

To: Ontario Ministry of Consumer Services

Re: Stakeholder Engagement Report on Dual Purpose Corporate Structure Legislation

Date: May 1, 2015

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The Ministry of Consumer Services announced a Social Enterprise Strategy entitled “*Impact - A Social Enterprise Strategy for Ontario*” (2013). The Government stated in that report that, among other things, it wants to “*support and attract both entrepreneurs and investors to do business in Ontario while contributing to the social good.*”

The *Stakeholder Engagement Report on Dual Purpose Corporate Structure Legislation* (2014) is the next step the Government wanted to take, that is to, “*explore introducing legislation to enable the creation of new “hybrid” corporations*”.

This submission is being made as a response to the request for input on the Stakeholder Engagement Report and represents the views of Dennis Tobin and Lauren Dalton.

Social Enterprises.

There is no common international definition of a “social enterprise.” While definitions may vary based on jurisdiction, the common theme that the term denotes is that social enterprises are businesses that have positive impacts on society, environment and communities.

The Government’s Impact Strategy defined “*Social Enterprise*” as “*an organization that uses business strategies to maximize its social or environmental impact*”. The Stakeholder Report to which we are responding then redefines and narrows the definition to: “*A corporate entity that exists primarily to promote public benefit using business strategies, building social and financial capital and offering innovative ways of operating for social and/or environmental purposes.*”

We do not believe that “Social Enterprise” should be narrowly defined.

According to Jeff Skoll, founding president of eBay and philanthropist, “*First of all, social entrepreneurs are entrepreneurs. Like business pioneers, social entrepreneurs are utterly determined to drive change with their innovative ideas. Both aim, in effect, to disrupt a status quo they see as sub-optimal.... If the goal is to drive change and be disruptive in an industry, confining the definition of “social enterprise” strictly to the not-for-profit and charity sphere is a misnomer. Many for-profit companies have acted in a way to change the face of the industries in which they operate.*”²

We prefer a broad definition that can apply to any enterprise that has a social mission and which applies market-based strategies to achieve a social purpose.

Benefit Corporations.

The word “hybrid” is used to suggest something that is a combination of two distinct breeds. It has been well established for a number of years that “hybrid” corporations are not so much a combination as a single breed where new capabilities are enabled.

In the USA, for-profit corporations that pursue a “Triple P Bottom Line” of profit, people and the planet are referred to as “benefit” corporations and were originally referred to as “hybrid” corporations. Fundamentally, they are for-profit corporations. Changes are made to their governing corporate legislation to enable them to focus more on their social purpose. Once a corporation adopts the mantle of being a benefit corporation, it carries on as a for-profit enterprise as it always has with an explicit mission to do good. This approach has been adopted in 27 States with many more in the process of evaluating it.

In Canada, British Columbia has passed legislation effective as of July 2013 to permit the creation of Community Contribution Corporations (“CCC”) and Nova Scotia has proposed legislation (which has not yet been enacted) to permit Community Interest Corporations (“CIC”). Both forms of legislation permit entities that are fundamentally non-profit enterprises. If the federal and provincial governments do not extend tax incentives to CIC’s and CCC’s they will not have any advantage over any other non-profit. For that reason, CIC legislation has not been enacted, and in the case of CCCs, there has been minimal success as fewer than thirty (30) such entities have been formed under the CCC statute. The federal government has so far rejected extending tax incentives to CCC’s.

The spectrum of corporate entities ranges from non-profits and charities at one end to purely for-profit, traditional corporations at the other. In theory, benefit corporation legislation could be implemented at any point along this spectrum of corporate entities. We propose that it be implemented at the end of the spectrum where for-profit corporations live. The goal should be to enable for-profit enterprises to take action having regard to profit, people and planet. A solution at one point in the spectrum does not exclude a solution at any other point in the spectrum. CCC and CIC type legislation could be effective at the non-profit/charity end of the spectrum. However, our view is that legislation enabling benefit corporations at the for-profit end is a solution that is likely to have the most lasting impact and achieve the goals set out in the Impact Strategy.

As of December 2012, there were 1,107,540 employer businesses in Canada. Small businesses made up 98.2 percent of employer businesses, medium-sized businesses made up 1.6 percent of employer businesses and large businesses made up 0.1 percent of employer businesses. 389,116 of these employer businesses were in Ontario.³ Benefit corporation status is best suited to private, closely held enterprises, just like the majority of employers in Canada.

Recommendations in this submission are based upon a model that is quickly being adopted throughout North America. Similar recommendations have been made by the Canadian Bar Association to the Canadian federal government on its review of the *Canada Business Corporations Act*.⁴ On a regional basis, the jurisdiction that adopts the most attractive and effective legislation will attract the greatest number of corporations who are looking to solve a

corporate governance problem, who want to pursue a profit, people and planet bottom line and who desire to create an organization based upon meaningful purpose.

Recommendation:

Our view is that the Government of Ontario should consider adopting the benefit corporation model. This involves enabling social responsibility by every organization. The Government should consider making relatively minor and uncontroversial amendments to the *Ontario Business Corporations Act* (“OBCA”) to permit corporations to incorporate as benefit corporations or amend their articles and become benefit corporations. Corporations that incorporate as benefit corporations, or amend their articles to become benefit corporations, provide their directors and officers with enhanced freedom to pursue social goals in addition to profit-maximization without fear of potential liability for doing so. This avoids the need to create new legislation or to seek amendments to federal tax legislation, and removes the cost and effort of creating new regulatory regimes.

Profit, People and Planet.

Some would say that the benefit corporation model is not necessary in Ontario as the common law (reflected in the *BCE Inc. v. 1976 Debentureholders* decision of the Supreme Court of Canada) enables for-profit corporations to consider stakeholders other than shareholders without further legislative changes. We prefer the approach that expressly gives entrepreneurs and corporations clarity, security of purpose and a level playing field. For this reason, it should be uncontroversial to implement the changes.

Benefit corporation legislation can be attractive for companies. Benefit corporation status can attract business. It can also impact culture, recruiting and employee retention. Many consumers prefer to buy products and services from companies that have implemented programs to give back to society. Many people prefer to work for socially responsible companies.⁵

Recommendation:

We suggest consideration be given to amending the business judgment rule in the OBCA to incorporate into the statute the common law principles set out in the *BCE* decision of the Supreme Court of Canada. In considering what is in the best interest of the corporation, directors should be permitted to consider not only the interests of shareholders, but also other stakeholders, including employees, creditors, consumers, governments and the environment in their decision-making. Directors should also be allowed to consider both short and long-term interests of the corporation, including benefits that may accrue to the benefit corporation from its long-term plans, and need not give priority to any particular interest.

Investors.

Corporate legislation is fairly consistent across the country. Amendments to the OBCA could form the model for federal and other provincial corporate legislative amendments.

One of the goals of the Impact Strategy is to attract investors to do business in Ontario while contributing to the social good. A major hurdle of attracting investor money is the requirement to

provide investors with a return on their investment. Benefit corporations will be owned by shareholders who invest with a view to receiving a financial benefit, either through the declaration of dividends or through the appreciation of their initial investment. Investors in benefit corporations may, however, be distinguished from traditional investors in that receiving a financial benefit is not their sole objective. Instead, they are looking to receive a financial return from a corporation that is, in some explicit way, more socially responsible. Tax exempt corporations do not have shareholders and do not exist to benefit their shareholders. Instead, tax exempt organizations are governed by their members. If a tax exempt organization wishes to maintain its tax exempt status, it must ensure that its income does not directly or indirectly personally benefit its members.

Recommendation:

While promoting socially responsible objectives it is also necessary to protect investors, shareholders and directors. We recommend amending the OBCA by adding provisions for “purpose, accountability and transparency” in the context of benefit corporations. This will promote socially responsible objectives and provide protection to shareholders, investors, and directors. We support the recommendations of the Canadian Bar Association and suggest their adoption including some or all of the following requirements for benefit corporations:

- require a special majority vote of the shareholders to become a benefit corporation or to revert to a regular corporation;
- have a mission-driven specific benefit purpose and/or a general benefit purpose in the articles in addition to permitting any lawful activities a corporation may pursue;
- have accountability and transparency by way of regular reporting requirements and disclosure;
- have a limitation on liability of the benefit corporation for failing to succeed at its public benefit purpose;
- use a name which clearly indicates a corporation is a benefit corporation; and
- create a new liability shield for Directors, except in the case of self-dealing, willful misconduct, or a knowing violation of law.

Answers to Your Questions.

Attached as Schedule A to this submission are our responses to the questions you posed.

Thank you for your consideration and the efforts of the Stakeholder Panel.

Dennis Tobin and Lauren Dalton

Schedule A

Answers to the questions posed by the Stakeholder Panel:

1. Corporations should be created with a dual purpose that includes a mandated social purpose, and allow the organization to pursue profit-making activity.

Existing corporations should be allowed to choose to pursue more than profit. It should not be necessary to create a new kind of corporation. It should be sufficient to allow for-profit corporations to include a particular social purpose in addition to the pursuit of profit in the scope of their goals/mandates.

2. Dual purpose corporations should be able to attract share capital, and allow founders, employees and stakeholders to have equity in the organization.

If you accept our recommendations, then nothing further is required on this point as for-profit companies are able to attract capital and equity stakeholders.

3. New legislation should complement existing legislation used for social enterprises.

New legislation is not required. Amendments to the OBCA would permit a corporation to include a social benefit in its mission, and to permit directors to consider long term results and the impact of their decisions on profit, people and the planet without assuming additional liability. This would be unrelated to other legislation governing enterprises at different points in the corporate spectrum.

4. Dual Purpose corporations would need a statement of social purpose in the Articles of Incorporation.

Benefit corporations would be required to state their beneficial purpose(s) in the articles without generally restricting their ability to carry on their for-profit activities.

5. New legislation should use either a “reasonable person test” or define social purpose (eg. “a purpose that is beneficial to society or a segment or society beyond just shareholders, directors or other persons related to the company.”)

We agree a public benefit or social purpose should be defined in some way. For instance, a public benefit has been defined in Delaware as a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders).

6. Proposed legislation should establish distribution constraints on assets/ profits to protect the organization’s social purpose and help develop a brand to attract impact investors and consumers.

No. Distribution constraints will severely limit companies’ ability to raise capital and are not necessary to protect the social purpose. For-profit companies are trusted now by their investors and do not have distribution constraints on assets or profits. The intent of enabling legislation is

to permit entrepreneurs (socially responsible ones) to utilize for-profit methods and that should extend to for-profit structures. Distribution constraints are not solutions; they are requirements of maintaining non-profit and charitable status.

7. Proposed legislation should set out director responsibilities including requiring directors to consider the organization's social purpose, requiring a minimum number of directors, and indicating that directors not be restricted from receiving compensation.

The OBCA already deals with the number of directors and permits compensation of directors. It also expressly deals with directors' responsibilities. We recommend that those responsibilities be clarified in accordance with our recommendations above. The issue of mandatory consideration of social and beneficial purposes seems to us to be a perpetuation of the process driven approach to Director decision making and we prefer a more permissive approach that permits the Directors to exercise their judgment.

8. Proposed legislation should provide shareholder rights similar to those found in the Ontario Business Corporations Act.

Yes.

9. Proposed legislation should require organization to report annually on the organization's activities and outcomes aimed at its social purpose and include financial information to demonstrate that the financial obligations associated with the distributions constraints are being met.

We do not believe in distribution constraints for benefit corporations. Also, for-profit corporations are already required to provide audited financial statements. We recommend that corporations include a report on their social purposes in their report on the organization's activities. The report should be made to shareholders. The purpose of the annual report should be to add a level of transparency and accountability on the activities of the company in its efforts to take into account its social purpose in the same way as the financial statements are a report on the financial activities in pursuit of making a profit.

10. Proposed legislation should include only those reporting requirements necessary to achieve transparency objectives.

Yes.

11. Proposed legislation should require that directors approve the social benefit report, and that it be provided to shareholders and be publicly accessible.

Directors should have to approve any reports to shareholders in the same way they approve financial statements. Benefit corporations should not be required to report publicly unless they are publicly listed or have some special designated status that requires such reporting.

12. Proposed legislation should require that financial statements be approved by the directors and provided to the shareholders.

Yes.

13. Proposed legislation should establish a framework for a basic regulator that provides flexibility and does not impede momentum for this new corporate structure to flourish.

The OBCA provides for regulations and a Director to enforce the Act and the regulations. There should not be separate legislation or a special regulator for benefit corporations.

14. Proposed legislation should establish a regulator to approve and review eligibility and manage the filing of annual social benefit reports. Proposed legislation should enable cost recovery.

We do not recommend there be a separate regulator or that reports be filed publicly. Adding another layer of regulation and review would discourage corporations from amending their articles and pursuing explicit socially beneficial purposes. We believe that our recommendations are consistent with a goal of matching socially responsible investors with socially responsible corporations. Once we have facilitated this, the government should have minimal involvement beyond already existing regulatory mandates applicable to all corporations such as the *Securities Act* and consumer protection legislation.

¹ Dennis Tobin is a lawyer and partner at Blaney McMurtry LLP in Toronto, Ontario. <http://www.blaney.com/articles/evolution-corporation-public-benefit-corporation>; <http://www.blaney.com/articles/canadian-bar-association-urges-parliament-change-law-encourage-creation-benefit-corporation>;

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² Jeff Skoll, “Social Entrepreneurs Dare to Change the World”; (September 2013). <http://www.cnn.com/2013/09/07/opinion/skoll-osberg-social-entrepreneurs>.

³ Industry Canada/Corporations Canada, Email from Patricia Côté (Information Officer), dated April 9, 2015

⁴ <http://www.cba.org/cba/submissions/pdf/14-30-eng.pdf>.

⁵ Jen Friedman, “The Benefit Corporation: A Tool For Building a Sustainable Brand”; (April 22, 2015). <http://www.cmo.com/articles/2015/4/20/the-benefit-corporation-a-tool-for-building-a-sustainable-brand.html>