Appendix 3

The Experience of Other Countries

The Charity Commission for England and Wales and the Canadian context

At this time, the only jurisdiction which has delegated authority to determine registration and deregistration issues to a separate agency is England and Wales. In developing Models 3 and 4, we looked to this example. While there are some similarities, the Canadian Charity Commission model described in this report has different powers from the one serving England and Wales.

An important distinction is that the Charity Commission for England and Wales administers the *Charities Act*, which is not the functional equivalent of the *Income Tax Act*. The Act gives the Charity Commission for England and Wales jurisdiction over all matters concerning charities including regulatory powers that in Canada fall under provincial jurisdiction, such as providing support and advice to ensure charities have good administrative practices and are effectively organized.

Currently, the central role of the federal regulator in Canada – under any institutional model – is to reflect the intent of Parliament through how it administers the charity provisions of the *Income Tax Act*.

The *Charities Act* gives the Charity Commission for England and Wales a number of powers that are not constitutionally available in Canada, which makes comparison sometimes difficult. These powers include the power to ignore previous court decisions where circumstances have changed and to exercise joint powers with the court in certain administrative functions. This gives the Charity Commission for England and Wales some justification for being regarded as a quasi-judicial body.

Finally, as a standalone agency, the Charity Commission for England and Wales does not report to a minister on its regulatory decisions, although it does report through a minister on its annual performance.

Accessibility and transparency

In the **United States**, the *Internal Revenue Code* provides for public access to both annual returns and to the applications of organizations that are accepted for tax-exempt status. Non-qualifying organizations are not subject to these provisions. Access can be obtained either from the Internal Revenue Service, or from the organization, which, if requested to provide the information, must promptly do so free-of-charge, or face a monetary penalty.

In connection with applications, the following must be made available:

- the application form;
- all documents and statements the Internal Revenue Service requires the organization to file with the form;
- any statement or other supporting document submitted by the organization in support of its application; and
- any letter or other document issued by the Internal Revenue Service concerning the application.

In **England and Wales**, the *Charities Act* requires the Charity Commission to maintain a register containing the name of every registered charity and any other information the Commissioners order. The register is open to public inspection, as are "copies (or particulars) of the trusts of any registered charity as supplied to the Commissioners."

Charities' annual reports and accounts sent to the Commission are open to public inspection, either at the Commission's office or by means of a photocopy, for which there is a copying charge. Members of the public can also review the accounts of any charity by making a written request to the charity. The charity can charge a fee to cover processing costs, but must meet the request within two months. Failure to do so renders the directors liable to prosecution and a fine.

Reports on inquiries undertaken by the Commissioners may be published as they see fit.

As a non-Ministerial government department, the Commission is subject to the *Freedom of Information Act 2000*, which is broadly similar to the Canadian access to information legislation. The Commission has issued some "operational guidelines" on the subject. Access to information held by the Commission is still subject to a number of restrictions, including:

- correspondence can still be kept confidential;
- cases can still be settled on the understanding that there would be no publicity;

- pre-decision discussions can be kept confidential if the balance of the public interest lies with non-disclosure; and
- a person seeking the names and addresses of a charity's trustees will be referred to the single correspondent and address identified on the website.

In practice, the Commission has identified organizations by name, giving reasons for its decisions, both positive and negative. This practice appears to be becoming less frequent. On its website, individual charities are most often named in connection with the Commission's inquiry powers.

Appeals

In the **United States**, all applications to the Internal Revenue Service for tax-exempt status are handled centrally, in Cincinnati. An organization that receives an initial adverse determination of tax-exemption (or a letter proposing to revoke an existing exemption) may seek recourse from a separate branch of the Internal Revenue Service (the Appeals Office), by filing a protest within 30 days. The protest letter must include details such as the aspects of the original decision the organization disagrees with, the facts supporting its position, and the law or authority on which it is relying. If requested, a conference can be held, but otherwise the procedure can be conducted by correspondence or telephone. Appeals Office staff can only determine cases according to established precedents and policy. Where there are no established precedents and policy, the matter is referred to head office in Washington. The organization also has the option of having the file referred directly to Washington.

In addition, organizations can go directly to court[1], rather than using the Appeals Office, or they can go to court if they disagree with the decision of either the Appeals Office or head office. If the court finds the organization to be the "prevailing party," it can recover its administrative and litigation costs.

In **England and Wales**, if the Charity Commission[2] decides an applicant does not qualify for registration, it writes to explain why. The organization may write back if it disagrees with the Commission's decision or considers the Commission has misunderstood the application. Such a response triggers an internal review of the decision. The reviewer is independent of the original decision makers. If the review upholds the negative decision, the organization can then ask for a review by the head of the legal department and ultimately by the Commissioners sitting as a board. If the decision is still negative, the organization can then go outside the

[1] The court in question would generally be the equivalent of the Canadian Tax Court.

[2] The Charity Commission also has a system in place to handle complaints about its service, as opposed to its decisions. A complainant can turn to an Independent Complaints Reviewer after he or she has exhausted the commission's internal procedures.

Commission and appeal to the High Court.[3] Very few cases have gone to the English courts from the Charity Commission in recent years.

An organization facing removal from the register on the grounds that it no longer appears to be a charity can also ask for an internal review of the preliminary negative decision. It remains on the register until the review is complete, but its name is removed if the reviewer issues a negative decision. At that point, the organization has a statutory right of appeal to the High Court.

Third-party interventions are permitted. The *Charities Act, 1993* allows "any person who is or may be affected by the registration of an institution as a charity" to object to the Commission on the grounds that the organization is not a charity. They also may proceed to court if the Commission disallows their objection.

Intermediate sanctions

At the federal level, the **United States** introduced new intermediate sanctions in the form of excise taxes in 1996 (those marked with an asterisk in the list below),[4] although there were a number of pre-existing remedies in the *Internal Revenue Code.* Among the sanctions now available to the Internal Revenue Service are:

- a per diem fine on the organization for failure to file the annual return on time or filing an incomplete return;
- a fine of $20 a day on an organization's employee who refuses to provide a copy of the organization's annual return to a member of the public who has requested it;
- a tax equal to a percentage of the amount spent on partisan "political activities" and of the amount above the allowable limit spent on "lobbying";
- a tax on income from unrelated businesses;
- penalties on the organization for issuing inaccurate donation receipts as part of a promotion in order to understate tax;
- a tax on persons in a position to exercise substantial influence over a charity's affairs, for any "excess benefit" they receive from the charity; and
- taxes of varying rates against private foundations for engaging in self-dealing, for not meeting a minimum spending amount, for excess business holdings, for making imprudent investments, and for making payments for a non-charitable purpose.

[3] The approximate Canadian equivalent of the High Court would be the Federal Court Trial Division or the trial division of the provincial superior courts.

[4] The new intermediate sanctions are being gradually phased in, and the Table is not aware of any analysis having yet been made of their effectiveness.

The Internal Revenue Service also uses its website listing of charities to encourage filing on time. Only the names of organizations that are up-to-date in their filing appear on the site.

The *Code* allows the Internal Revenue Service to enter into "closing agreements" to settle accounts with any taxpayer with finality. Organizations have a strong incentive to negotiate such an agreement, to avoid the loss of their tax exemption. (However, there is no equivalent of the Canadian revocation tax.) Such agreements can include payments to cover Internal Revenue Service costs, but their chief aim is to prevent a recurrence of the problem. To that end, the Internal Revenue Service will go deeply into an organization's operations and require, for example, the restructuring of its board. The closing agreement may also include a provision allowing for publication of the details as part of the settlement.

In **England and Wales**, the Charity Commission does not exercise sanctions equivalent to the deregistration and revocation tax found in Canada. While the Commission can remove non-charities from the register, the focus of its efforts is on protecting charitable property and taking action against individual directors or trustees. Thus, there are no financial penalties on organizations, although non-compliant charities are publicly identified.

In practice, the main sanction is holding an inquiry under section 8 of the *Charities Act*. If the Commission's investigators find "misconduct" or "mismanagement" (the terms are not defined), the Commission can invoke a wide range of powers that in Canada are associated with provincial jurisdiction, including:

- appointing a receiver and manager to replace an existing board;
- freezing the charity's assets;
- removing a director or employee; and
- making a scheme that could totally change the constitution of the charity concerned.

Charities are publicly identified when the results of these inquiries are posted on the Commission's website. The Commission has also listed the names of charities that were two years behind in their filing requirements. The practice has become known as "naming-and-shaming."

It is also an offence under the *Charities Act,* punishable with a fine, for any "person" not to meet the filing requirements imposed by the legislation. Other offences are also identified. In these cases, the Commission hands the matter over to the police to lay charges. The law allows for the free flow of information among the Commission, the police, and various governmental authorities, including the local authorities that license various forms of fundraising.

Institutional models

In our review of institutional arrangements, we examined the situation in other common law jurisdictions (England and Wales, Scotland, the United States, Australia and New Zealand).

In a majority of jurisdictions we examined, revenue officials initially make the decision as to whether an organization is charitable. This approach is based on the assertion that revenue officials are non-partisan in their determinations of charity registrations and that the tax authority is in the best position to administer the system of tax deductibility, including determining which organizations are eligible for tax exemption.

At this time, the only jurisdiction that has delegated authority to determine registration and deregistration issues to a separate agency, is England and Wales. It is important to note, however, that the government in New Zealand has announced that it will proceed with the establishment of a commission as well. Some commentators have suggested that the delegation of registration decisions and ongoing regulation to a separate agency is justified on the basis of the expertise the Charity Commission has developed in relation to a wide range of charitable matters, including areas that fall under provincial jurisdiction in Canada. This broad-ranging jurisdiction is constitutionally unavailable in Canada.

Under the *Charities Act,* Commissioners have the general function of promoting the effective use of charitable resources by:

- encouraging the development of better methods of administration;
- giving charity trustees information or advice on any matter affecting charity; and
- investigating and checking abuses.

There have been some recent developments in other jurisdictions that may be of interest. It should be kept in mind, however, given the different mandates and nature of these inquiries, that their findings are not necessarily transferable for the purposes of this review.

In Australia, a recent inquiry into the definition of charities and related organizations recommended establishing a national, independent administrative body for charities and related entities. It also recommended that the government seek the agreement of all state and territory governments to establish the administrative body.

Like Canada, primary jurisdiction over charities in Australia rests with regional governments. The Australian experience suggests a model for the transfer of federal authority to a separate administrative body should the provinces and territories also agree to delegate their jurisdiction over charities to such an agency.

In Scotland, the Scottish Charities Office has responsibility for supervising organizations that have been recognized as charities by Inland Revenue or by the Charity Commission for England and Wales. This includes monitoring compliance with charities legislation and investigating concerns about misconduct and mismanagement.

As a result of a recent inquiry into charity regulation, Scotland is also considering transferring oversight responsibilities for charities to a commission similar to the Charity Commission for England and Wales. Among its findings, the Scottish Charity Law Review Commission report recommends that the new body have the dual role of protecting the public interest and providing an effective support and regulatory system for charities. However, supervising and regulating charities in Scotland is not shared with regional governments, as is the case in Canada.

An inquiry into the registration, reporting and monitoring of charities in New Zealand, released in February 2002, examined three alternatives for the structure of its regime. This included a Charities Commission; a semi-autonomous body within an existing government department with a statutory advisory board from the charitable sector; and a business unit within an existing government department.

The inquiry preferred a Commission for Charities to assume responsibility for the registration, reporting and monitoring of New Zealand charities. It recommended that the commission be established as a new crown agency with its own statute and regulations. It based its decision on the belief that a Charities Commission would be most acceptable to the charitable sector and that this would mean the costs of monitoring and enforcement would likely be less if the sector supports and has confidence in the organization.

The Crown would appoint Commissioners, with a majority drawn from the charitable sector. The new commission would act as a "one-stop shop" for the legislative requirements of charities.

The inquiry also recommended that the Charities Commission be required to report annually to the sector, and to the government through the Minister of Finance, and to the Minister responsible for the Community and Voluntary Sector. Presently, charities must apply to Inland Revenue (department of taxation) to obtain charitable status. The government of New Zealand has now accepted the recommendation of the inquiry and is moving to a commission model.