

Table Talk: Dumbing-down the Law of Charity in Canada

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Introduction

The task which I have been given in the opening session of this charities conference of the Pacific Business and Law Institute is to peer into a crystal ball and tell you what the future holds with regard to the definition and regulation of charity in Canada. Not being able to find a crystal ball, I went to Ottawa for a couple days last week to poke around and find out what I could learn by the old fashioned method of asking questions. While everyone with whom I spoke was unfailingly polite and quite willing to talk about matters, there was an understandable reluctance to release documents and provide information which could be publicly attributed to the source at this stage in the process. Consequently, while I have a lot more information than I did before going to Ottawa, I now have much less understanding of where the sector is being led. I do believe that the voluntary sector should acquire more knowledge of the Joint Table¹ process begun since the Broadbent Report and not wait until things are written in stone before reacting.

What I did learn in Ottawa was that I was wrong in most of my assumptions as to the agenda and issues being discussed in the Joint Table process. Given how much press attention has focused on the Supreme Court of Canada's call for Parliament to enact a modern statutory definition of charity, I assumed that the definition of charity was a high priority on the agenda. A variety of different people told the story of how Mr. Herb Dhaliwal was telephoned by his mother after she read newspaper reports of the Supreme Court of Canada's January 28, 1999 decision in *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue* ("Immigrant Women"). She did not like what she was reading. Since her son was the Minister of National Revenue she wanted to know what was going on and reminded him that she was an immigrant and visible minority woman from Vancouver. Activists in the voluntary sector also devoted a lot of resources to spinning the significance of the Supreme Court's call for Parliament to enact a broader and more modern definition of charity.

Consequently, it came as a surprise to me that one of the first decisions taken by the "Joint Table on Improving the Regulatory Framework" ("Regulatory Table") was to **not** proceed with discussion of changing the definition of charity. At this time there is nothing in the Regulatory Table's list of issues set out in first and second levels of priority which will assist Herb Dhaliwal in any table talk with his mother about expanding the definition of charity. However, the second item on the first level of priority of issues is "Advocacy/political activity and public education". While the Supreme Court did not rule against the

¹ There are Joint Tables called *Building A New Relationship, Strengthening Capacity and Improving the Regulatory Framework*.

Vancouver Society of Immigrant and Visible Minority Women (“Vancouver Society”) for anything in the areas of advocacy, political activity or public education, these are the driving issues for the activists in the voluntary sector.

The absolute first priority of the Regulatory Table is whether a new agency should be created to complement or replace Charities Division at Revenue Canada. There are three options on the table. One is to adopt the Broadbent Report’s proposal of a “Voluntary Sector Commission” (“VSC”). The VSC will handle difficult and cutting edge definitional issues while leaving Revenue Canada Charities Division (“RCCD”) in place as the primary examining and registering agency for tax purposes as well as the auditing and revoking agency. What I did not realize until going to Ottawa is that this proposal is tottering on the verge of falling off the table. Currently, the real energy is going into exploring a full-blown “Canadian Charity Commission” (“CCC”) which will be much closer to the Charity Commission for England and Wales and have full registration and regulatory authority. The Regulatory Table’s Voluntary Sector Co-Chair commissioned a proposal of a CCC (paid for with funds provided to the Regulatory Table by the federal government) which has been circulated to all members. The third option (“RCCD Option”) suffers from the appellation of being called the “*status quo*” and is denigrated as leaving things essentially as they are with the exception of possibly providing more budget to RCCD.

It is quite clear in Ottawa that the *status quo* is not an acceptable proposal politically. An election is coming and the federal Liberals want to put a check beside the pre-election promise in the “Red Book” called “Securing Our Future Together” that it has done something for the voluntary sector. Political will is evidenced by the fact that seventeen federal government Departments are represented on the Voluntary Sector Steering Committee of Assistant Deputy Ministers. This has resulted in the Voluntary Sector Task Force in the Privy Council Office preparing a paper called “Engaging the Voluntary Sector” (“EVS Paper”) for the federal Cabinet². The substance of what is proposed is far less important than the public perception that it is bold and visionary. Several Cabinet ministers are positioning their next move for personal political advancement in part on what bold visionary action is taken with regard to the voluntary sector. Backbenchers like MP John Bryden are clamouring for recognition by having the press publicize their concerns about the failings of the sector.

These political objectives are being pandered to by voluntary sector activists with, in my opinion, primarily two issues on their agenda. The first, in the words of the EVS Paper under the heading “The sector’s own vision”, is:

“The sector has a vision for its role in Canadian society that goes beyond sharing fundamental goals with government and being its instrument for program service delivery. It wants to have a place at the table, be part of the planning process at all levels and bring a community-based perspective to policy formulation.”

This articulated vision does not place a great deal of emphasis on the traditional independence of the voluntary sector from government. This is because the other driving issue is government funding and in

² The EVS Paper, dated February 18, 1999, can be obtained by contacting the Voluntary Sector Task Force in the Privy Council Office of the Government of Canada.

particular, core funding for intermediary associations. This is found not only in the EVS Paper but is also a key proposal of the Broadbent Report. There is a limit to how much independence from government can be demanded when the objective is core funding.

This morning I want to touch on the statutory definition issue but it is more fully dealt with in my complementary paper “Answering the Broadbent Question: The Case for a Common Law Definition of Charity”. My concern is that frustrations with complexities inherent in a rich legal tradition is resulting in a concerted effort to dumb-down the law of charity. Qualifying for the legal and tax privileges accorded a registered charity should require more than a politically correct cause. Canada will not necessarily have a healthier, more effective and fraud-free charitable sector if our law is reduced to little more than a list of charitable causes or worthy beneficiaries. As the Supreme Court said in *Immigrant Women*: “The requirement of being ‘for the benefit of the community’ is a necessary, but not a sufficient, condition for a finding of charity.”³

It seems to me that the original quest to broaden the list of purposes which the law considers charitable has gone through an unheralded metamorphosis into a demand that all the difficult bits of charity law be rejected. The historical legal culture of charity and equity are being expunged in favour of the modern civil society culture of citizenship, advocacy and democracy. Opening up the sector is coming at a huge cost of proposed increases in regulation and compliance requirements. As the sector is broadened and admission standards lowered, the tradition of self- policing imposed by the law of equity is being replaced by even broader statutory government enforced sanctions. The new *Competition Act*⁴ includes charitable fundraising in its definition of “business” and individual directors can face fines up to \$100,000 for offences. It is hard not to draw some correlation between this type of legislation and the publicity process leading up to the Broadbent Report. What is not clear is whether the Broadbent Report’s call for a cap on the degree of liability of charity directors⁵ would include these fines for the offence of permitting intentionally or by omission a false or misleading representation on behalf of the organization.

RCCD is reasonably benevolent when it audits and seeks to bring charities into compliance. The same cannot be said for other parts of Revenue Canada. When Revenue Canada takes action against a donor, it has no concern for the economic interests of the donee charity. The Crown as *parens patriae* of charities should exercise its prerogative powers to protect charitable gifts. Revenue Canada now is denying charities access to the courts of equity which could exercise their inherent jurisdiction to protect charities. It will be important for the Regulatory Table considering the proposed new options of the VSC or CCC to be careful to try retain the equitable protections traditionally available to charities under the common law.

³ *Immigrant Women*, at para 148.

⁴ Bill C-20 passed third reading in the House of Commons and then was amended in the Senate so has been returned to the Commons for final committee review before becoming law.

⁵ *Broadbent Report*, p. 93.

Statutory Definition Issue

The advertised title for my paper this morning was “Evolution to Revolution - The Definition of Charity”. This title was assigned months ago soon after the release of the Supreme Court’s *Immigrant Women* decision in which Iacobucci J. states “In fact, it (Vancouver Society) reserved perhaps its most forceful submissions to urge this Court to consider adopting an entirely new approach to the definition of ‘charitable’”.⁶ The Broadbent Report also placed a great deal of emphasis on the need for Parliament to legislate a modern new definition. Incremental change within the power of the courts was not adequate. It was time for a revolution to throw off the shackles of the common law imposed by colonial England and craft a made-in-Canada definition which would result in our sector being granted all the political advocacy freedoms allowed in the United States.

The question to be asked is why the Regulatory Table has shunned the definition issue. It is possible that the recklessness of building a case for Parliament’s intervention on the basis that the existing law is irretrievably broken has dawned upon some activists. It is doubtful that Broadbent has abandoned the view that the sector is out of control and desperately needs more government regulation. There is no suggestion that MP John Bryden has changed his views. The answer lies in the fact that the strategy has changed rather than the objectives. The view is developing in Ottawa that the proposed new CCC will be a far more malleable agency for broadening the definition than Parliament.

When one analyzes the *Immigrant Women* decision, it is quite clear that Herb Dhaliwal’s mother’s concern is not addressed by adding “the advancement of immigrant and visible minority women” as an extra head of charity in *Pemsel*.⁷ The common law requires much more of a charity than a politically correct name. Vancouver Society is registrable only if Parliament legislates “immigrant and visible minority women” as a “charity-plus” category and exempts it from the normal criteria which apply to charitable registrations. Based on its application as received by Revenue Canada, for Vancouver Society to be registered as a charity the enabling legislation passed by Parliament would need at least three components to overcome obstacles which bothered the Supreme Court of Canada. These are:

- A. an applicant can become a registered charity even if its formal objects clause are drafted with very wide and broad language that may include things which are not exclusively charitable;
- B. an applicant can become a registered charity even if its activities are broader than its formal objects clause and may be *ultra vires* its objects;
- C. an applicant can become a registered charity even if its social services are available to the wealthiest members of the community without regard to financial need.

There is legal authority in Canada for registering an organization solely on the basis that the beneficiary group is exceptionally needy. Registration has been granted on a political correctness basis after waiving the normal standards which examiners at RCCD apply with regard to the wording of the

⁶ *Immigrant Women*, at para 196.

⁷ *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.) (“*Pemsel*”).

objects and the exclusively charitable nature of the activities. This was done in the Federal Court of Appeal decision in *Native Communications Society of BC v. Minister of National Revenue*.⁸ Stone, J.A., cited Australian jurisprudence which he characterized as “particularly helpful” which began with the sentence “Australian aborigines are notoriously in this community a class which, generally speaking, is in need of protection and assistance.”⁹

Transposing this view to Canada, he refers to the *Indian Act*, RSC 1970, c. I-6 and states, “From this elaborate set of provisions it may be seen that the state has assumed a special responsibility for the welfare of the Indian people. Unlike the vast majority of their fellow citizens they are rather a people set apart for particular assistance and protection in many aspects of their lives.”¹⁰ He then goes on to waive the concern about broadness of the language in the formal objects clause by stating “It is true that they are not drawn with exceptional precision but it is of the nature of corporate objects clauses to be rather broadly phrased.”¹¹ This may no longer be the law as the Supreme Court was much less forgiving of imprecise drafting in *Immigrant Women*.

While *Native Communications* may be good legal authority for dumbing-down the law of charity, it is not a precedent which contributes to building respect for the targeted beneficiaries. My experience with a variety of immigrant groups is that they have too much pride and self- respect to seek registration on the basis of lower legal standard if it requires the court to editorialize about them in the way it did about Indians in the *Native Communications* case.

Charity Law Reduced to a “List”

One of the significant aspects of what I call “dumbing-down” the law of charity is the demand that the law of charity be reduced to a list of categories and groups. Many applicants who fall within a category on that list insist that they be registered and accorded full tax privileges without any further questions being asked. Some believe it is qualification enough for registration that an applicant have a politically correct name such as Vancouver Society for Immigrant and Visible Minority Women. Any RCCD examiner who dares to demand more, such as evidence that the objects be drafted with precision and the activities contemplated fall within those objects, is considered an ignoramus harassing the applicant and standing foursquare in the way of legal progress. One is led to believe that Canada’s democracy will fail and our society will cease to be civil if such impertinent questions are allowed to be asked.

The list mentality is evidenced by the Broadbent Report’s proposal of “charity-plus”. In Canadian jurisprudence, the Preamble¹² has been reduced to nothing more than a list. While the English courts have always referred to “*the spirit and intendment of the Preamble*”, in Canada we almost never move beyond analogizing specifics on the list. It is an abuse and denial of the spirit and intendment of the Preamble to deny as being charitable an object which is consistent with the list simply because it is not

⁸ *Native Communications Society of BC v. Minister of National Revenue*, [1986] 3 F.C. 471 (“Native Communications”).

⁹ *Native Communications*, at p. 482.

¹⁰ *Native Communications*, at p. 483.

¹¹ *Native Communications*, at p. 484.

¹² *The Preamble to the Charitable Uses Act, 1601 (Eng.)*, 43 Eliz 1, c.4 (*Statute of Elizabeth*) having the full title *An Acte to Redress the Misemployment of Landes, Goodes and Stockes of Money heretofore Given to Charitable Uses is frequently acknowledged as the starting point for the “modern” law of charity.*

on the list. If I am reading Professor W. K. Jordan¹³ correctly, the Preamble is essentially the articulation of non-religious charitable objects as commonly understood in the Middle Ages. The fact that its wording follows very closely the words in the fourteenth century poem *The Vision of Piers Plowman* is evidence that the Preamble reflects a consensus of charitable objects for at least two centuries before its date of 1601. However, tracing the spirit and intendment and using analogy require a lot more work than dumbing-down the law of charity to a list.

The advantage of a list approach to its proponents is that it also contributes to jettisoning most of the difficult aspects of charity law which are not easily reduced to simple rules outlined in a pamphlet distributed by RCCD to applicants or by Coles Notes to law students. All of the rich fabric of the common law restricting objects to those which are exclusively charitable is to be torn away. Advocacy becomes the badge of modernity as political activity is embraced. Restraints on propaganda are removed as balance in public education gives way to single issue advocacy.

The future of the legal concept of “charity” when it is reduced to nothing more than a term in the *Income Tax Act* (“ITA”) for an entity with special tax privileges can be partially predicted by examining what the legal concept of “trust” has become in the same regime. The ITA began distancing a trust from its legal origins when it declared a trust a “person” for purposes of the ITA. Trusts gradually became little more than an instrument for clever tax planning promoted more often by accountants than lawyers. As a legal instrument of avarice rather than equity, lawyers began nullifying all of the difficult aspects of trust law which are only understood and cherished by equity lawyers rooted in the common law. Fiduciary concepts such as the even handed rule, duty of loyalty, forbidding conflict of interest and personal gain to the trustee were all expressly drafted out of trust indentures so the tax advantages could be exploited without the constraints of equity law. Trustees were then authorized to delegate all of their powers and granted immunity from responsibility for their actions so the settlor could control things with the trustee being little more than a legal puppet. Even that was not enough. Consequently, the concept of the “protector” was added to hire compliant and fire independent trustees as well as add and delete beneficiaries in ways which pervert trust law.

The result is that the law of trusts has been dumbed-down to the point that if a document is called a trust and survives the minimum legal check-list of having three essential characteristics, being certainty of intention, certainty of subject-matter, and certainty of objects, it will be certified by any modern lawyer as a trust. Similarly, the quest with regard to charities is to require an applicant organization to submit to only a cursory examination to determine whether the drafted objects vaguely fit within *Pemsel* or some statutory charity-plus list and make sure that it is not for private pecuniary gain. Having met those minimum standards, the applicant wants to cry “enough already” and claim full tax privileges as a registered charity.

Having jettisoned all the baggage of the bad old common law, this new enlightened regime will necessarily proceed to replace (or possibly just re-introduce) all of the restraints and constraints of

¹³ *President of Radcliffe College and Professor of History at Harvard University, M.K. Jordan's Philanthropy in England 1480-1660, published in 1959 by George Allen and Unwin Ltd is one of the most insightful histories of the evolution of charity.*

charity law if it wants to avoid abuse and fraud. However, rather than fiduciary obligations subtly imposed by the courts of equity, they will invoke the “modern” codewords of accountability and transparency to justify heavy-handed regulation legislated by government. The Broadbent Report proposes that as a condition of registration for tax credit status, a voluntary organization should adopt a code of ethical fundraising and financial accountability similar in principle to the code developed by the Canadian Centre for Philanthropy.¹⁴ It goes on to propose that the general standards of the duty of care and loyalty should be codified and applied more consistently to all nonprofits.¹⁵ Presumably, the assumption is that the Canadian Centre for Philanthropy and Parliament will remedy all of the failings of the common law of charity in the fiduciary field.

Charity-Plus Model

There is a serious difference of opinion as to what is meant by the charity-plus model. The Broadbent Reports says that it wants “a ‘charity-plus’ model, as advocated by Arthur Drache”.¹⁶ Arthur Drache has at times advocated a complete redefinition of public benefit organizations with a list of “charitable purposes” as modelled in the *Charities Act*¹⁷ of Barbados. As well, Drache has advocated a much more limited charity-plus model in which the existing *Pemsel* categorization is maintained and a few additional categories are added by statutory amendment. My understanding is that it is this second limited proposal which is meant by “charity-plus”.

My concern is that the EVS Paper states that the Supreme Court of Canada “commended for serious consideration a proposal put forward by the Canadian Centre for Philanthropy which is along ‘charity-plus’ lines”.¹⁸ In my understanding of the *Immigrant Women* decision, this is quite an inaccurate representation of the Supreme Court’s position.

The Canadian Centre for Philanthropy proposed a sweeping new definition based on its proposed understanding of the term “public benefit” which went far beyond a charity-plus model. It was this broad proposal which was commended by the Supreme Court for serious consideration by Parliament. However, Iacobucci, J. then proceeded to consider “the suggestion that the Court simply add another category to the categories established by *Pemsel*”. This would be my understanding of what is meant by charity-plus. Iacobucci J.’s verdict was that it was “a suggestion which, in my view, would do little to enhance the fairness or the flexibility of the law”.¹⁹ Consequently, I am of the opinion that the Supreme Court expressly rejected the charity- plus model.

In the consultations which were undertaken with the voluntary sector prior to the Broadbent Report, a significant amount of concern was expressed by charities about the possibility that a new definition of charity would remove existing categories. Those concerned organizations were repeatedly advised that the charity-plus model meant that only new categories would be added and that existing ones would

¹⁴ *Broadbent Report*, p. 88.

¹⁵ *Broadbent Report*, p. 92.

¹⁶ *Broadbent Report*, p. 54.

¹⁷ L.R.O. 1989, c. 243.

¹⁸ EVS Paper, at para 65.

¹⁹ *Immigrant Women*, at para 203.

not be removed. Consequently, it was surprising to read in the agenda of issues being considered by the Regulatory Table an item called “Wholesale Review of the Register” which asks whether obsolete organizations or organizations that are no longer charitable should be removed.

I have a similar concern with regard to the regulation of universities and hospitals. The original Discussion Paper issued by Broadbent stated that its ambit excluded “para-governmental organizations” and cited universities and hospitals as examples. The final Broadbent Report did not exclude these organizations but stated “We have focused less on museums, learning institutions and hospitals”.²⁰ Consequently, it was surprising to read that, depending on the issue, the Regulatory Table should determine whether agencies such as universities and hospitals should be included or subject to a separate regulatory regime. Again, it is very clear that the issues being discussed at the Regulatory Table as well as the starting point of those discussions are significantly different than what I had assumed prior to visiting Ottawa.

Inherent Jurisdiction Issue

In the common law system, imposing restrictions on a charity’s purposes and the trustee’s conduct are only a part of the court’s function. The court goes much further and provides protection to charities when they are abused by trustees or suffer from maladministration. The Attorney-General represents the Crown as *parens patriae* in litigation and the Crown has a prerogative right to protect all charitable trusts. The court also has the inherent jurisdiction to act to protect gifts donated to charity even if the donation is imperfect at law or trusts have been drafted with flaws.

England does not have a statutory definition of charitable objects. However, the *Charities Act 1993* does have a statutory definition of “charity” which includes the requirement that a charity “is subject to the control of the High Court in the exercise of the court’s jurisdiction with regard to charities”.²¹ Originally it was the ecclesiastical courts which extended special protection to charitable gifts. These privileges were preserved in the Court of Chancery when it developed equitable jurisdiction. These privileges continue in England today. Unfortunately, Revenue Canada is seeking to eliminate them in Canada. Revenue Canada is doing this by legally challenging the jurisdiction of provincial courts, which have equitable jurisdiction with regard to charities, to hear cases involving gifts to a charity. On October 22, 1997 a private foundation petitioned the Supreme Court of British Columbia seeking a declaration that certain transactions between the private foundation and a donor corporation which occurred on October 31, 1992 “constitute gifts at common law”. The donor corporation and “Her Majesty The Queen in Right of the Province of British Columbia in her capacity as *parens patriae* of charities” were respondents. The Petitioner expressly sought relief under “the inherent jurisdiction of the court”. Revenue Canada’s counsel “on behalf of Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue” filed a Notice of Motion asking that the petition “be struck as an abuse of court process”. In an oral judgment dated January 28, 1998, the Supreme Court of British Columbia granted Revenue Canada’s application. The litigation was transferred to the Tax Court of

²⁰ Broadbent Report, p. 8.

²¹ 5 Statutes, 866, s. 96(1).

Canada which does not have equity's inherent jurisdiction over charity matters. Revenue Canada refused to represent the Crown as *parens patriae* in protecting the rights of the donee charity. Unlike the litigation in the Supreme Court of British Columbia, the private foundation was not a party in the Tax Court litigation and was completely unrepresented.

By a coincidence of timing, this case was heard in the Tax Court of Canada in Vancouver last week. I was called as a witness because I had done the tax planning. The case is a product of the federal government's vendetta against private foundations which engaged in loanbacks prior to the Federal Budget of 1997. The donor corporation had made a gift utilizing the provisions of ITA Subsection 110.1(3) of capital property having a fair market value of more than \$9 million to a private foundation in 1992. Revenue Canada re-assessed the donor five days before Paul Martin's 1997 budget and denied that the gift was effective. The timing is interesting because the 1997 budget increased the deduction limit for a corporation donating capital property to cover 100% of the taxable capital gain. Consequently, it would no longer be necessary to utilize the roll-over provisions in ITA 110.1(3).

In retrospect, the true significance of the timing was that the consideration by the GAAR Committee in Ottawa of re-assessing took place at the height of negotiations between voluntary sector representatives and Finance officials in which the interests of private foundations were being sacrificed by representatives of other parts of the charitable sector. Outsiders learned in the budget announcement that Finance had reduced the inclusion of a donor's taxable capital gains by one half if publicly traded securities were donated to any registered charity other than a private foundation. The trade-off in this same budget was that Finance proposed a 50% penalty tax if there was a donation of private company shares or a loanback. This private foundation had loaned proceeds of the gift back to the donor corporation years before the 1997 budget. Revenue Canada re-assessed so it could deny the \$2 million of interest payments made by the corporation to the private foundation because of this loan as well as the gift itself.

The result was that the private foundation was denied approximately \$12 million. That money was assessed to be the donor corporation's money. Revenue Canada then levied taxes and late payment interest charges of approximately \$5 million on the donor corporation. The "good news" was that it could keep the remaining \$7 million after Revenue Canada collected \$5 million. The first ground for Revenue Canada's reassessment was that the donor corporation lacked the legal capacity to make gifts of the specific properties donated. The alternative ground was that the gift was an abuse of the ITA and should be denied under GAAR — the General Anti-Avoidance Rule.²²

Because Revenue Canada's first ground for denying the gifts was that the donor corporation lacked the legal capacity to make the gift, it seemed reasonable for the recipient charity to seek a court declaration that the transactions "constitute gifts at common law". It was a shock to learn that Revenue Canada would allege that seeking such a declaration was "an abuse of court process". Property and civil rights are a matter of provincial jurisdiction. According to the *Constitution Act*, the Province of British

²² ITA, Part XVI, Tax Avoidance.

Columbia has exclusive jurisdiction over charities and eleemosynary institutions in the province.²³ However, for possibly the first time in the history of charity in Canada, a charity was denied the protection of the inherent jurisdiction of the court of equity because of Revenue Canada's legal manoeuvring. The Supreme Court of British Columbia could either have found that the corporate donor did not lack capacity to make the gift or could have exercised its inherent jurisdiction to remedy any technical legal failings.

Although I was a witness rather than the lawyer arguing the case, the judge spent a considerable amount of time examining me from the Bench about Revenue Canada's prior legal actions in removing the case from the Supreme Court of British Columbia. While he was not convinced that the Supreme Court should have declined jurisdiction, he was bound by its decision. Further, he recognized that as a judge of the Tax Court of Canada he did not have the inherent jurisdiction or prerogative power to protect the gift should he rule against the charity on the capacity issue.

We also discussed the fact that it was the donor, in spite of the fact he stood to gain \$7 million if the donor corporation "lost" its appeal, who was the person acting as *parens patriae* to defend the interests of the charity. Revenue Canada was only interested in denying the gift. Revenue Canada had admitted in discoveries that the donated properties had been sold at fair market value and the private foundation was meeting its entire disbursement quota requirements. There were no allegations that the donor had engaged in improper conduct other than the gift itself. RCCD was completely silent with regard to the interests of the charity. RCCD had previously acknowledged in writing that if the Tax Court decision went against the private foundation, RCCD would cooperate in amending all the T3010 filings consistent with the gift never having been made. RCCD is bound by the position taken by the officials in Revenue Canada making the re-assessment decision.

Revenue Canada's lawyer obviously was not happy about the judge's interest in the inherent jurisdiction discussion. He began his cross-examination of me by having me admit that there was no legal impediment to the corporation donating to the private foundation the \$7 million which remained in the corporation after the tax payment. Having secured that admission, Revenue Canada's lawyer advised me that he had established during cross-examination of the donor that the corporation had paid the donor personally dividends of \$5 million in the same period. Consequently, I was then asked to admit that there was no legal impediment to the donor personally donating that additional \$5 million so that the foundation would end up with \$12 million. Revenue Canada's lawyer also spent considerable time with the donor's accountant leading evidence as to how much money the donor earned. Finally, the judge stopped him, saying this information was irrelevant because the issue was whether the donor had capacity to donate the specific properties and not whether the donor was rich enough to make additional gifts.

It was clear that Revenue Canada's position was that it had no responsibility to protect the interests of the charity. Implicit in the cross-examination was the belief that this donor was a rich bastard who

²³ Section 92(7) of the Constitution Act reads: 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, (7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

should give after-tax cash rather than assets prior to sale. Further, he was unworthy of being considered a philanthropist if he took offense at Revenue Canada’s characterization of him both as a personal tax abuser and an abuser of the court process and did not immediately make a new \$12 million gift of cash. I was tempted to remind Revenue Canada’s legal counsel that when Judas betrayed Christ, he at least was offered 30 pieces of silver by a third party. It seemed Revenue Canada was betraying all of its fiduciary obligations to charities so that it could steal the 30 pieces of silver directly from Christ.

As previously discussed, the inherent jurisdiction of the court allows it to exercise extraordinary powers to protect and save a charitable gift. If that power represents the good end of the spectrum offered to the charities by the common law, then GAAR is the opposite end of the spectrum representing Revenue Canada’s statutory authority to abuse the rights of charities. The inherent jurisdiction authorizes the court to make the necessary amendments to save a gift which would otherwise fail because of technical flaws. GAAR authorizes Revenue Canada to exercise its statutory jurisdiction to deny a gift to a charity even when it is technically correct from a legal and tax analysis on the basis that Revenue Canada does not like the “tax benefit” received by the charity. On May 12, 1999 the Tax Court of Canada reserved its decision so it will be some time before the case is decided. However, the Regulatory Table should be careful when considering the Broadbent Report’s proposal²⁴ to transfer appeals from the Federal Court of Appeal to the Tax Court of Canada that such a change does not further deny a charity the protections offered by the inherent jurisdiction of the courts of equity.

Voluntary Sector Commission Option

The Voluntary Sector Commission (“VSC”) option is fading in Ottawa. Like most aspects of the Broadbent Report, it does not stand up well to rigorous scrutiny. The VSC will add bureaucracy and solve very few problems.

The Broadbent proposal is that RCCD continue to be the primary agency for registering charities as well as regulating, auditing and, if necessary, revoking their charitable status. The VSC will act as a complementary body to deal with the problem registrations with the power to advise, but not overrule, RCCD on a registration decision. Given the Broadbent Report’s aversion to the courts being the solution, the VSC decisions will not have precedential value or the other attributes of a court determination.

The long term results of the VSC will be to increase the impotence and disrepute of RCCD. Expertise and budget will be siphoned away from RCCD with the result that its determinations will, in all probability, become worse rather than better. The VSC will portray itself as the agent of all progressive thinking and shuffle onto RCCD’s shoulders all of the rage from applicants when registration is denied. The VSC proposal has a significant potential to be counterproductive.

²⁴ *Broadbent Report*, p. 89.

Part of the problem in the Broadbent Report is that it seeks to break the charitable sector’s historic links to the common law of charity. Changing even the name, Broadbent wants to recast it as a “voluntary sector” rooted in the values of citizenship, civil society and democracy. As the Broadbent Report says in its “Guiding Principles”:

“The voluntary sector is a garden in which democratic skills are planted and nurtured. As diverse vehicles for participation by different constituencies, voluntary organizations enable a broad range of Canadians to have a voice in what shapes their daily lives. By participating in voluntary organizations, people learn and practice the skills of citizenship. As deliverers of services, voluntary organizations develop an intimate understanding of what works, and what does not in the implementation of public policy. When members of voluntary organizations engage constructively in policy dialogue and express themselves as advocates of particular causes and constituencies, they illustrate and reinforce the goals of participatory democracy. In this, they complement our democratic political institutions, notably parties and parliaments. A flourishing, tolerant civil society is crucial to a healthy democracy.”²⁵

Later in the Guiding Principles, it refers to the voluntary sector as consisting of more than 175,000 organizations. It is clear from the preponderance of the Broadbent Report, but not the small section dealing with legal definition, that it is dealing with all nonprofit organizations in Canada as well as registered charities. If that is the case, there is very little need for a VSC as any non-profit organization will qualify for tax privileges. RCCD has a budget of \$8.6 million and a staff of 130,000 to oversee 78,000 registered charities. There are almost no staff or budget assigned to oversee the remaining 100,000 nonprofit organizations. While the Broadbent Report wants to bring all of these social organizations under the same accountability and transparency regime which it is proposing for registered charities, the voluntary sector is not clamouring for more bureaucracy and red tape to be imposed on it by government.

It is fairly clear that this whole exercise in broadening the definition of organizations which are entitled to give donors generous tax benefits is rooted in government cutbacks and downloading services onto the voluntary sector. The Broadbent Report recognizes this when it states: “Over the years, the Secretary of State expanded its granting programs to advocacy and service organizations working to support constituencies of minority official languages, women, multiculturalism, persons with disabilities and Aboriginal political mobilization. The Department was eliminated in 1993 and its programs either wound down or transferred to other departments.”²⁶

A significant number of these advocacy and service organizations have never met the historical definition of charity at common law. This did not prevent the Secretary of State from recommending that these organizations all apply for charitable status to provide tax benefits to donors. Having told these organizations to seek the mirage of private sector funding, the federal government then walked away from its funding commitments. Donor funding, of course, was only available if the organization

²⁵ *Broadbent Report*, p. 9.

²⁶ *Broadbent Report*, p. 57.

obtained registered charity status. No one in government stood up for RCCD as it absorbed all the expressed rage of applicant organizations, such as multicultural groups, which have no realistic expectation of being registered under the present law of charity. Fortunately for the government, activists in the voluntary sector have now made this a *cause célèbre*. They have continued to channel all the rage at RCCD while ignoring that the problem started with government cutbacks. The Broadbent Report goes so far as to state: “Neither are we suggesting a return simply to the old grants making programs of the Department of Secretary of State ...”²⁷

To the extent that all of the Joint Table activity in Ottawa this year stems from a need for additional funding for voluntary sector organizations which fall outside of the historical definition of charity, the government should analyze whether the cost to the federal Treasury would be less if it reinstated direct grants than if it significantly broadens the definition of charity.

Canadian Charity Commission Option

The problem in examining the CCC option is that it only exists in a paper commissioned by the Regulatory Table. Consequently, it is very difficult to comment on this option. Presumably, it will transfer all of the registration, supervision and revocation powers of RCCD to CCC. This will have the advantage of creating a new agency to replace RCCD rather than simply adding more bureaucracy to the government departments already in place. Whether this is preferable to the existing RCCD will depend on how much budget CCC receives, the expertise it attracts and whether its determinations will have judicial or quasi-judicial precedent value.

One concrete thing I did learn about the CCC proposal was its recommendation with regard to staffing. The proposal states that apart from very few exceptions, the staff at RCCD lack expertise and suffer from a bad corporate culture. It recommends that none of the existing staff at RCCD should be hired by, or transferred to, the new CCC. While the bashing of RCCD is so widespread that this recommendation is not surprising, it is difficult to determine how it can be considered helpful or constructive. The corporate culture which needs to be changed is the one within the voluntary sector which responds to every frustration by bashing RCCD examiners.

Whatever limitations may exist in the expertise of the staff at RCCD, there is not such a surplus of legal talent and charity law knowledge in Canada that we can afford to throw the collective institutional experience of RCCD on the trash heap.

Let me qualify my defence of RCCD by stating that I also experience a great deal of frustration with the length of time it takes RCCD to process an application whether or not it is complex. Part of my time in Ottawa last week was spent meeting with examiners. In one of the four applications, I was advised by the examiner in very declaratory tones that the objects clause which I had drafted was not charitable at law. This declaration was accompanied by a dismissive shrug of amazement that someone as old as myself could know so little about charity law. Since I had endured ten months of silence before RCCD

²⁷ Broadbent Report, p. 57.

came to this determination, I was not particularly pleased. However, having three children in university, I have often experienced being dismissed with bewildered amusement for what I don't know by younger persons with the omniscience of youth. Consequently, I persisted with a few challenging questions. Before the end of the meeting it was decided that my objects clause would be referred to someone more senior within RCCD to determine whether it indeed might meet the legal test of being charitable.

It is not a firing offence that a relatively new examiner might be overly dogmatic in his or her statement as to the law. The tragedy is that as examiners do develop real expertise, they simultaneously learn that RCCD is a backwater within Revenue Canada with very limited opportunities for career advancement and higher pay. Consequently, the best and the brightest will transfer out of RCCD unless they have developed a particular desire to work in the charities field without regard to the adverse impact on their career advancement opportunities and take-home pay. It is undeniable that this backwater in Revenue Canada has accumulated some dead wood. However, I have been around long enough to know that some very capable examiners have moved out of RCCD for career and compensation reasons. The Regulatory Table should recognize that the problems will simply repeat themselves in a new environment if adequate financial resources are not made available to the VSC or the CCC.

Revenue Canada Charities Division Option

The RCCD option is the one which is the least attractive to politicians and activists in the sector. They have been denigrating RCCD for so long that portraying RCCD as the solution is unthinkable. Politicians want a bold, new initiative with great vision. It is difficult to think how even the greatest supporter of RCCD can “spin” RCCD as an attractive solution. Consequently, from the perspective of the Regulatory Table, RCCD is an option only if all of the other alternatives fail completely.

Even with those handicaps, the RCCD option may ultimately be the one pursued. I suspect that when all of the financial and contractual issues of either terminating the RCCD staff or transferring them to the CCC are examined, the *status quo* may look more palatable. When cost-benefit fiscal efficiency experts compare the return on setting up a new bureaucracy as opposed to providing extra resources to RCCD, enhancing RCCD may be a more prudent economic decision.

The most likely reason why RCCD will be the option finally chosen is the significant constitutional law problem in the other options. Under the *Constitution Act*, the provinces are given exclusive jurisdiction over property and civil rights as well as “hospitals, asylums, charities and eleemosynary institutions”. The Regulatory Table has some extremely difficult constitutional problems to overcome with either the VSC or CCC options. Leaving the regulation of charities within the tax jurisdiction of the federal government may be the only constitutionally workable option. The Regulatory Table needs to be careful to ascertain the constitutional problems early so it does not design a politically attractive proposal which is constitutionally impossible. It must be careful to respect how problematic it is to ignore issues of provincial jurisdiction.

Conclusion

The views which I have presented this morning are based upon the rather sketchy information which I obtained in face-to-face conversations in Ottawa last week. This morning the Regulatory Table began another two days of consultations. There will be another meeting on June 3-4. All three of the Joint Tables are to report by mid-June. Much of the information presented to you this morning may be obsolete by that date. Entirely new issues may be added to the agenda and existing issues moved far down the priority list.

It is clear that the federal government wants to take some bold action with regard to the voluntary sector. It is not clear what the agenda is and who is driving the agenda. The suspicion remains that the timing of the government's action will be determined by when it is most politically opportune. The fact that the proposals may not have been adequately considered by that point in time is not likely to deter the government from acting. One hopes that the process will continue for enough time for the government members of the Regulatory Table to fully understand and consider the issues. There is a higher probability that bureaucrats enter this process with fewer established agendas and axes to grind than do the voluntary sector representatives. Unfortunately, the government representatives are powerless to implement their recommendations without political approval. Nor can bureaucrats do other than acquiesce should the politicians choose to hastily embark on radical changes.

On May 5, 1999 the Federal Court of Appeal brought down its decision upholding Revenue Canada's action in revoking the registration of the anti-abortion organization *Alliance for Life*.²⁸ Stone, J.A. considered the broadened definition of education in *Immigrant Women* and still held against the organization, stating:

“I do not find in much of the disseminated materials any real desire to ensure objectivity. It is not, in my view, farfetched to regard the bulk of these materials as ‘political’.”²⁹

One hopes that the materials supplied to the Regulatory Table will meet the standard of objectivity and balance which the law of charity requires of education. I know that some of the most powerful players there are committed to advocacy and disagree strongly with the court's views on public education. However, the issues regarding the competency of staff at RCCD and complexity of the law of charity as well as the merits and drawbacks of a new VSC or CCC require informed debate rather than zealous advocacy. The issues at stake in the Ottawa consultations are of such great importance to the future of the charitable and voluntary sectors that the materials prepared by and circulated to the members of the Regulatory Table must be objective and balanced.

The law of charity will benefit from some changes and modernization. It is unfair to the leadership shown by RCCD on cutting edge issues such as micro-enterprises and community economic development to not acknowledge breakthroughs as well as roadblocks. Similarly, the courts have been creative with regard to native communities, women's health and the internet. The stumbling block is advocacy and political activities. Not everyone in the sector wants the courts to go down that road.

²⁸ *Alliance for Life v. Minister of National Revenue*, Date: May 5, 1999, Docket: A-94-96.

²⁹ *Alliance for Life*, at para 68.

Unfortunately, the issue has been so positioned publicly that disagreeing with activists on the political activities issue is automatically translated as supporting the *status quo*.

It is important that you as individual organizations in the charitable sector communicate your views to the Regulatory Table. There is a concern that the representatives of the voluntary sector have been selected on the basis that they will all sing in harmony from the same page. The experience of private foundations and Crown foundations in the 1997 pre-budget consultation process demonstrate that it is possible for some perspectives to go unrepresented by sector representatives.

If you want your viewpoint to be known in Ottawa, I would suggest that you write Mr. Bill McCloskey who is Revenue Canada's Assistant Deputy Minister of Policy and Legislation Branch. He can be reached by writing to Room 1018, 123 Slater Street, Ottawa, ON, K1A 0L5 or sending an email to William.McCloskey@ms.rc.gc.ca. His fax number is (613) 957- 2067.