similar definitions. Felipe Santos, for instance, holds that “social enterprises are those businesses with a predominant strategic focus on value creation over value capture.”²¹ Another perspective comes from Dana Reiser, who envisions social enterprises as “organizations formed to achieve social goals using business methods.”²² In many ways, these conceptions echo those put forward by the legislature, governments, and institutions in that they seek to pair social missions with a business approach.

Academic scholarship has also, however, put forth some more complex definitions. For example, Carlo Borzaga and Jacques Defourny posit that social enterprises, functioning within the “third sector” of modern economies, hold a number of common criteria (of which there are two categories). The first category features economic criteria, of which there are four elements: (1) a continuous activity producing goods or selling services; (2) a high degree of autonomy; (3) a significant level of economic risk; and (4) a minimum amount of paid work. The second category focuses on social criteria, of which there are five elements: (1) an explicit aim to benefit the community; (2) an initiative launched by a group of citizens; (3) a decision-making power not based on capital ownership; (4) a participatory nature that involves the persons affected by the activity; and (5) limited profit distribution.²³ This definition’s network of factors is more exclusive and refined than any of the other definitions discussed.

F. TOWARD A WORKING DEFINITION OF SOCIAL ENTERPRISE

How we define (and that we define) social enterprise is important if regulatory and policy benefits and burdens are to flow based on whether an organization or business is characterized as a social enterprise. In other words, while there is

21. Ball, *supra* note 19 at 928.

22. *Ibid.*

23. Carlo Borzaga & Jacques Defourny, *The Emergence of Social Enterprise* (London: Routledge, 2003) at 16-18.

no legal requirement to define social enterprise, the interaction of other legal schemes with social enterprise (for purposes such as tax, subsidies, and corporate governance) makes it necessary to develop a shared understanding of what is and what is not a social enterprise.

While a single definition of social enterprise is elusive, as our analysis above demonstrates, some sufficiently common features are apparent, which we believe serve as a point of departure for any definition of social enterprise.

First, a social enterprise must have a legal structure, including some aspect of governance, and must be an organization with some recognized legal capacity (whether as a public, private, or hybrid organization). This element is essential as the pursuit of revenue through economic activity, in any capacity, requires a legal structure through which to channel the funds and pay taxes.

Second, a social enterprise must engage in some form of economic risk-taking to generate profit. While economic risk is crucial, as it is what separates social enterprise from charities and nonprofit organizations, it is just as important that a social enterprise engage in socially responsible economic activities. In other words, how an entity generates revenues matters. The social purpose to which revenues from a social enterprise are directed should also inform the way in which those revenues are obtained. A business that contaminates water supplies in order to generate revenues to invest in conservation, in other words, would not meet our definition of social enterprise.

Third and finally, the revenue received from this economic activity must then be used to advance some form of social mission, which is any mission that aims to improve the lives of disadvantaged or vulnerable individuals and communities, to benefit society at large through the revitalization and protection of the natural environment, or to forward the social good through other analogous means. If an organization does not have a social mission on behalf of which it generates its revenue, as is the case with traditional for-profit business enterprise, then it is not a social purpose organization. Taking these considerations together, we arrive at our working definition of social enterprise:

A social enterprise is a legal entity engaged in socially responsible economic activity for the purpose of generating revenue which is to be used to advance a social mission.

Using this definition as a launching point, we are now prepared to examine the ways in which law may inform social enterprise and change to foster and refine it.

II. WHAT DOES LAW HAVE TO DO WITH SOCIAL ENTERPRISE?

A key but underexplored aspect of the emergence and rise of social enterprise has been legal innovation and thought leadership. Much as the creation of the corporation fueled capitalist enterprise, so the development of new and hybrid legal structures catalyzes social enterprise.²⁴ These new structures include the Community Contribution Companies (British Columbia) and Community Interest Companies (Nova Scotia) discussed above, as well as variations on existing structures such as cooperatives, partnerships, and public and private corporations.

Jacques Defourny has argued that precursor legal forms such as cooperatives and nonprofit corporations set the stage for the emergence of social enterprise.²⁵ Social enterprise, however, differs from both. It differs from cooperatives because its benefits are directed at social goals, not simply the interests of its members, while it differs from nonprofits in that its social goals may relate to the distribution of profits. Thus, one question to which our analysis gives rise is whether it is now appropriate to develop and recognize social enterprise itself as a legal form, with legal implications that differ both from for-profit and nonprofit organizations.

Felipe Santos provides a helpful framework for understanding the potential of these legal implications.²⁶ As noted earlier, Santos defines social enterprises as those businesses with a predominant strategic focus on value creation over value capture, which explains why social enterprises are often in the business of providing services to socially neglected populations (as that is where the potential for value creation is highest). In this sense, any legal structures encompassing social enterprise must be concerned both with how revenues are generated and how they are allocated—a business serving a socially neglected population would not, in itself, be engaged in social enterprise, but one serving a socially neglected population and whose revenues are directed to benefitting that population would be a social enterprise.

In such settings, where the thresholds for a social enterprise are met, a business occupies a space that is neither for-profit nor nonprofit. Or, as Allen Bromberger asks in his work, could an organization or corporation be at once a nonprofit and for-profit entity? In his view, such “contract hybrids” are both

24. Pauline O'Connor, “The New Regulatory Regime for Social Enterprises in Canada: Potential Impacts on Nonprofit Growth and Sustainability” (2014) Centre for Voluntary Sector Studies at Ryerson University Working Paper at 9-37.

25. Borzaga & Defourny, *supra* note 23.

26. Ball, *supra* note 19 at 928.

possible and necessary.²⁷ At a minimum, our definition of social enterprise could include both organizations that now have the status of for-profit companies and those that now have the status of nonprofit organizations. Viewed through a social enterprise lens, however, the significant tax and regulatory distinctions between these two legal forms may well be unjustified.²⁸

Another benefit of a legal category designed to respond to the distinct needs of social enterprise is that it would allow specific regulation of the sector in the public interest.²⁹ Some have focused on the issues of taxation in the context of social enterprise and how to create incentives for more investment and activity in the sector.³⁰ Others, like Peter Lee, have explored the regulatory perspective on social enterprise by focusing on the patent system and the need for new mechanisms in which to identify and protect social forms of innovation.³¹ The need for both regulatory oversight and legal services reflects the absence of a legal structure designed to accommodate social enterprise.

In Canada, the literature on social enterprise has focused on its evolution as a form of corporate social responsibility (CSR). Carol Liao has argued Canada is poised to contribute to this global discussion by developing legal structures that facilitate both CSR generally and social enterprises specifically.³² Pauline O'Connor has suggested Canada has thus far patterned its social enterprise initiatives—such as British Columbia's Community Contribution Companies (C3s) and Nova Scotia's Community Interest Companies (CICs)—on the Community Interest Company (CIC) introduced in 2005 in the UK.³³

Dana Reiser has highlighted the role Attorneys General might play (based on their experience with the oversight of charitable and trust activities) in the regulation of new forms of organizations established for social enterprises,³⁴ while

27. Allen R Bromberger, "A New Type of Hybrid" (2011) 9:2 *Stan Soc Innovation Rev* 49 at 49.

28. See Robert A Katz & Antony Page, "The Role of Social Enterprise" (2010) 35:1 *Vt L Rev* 59.

29. See *e.g.* Aneel Karnani, "Needs Regulation" (2011) 9:1 *Stan Soc Innovation Rev* 48. Karnani, a professor at the University of Michigan Ross's Business School, discusses the need for regulation in microfinancing in particular.

30. See Lloyd Hitoshi Mayer & Joseph R Ganahl, "Taxing Social Enterprise" (2014) 66:2 *Stan L Rev* 387.

31. Peter Lee, "Social Innovation" (2014) 92:1 *Wash U L Rev* 1 at 8-9.

32. Carol Liao, "The Next Stage of CSR for Canada: Transformational Corporate Governance, Hybrid Legal Structures, and the Growth of Social Enterprise" (2013) 9 *McGill Int'l J Sust Dev L & Pol'y* 53 at 79-82.

33. O'Connor, *supra* note 24 at 7.

34. "Regulating Social Enterprise" (2014) 14:2 *UC Davis Bus LJ* 231.

others have focused on social enterprise as an emerging area for legal services (discussed further below in the context of the role of law schools).³⁵

One area that relates both to regulation and legal services involves social enterprise governance. Ball argues that the established corporate governance regime, which is tailored towards public companies, is not adequate for promoting good social enterprise governance.³⁶ We believe this is one of the areas with significant promise for further legal innovation, including collaborative structures that involve both social enterprise and the communities or groups who are intended to benefit from the social enterprise.

Many legal aspects of social enterprise remain to be explored and further developed. The need for a culture of legal innovation is both a precondition for and a product of the rise of social enterprise. For this reason, our view is that the university-based law school is an ideal generative force in the social enterprise context. It is to this area we turn in Part III.

III. LAW SCHOOLS, CAPACITY BUILDING AND SOCIAL ENTERPRISE

Social enterprise and law schools interact in at least two key ways: First, law schools are part of universities that often share the goals of social enterprise (for example, to develop environmentally sustainable practices or social inclusion) and may themselves be participating in or facilitating social enterprise (for example, through incubators and accelerators); and second, law schools play a key role in the legal community and in law reform by (re)generating legal culture and the expectations and aspirations of future lawyers. In Part III, we explore the relationship between social enterprise and law schools, and suggest some key questions that will need to be addressed as the relationship between social enterprise and legal education grows.

There are many law school programs designed to support social enterprise either directly or indirectly. For example, law school programs provide pro bono legal services and capacity for social enterprises, enabling them to pursue their missions at a reduced cost and in a supportive environment. Second, the programs provide the opportunity for experiential learning for students, offering them insight into the real-world problems that social enterprises are trying to solve, as well as the legal and organizational issues such entities face. Further, law

35. See *e.g.* Alicia E Plerhoples, “Representing Social Enterprise” (2014) 20:2 Clinical L Rev 379.

36. Ball, *supra* note 19.

school programs can help strengthen the culture of social enterprise by exposing students and entrepreneurs to new ideas focused on a unified goal of improving our world. Together, these interrelated and reinforcing means of support may provide social enterprises with the knowledge, energy, and enthusiasm they need to succeed. As such, we believe such programs can be valuable to the growth of social enterprise.

In light of this, we canvass a range of existing programs with an eye to whether support for social enterprise should be an area of growth for law schools and, ultimately, whether law schools should themselves develop social enterprises as part of their mandate and mission.

A. INCUBATORS

One type of program aimed at expanding capacity for social enterprises (and social innovation more broadly) is an incubator, which seeks to provide a functional, co-working space for social enterprises to work and interact with each other to build community and share ideas.³⁷ While incubators have proliferated at many universities and in many fields, we focus for purposes of this discussion on legal services, and particularly those directly or indirectly benefitting social enterprise. Such law school programs provide specific services to assist the organizations in developing a sustainable and successful practice. For instance, at University of Pittsburgh Law, the Pitt Legal Services Incubator (PLSI) focuses on helping recent graduates with solo or small-firm practices with an aim to increasing access to justice. Taking the view that the “greatest challenge for the entrepreneurial lawyer is the development of a viable and sustainable business, the formal PLSI program focuses on the business side of law practice” and offers training and mentorship to its members.³⁸

Similarly, at Ryerson University in Toronto, which is in the process of establishing its first J.D. program, the Legal Innovation Zone (LIZ), is a co-working space for entrepreneurs, lawyers, students, tech experts, government members, and industry leaders who aim to influence and change Canada’s legal system. Focusing on legal tech, the Legal Innovation Zone helps social enterprises build and refine solutions to legal problems that impact the justice system and legal services in general.³⁹

37. See the explanation of incubators (and the related concept of accelerators) at the Stanford Social Entrepreneurship Hub. “Accelerators & Incubators Guide,” online: <sehub.stanford.edu/accelerator-incubator>.

38. PittLaw, “Pitt Legal Services Incubator” (2014), online: <www.law.pitt.edu/incubator>.

39. Legal Innovation Zone, “About Us” (2017), online: <www.legalinnovationzone.ca/about>.

At the moment, however, law-based incubators do not share a mission to advance social enterprise. Some, like LIZ, focus on tech start-ups which may have a purely commercial focus, while Pitt Legal Services seeks to support small firms that may or may not serve social purposes. Legal incubators tend to look on the outcomes of entrepreneurial activity (enhancing access to justice, for example) as socially useful even if (and perhaps especially if) this is accomplished through economic risk-taking activity by for-profit companies and firms. In light of the current experience, and given the public interest mandate of Canadian law schools, we think it is worth considering whether a greater focus on social enterprise should be part of the mandate of law-based incubators, and whether more law schools should be developing incubators with this goal in mind.

B. PRO BONO LEGAL SERVICES

Another type of program that seeks to assist social enterprise is pro bono legal services programs based in law schools. Taking varying approaches and offering a wide variety of services, these programs provide social enterprises with free legal advice, enabling them to advance their social missions in a manner that might otherwise be impossible. For example, at New York University, the Social Enterprise & Startup Law Group is a student-run organization that partners with firms and other organizations outside the law school to provide pro bono legal services to entrepreneurs. In addition to helping its clients, the Group allows students to gain valuable lawyering experience.⁴⁰ Another program, at Georgetown Law, is the Social Enterprise and Nonprofit Clinic, which provides free corporate and transactional legal services to social enterprises, nonprofits, and small businesses in Washington, D.C.⁴¹ Similarly, Osgoode Hall Law School runs three initiatives: the IP Osgoode Innovation Clinic, the Osgoode Venture Capital Clinic, and, the Osgoode Business Clinic—all of which are aimed at providing free legal services to small, growing businesses (though, for the moment, there is no requirement such businesses be social enterprises as defined above).⁴² Pro Bono Students Canada, which has chapters in all Canadian law schools, has not yet developed

40. NYU Law, “Social Enterprise & Startup Law Group” (2017), online: <www.law.nyu.edu/studentorganizations/social-enterprise-startup-law>.

41. Georgetown Law, “Social Enterprise and Nonprofit Clinic” online: <www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise>.

42. IP Osgoode, “IP Osgoode Innovation Clinic” (2008), online: <www.iposgoode.ca/ccr-ip-osgoode-innovation-clinic>; Hennick Centre for Business and Law, “Osgoode Venture Capital Clinic” (2016), online: <hennickcentre.ca/fellowships/osgoode-venture-capital-clinic>; Osgoode Clinics and Intensives, “Osgoode Business Clinic” (2016), online: <www.osgoode.yorku.ca/programs/jd-program/clinics-intensives/osgoode-business-clinic>.

a specific program related to social enterprise, though some law school chapters have explored related terrain.⁴³

While being a social enterprise is not a requirement to participate in these programs or other similar law school-based pro bono programs, it is in the best interest of such programs to take on social enterprise clients due to the two-pronged benefit that it enables: Access to justice for organizations in need, and positive social impact through supporting an organization dedicated to social improvement. Again, in our view, law schools should consider pro bono programs more expressly designed to support and advance social enterprise.

C. CULTURE AND EDUCATION

A final type of program promotes social enterprise through education and fostering a culture of innovation. This type of program takes a more student-focused approach and aims to instill an understanding and appreciation for social enterprise in students during their studies. For instance, at New York University, the Grunin Centre for Law and Social Entrepreneurship works to improve the legal systems that affect social entrepreneurs through research and teaching.⁴⁴ Another program, at Suffolk University Law, called the Accelerator-to-Practice Program, is an experiential education initiative that aims to prepare graduates to join or start sustainable law practices serving average-income individuals and families. We are not aware of any Canadian law school that has developed specific programming in relation to social enterprise. Taking a view that the long-term success and growth of social enterprise rests in the exposure of this model to new generations of legal professionals, such programs are essential to the fostering of a strong and innovative culture. At Stanford Law School, for example, students can take “Entrepreneurship, Leadership and Law in Social Enterprise,” the syllabus for which describes the course in these terms:

Many believe that society’s greatest challenges have already been solved by social entrepreneurs and the challenge is how to take their ideas to scale. However, it has become increasingly difficult to start and sustain social ventures. The lines between

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43. The University of Toronto chapter of PBSC, for example, has a Not-for-Profit Corporate Law Project, which is described as providing pro bono services to any nonprofit organizations in Ontario have vital business law needs, but lack the resources to pay lawyers for information or assistance. The Queens Rural Entrepreneurial Legal Handbook Project, similarly, provides legal information as a handbook designed to meet the needs of rural businesses in Eastern Ontario. See the description of PBSC chapter projects at, Pro Bono Students Canada, “Chapter Projects” (2017), online: <www.probonostudents.ca/programs/chapter-projects>.
44. NYU Law, “Grunin Centre for Law and Social Entrepreneurship” (2017), online: <www.law.nyu.edu/centers/grunin-social-entrepreneurship>.

the public and private sectors have become increasingly blurry as best practices in the social sector now include innovation, strategy and accountability. This course will expose students to the work of social entrepreneurs in social enterprises – focusing primarily on domestic nonprofit organizations. Using the “case study method” typically used in MBA programs, students will examine the challenges of starting, counseling, serving, funding and scaling social ventures through the eyes of the entrepreneur, investor, attorney and community leader. The course will explore the intricacies of remaining mission driven, talent, board relations, managing and sustaining growth, the changing role of corporate governance, and leveraging private sector partnerships and resources. Students will also explore innovative public / private sector partnerships and the challenges and opportunities of engaging diverse partners with differing agendas. The course will include guest speakers from the fields of law, business and the social sector. Throughout, students will explore the valuable roles that attorneys can and have played in such ventures.⁴⁵

Similar courses have been developed at other law schools. These courses may provide invaluable settings in which to augment and reinforce a culture of social enterprise, but they are typically seminars or experiential programs that appeal to a small number of students. The extent to which all law students should be exposed to social enterprise remains an open question. At Osgoode Hall Law School, for example, the Osgoode Public Interest Requirement ensures that all students engage in at least forty hours of supervised, law-related public interest work. The scope of law-related public interest work certainly includes but is in no way limited to social enterprise-related activities.

D. WHERE IS THE LAW SCHOOL SOCIAL ENTERPRISE?

It is interesting to note that while all of these programs aim to support social enterprise, they are better understood as instances of social innovation rather than social enterprise. This is because, while they are aimed primarily at solving social problems, such as access to justice for social enterprise organizations, they do not do so in a way that generates value or revenue in exchange for their goods or services. In other words, they do not take economic risk or seek economic gain in service of social ends. Rather, many of the programs are supported entirely by their respective universities or by forms of public or private funding.

As such, we are left with the question of whether there is scope, beyond the ways in which law schools offer support through capacity and thought leadership for social enterprise, for law schools themselves to participate in establishing social enterprises. Given the economic risk at the heart of the concept, the role

45. Stanford Law School, “Entrepreneurship, Leadership and Law in Social Enterprise,” online: <law.stanford.edu/courses/entrepreneurship-leadership-and-law-in-social-enterprises>.

of universities may not be direct. However, it has also been suggested that law schools might create law firms to promote access to justice. For example, the Georgetown Law Center in Washington, D.C. partnered with two large national law firms—Arent Fox and DLA Piper—to create the “D.C. Affordable Law Firm.” The new firm launched in 2015 with six recent graduates of Georgetown Law as the initial lawyers in the project. The lawyers are paid but earn salaries lower than entering legal aid lawyers, and receive an LL.M for participating in the start-up.⁴⁶ The aim of such law school-based ventures would be to offer clients subsidized services while simultaneously providing students with an experiential learning opportunity. The revenues or profits of the social enterprise law firm then can be invested back into the delivery of expanded, subsidized services.

A fundamental question, however, is how such an organization would be legally and operationally distinct from the existing programs at law schools. For instance, what would the decision-making and governance structures look like? Would the organization be run autonomously or would it be answerable to a board at the university? Would it be subject to procurement policies and other regulatory oversight structures at the university? In this context, existing partnerships between law schools and community organizations, such as that between Osgoode Hall Law School and Parkdale Community Legal Services, first entered into in the early 1970s and revised several times since, may serve as a template. Partnerships between Canadian law schools and legal tech providers offer another model. The legal database Quicklaw began as a partnership between Queens Faculty of Law, IBM and the Canadian government.⁴⁷ More recently, the relationship between artificial intelligence (AI) start-up Blue J. Legal and the University of Toronto Faculty of Law provides another potential path.⁴⁸

Another crucial set of questions relates to the financial structure and operations of the organization. As an essential element of social enterprise is plowing profits back into the business and its social mission, it is important that the organization be capable of directing its profits where it considers them most likely to be effective. Further questions relating to whether or not the organization’s finances would be included in the books of the university are also important.

46. See Kathryn Fanlund, “Law School’s Role in Increasing Access to Justice” (2015), online: <www.aals.org/about/publications/newsletters/aals-news-august-2015/increasing-access-to-justice>.

47. See Simon Chester, “The Birth of Quicklaw” (25 January 2007), online: <www.slw.ca/2007/01/25/the-birth-of-quicklaw>.

48. John Lorinc, “Helping Machine Learning Start-Ups Succeed” *University of Toronto Magazine* (2017), online: <magazine.utoronto.ca/winter-2017/blue-j-legal-brings-ai-to-tax-law-helped-by-machine-learning-stream-at-rotman-school-creative-destruction-lab>.

Beyond these purely organizational questions, there are also a range of strategic discussions to be had. For instance, in building such a social enterprise with an eye to long term sustainability, is it preferable for the organization to be established organically by the university itself or inorganically through a partnership with an outside organization that can insert itself into the university and grow? Osgoode Hall Law School, for example, has entered into a partnership with the DUKE Business Improvement Area (BIA) to develop an employment hub for local youth. Osgoode law students will provide the legal support as part of the law students' public interest requirement, while the DUKE BIA hires the coordinator and staff to design and operate the hub.⁴⁹

Overall, it is clear that such an initiative is a complex endeavour that would break new ground for law schools. As such, there are many important questions still to be answered and problems to be experimented with. We would love to see more attention paid to studies that measure the level of engagement and thought leadership from the schools that have undertaken these initiatives.

However, as we envision it, the fundamental difference between such a social enterprise and the existing programs at law schools would be a degree of self-sufficiency and autonomy. While existing programs are tied to university or grant funding, such an enterprise would be responsible for its own revenue generation and thus would control its own commercial strategy. As such, it would need to invest time, money, and other resources into all of the things that make a business successful and sustainable, such as marketing, customer service, and efficient service delivery. Quite simply, the organization would be run like a business (albeit a socially responsible business) and would be accountable for itself. It would be required to understand and service its clientele in a manner that would be sustainable and generate sufficient revenue to be profitable. Further, it would need to adapt to the changing marketplace. If a certain service is no longer in demand or if a new service becomes highly sought after, the organization would need to adapt and take advantage. At the same time, its social mission, to provide access to legal information and services to underserved communities, would remain paramount.

Further, it seems plausible that the success of such an organization would require an array of skills, not all of which may be found at law schools. As such, there is an opportunity to involve business school students and professionals as well as others. This idea has the capacity to reinforce and enhance key goals of legal education and law school community engagement. Addressing the

49. See Osgoode Hall Law School, DUKE Heights BIA Memorandum of Agreement, May 9, 2017 (on file with authors).

questions set out above may have salutary benefits for a law school as it comes to better understand the possibilities and limits of social enterprise in the law school context.

IV. CONCLUSION

The vision of law-school-based social enterprise laid out here is both preliminary and ambitious. We have attempted to examine the rise of social enterprise through a legal lens—both defining the scope of what constitutes social enterprise (in statutory, policy, institutional and academic settings), and exploring the legal structures which facilitate social enterprise, and how these might be developed and enriched through the involvement of legal education. In the course of this analysis, we have advanced three conclusions.

First, social enterprise, as a component of the broader array of social innovation initiatives, encompasses legal entities that engage in risk-based economic activity with a social purpose, and generate revenue to advance social ends. In this sense, definitions of social enterprise that focus only on whether revenue is generated with a social purpose, or focus only on whether revenue is allocated to a social end, are insufficient.

Second, once defined in this way, we believe social enterprise justifies recognition as its own legal category for tax, regulatory and policy purposes. This recognition is required because the distinctions currently drawn between for-profit social enterprise and nonprofit organizations engaged in social enterprise may be unjustified.

Third, we have suggested that thought leadership, pro bono activities, incubator and accelerator hosting, and inculcating a culture of social innovation at law schools reflect the important and generative role legal education plays in the development of social enterprise. We also observe that while embedding social enterprise itself in law schools remains embryonic in its development, it may be a significant area of future growth and collaboration. In our view, each sphere has much to contribute to the other, but to what extent will be determined by how a range of key questions relating to the relationship between law schools and social enterprise are addressed.

We hope this brief study will contribute to new and broader discussions of the way in which law and legal education might enhance social enterprise, and the way in which social enterprise might change how we understand the possibilities of law and legal education.

