Appendix 4

Previous Studies and References

Accessibility and transparency

In 1996, the Ontario Law Reform Commission published its *Report on the Law of Charities*. The *Report* included a number of proposals regarding the federal registration of charities under the *Income Tax Act*. It noted that the Charities Directorate deals with some 4,000 applications and deregisters some 2,000 organizations each year, and in almost all cases there is no public record of the decision. It urged the Directorate to publish an annual report along the lines of that published by the Charity Commission for England and Wales.

Three years later, the Broadbent Panel in its report, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*, pointed to the lack of transparency in the registration process and with regard to the CCRA's policies. The Panel considered that applications for, and decisions regarding, registrations should be considered public information. As well, the regulatory authority should routinely publish guidelines for interpreting the "grey" areas of the law.

The issue of transparency received considerable attention by the Table on Improving the Regulatory Framework. In its contribution to *Working Together: A Government of Canada/Voluntary Sector Joint Initiative* (1999), it defined transparency as covering informing, reporting, responding to requests for information, and conducting one's affairs in a manner that can be easily observed and understood. It felt that the existing system was far from this standard, and the result was that registration was perceived to be administratively complex and difficult to understand. Transparency was needed to provide guidance to organizations on how the common law was being administered and interpreted. The Table wanted the registration process to be as wide open as allowable under the *Privacy Act*, and it felt that third-party interventions at the registration stage would be desirable. However, it considered that little information should be available on the compliance side. The fact that an organization has been investigated should not be released, because this fact alone could be prejudicial, even though the audit might well reveal no significant problems.

Patrick Monahan, in his paper "Federal Regulation of Charities" (2000), also noted that the CCRA's decisions are shrouded in secrecy and in effect unreviewable. As well, given the dearth of court precedents, the lack of policy statements was all the more regrettable. Monahan called for a transparency regime operated under the principles of the access to information and privacy legislation, as well as an annual report pointing out significant decisions.

In an earlier paper "Charities, Public Benefit and the Canadian Income Tax System" (1998), Arthur Drache pointed to the confidentiality provisions in the *Income Tax Act* as responsible for leaving practitioners in complete ignorance of what types of organizations were or were not being registered, and urged that key decisions should be published. Drache and Laird Hunter, in their paper, "A Canadian Charity Tribunal for Canada" (2000), urged that registration decisions be removed from the CCRA and put into another institution, in part to escape the confidentiality provisions of the *Income Tax Act* and thus permit an adequate explanation of registration decisions.

Appeals

An overriding concern of the Ontario Law Reform Commission in its *Report on the Law of Charities* (1996) was to work towards the harmonization of the federal and provincial regulatory schemes. To this end, it suggested that the province having jurisdiction over a particular organization should have at least the right to comment at the administrative stage and the right to intervene in any court proceedings. More generally, the *Report* would allow all third parties to intervene at the judicial stage, subject to the approval of the court.

The *Report* was critical that the only recourse mechanism provided in the *Income Tax Act* was an appeal to the Federal Court of Appeal. Given the need for expertise in charity law, the *Report* favoured creating an intermediate tribunal devoted exclusively to deciding questions of charity law. However, it felt that reducing administrative costs and providing procedural fairness, openness, and a more fully developed record might be more easily achieved by using an existing recourse mechanism – the Tax Court. Hearings would be conducted along the lines of an appeal from a tax assessment, which is fundamentally a hearing *de novo*.

The *Report* also recommended that applicants should have an automatic right of appeal if the Charities Directorate has not decided on an application within 90 days, as opposed to the current 180 days.

Arthur Drache, in his paper "Charities, Public Benefit and the Canadian Income Tax System" (1998) came to a similar conclusion. He considered that reform was needed because costs and other constraints have limited the number of cases proceeding to appeal. His ideal solution was to create a "charity court" as a stand-alone body that would develop its own expertise, but the Tax Court would be an acceptable alternative. The procedure in the Federal Court of Appeal is, in his view, inappropriate. In a later paper, (Drache and Hunter, "A Canadian Charity Tribunal: A Proposal for Implementation" (2000)), the authors pointed out that the process in the Federal Court of Appeal is an appeal, and not a hearing *de novo*. This means that the responsibility is on the organization to prove that the Charities Directorate's

decision was wrong. Also, the appellant organization does not have the right of examination for discovery, calling witnesses, and cross-examining the government's decision makers for potential bias.

In its report, *Improving Governance and Accountability in Canada's Voluntary Sector* (1999), the Broadbent panel also urged that the appeal process be made more accessible and less expensive, and proposed that appeals should lie to the Tax Court.

The Table on Improving the Regulatory Framework, in its contribution to *Working Together* (1999), criticized the existing system as being not easily accessible and too expensive. It stated that because only a few cases have been decided, there is insufficient guidance for the regulatory authority and the voluntary sector. This first Table indicated that reform of the system should allow for greater access to appeals and a richer accumulation of expertise by adjudicators.

Under all the models for a new regulatory structure for charities examined by the Table on Improving the Regulatory Framework, the proposal was that the recourse system allow for a hearing *de novo*. Tax Court was not recommended as the venue for such a hearing, but rather a newly created quasi-judicial body. If the initial decision making stayed with the CCRA, reconsideration of the initial decision by an internal review process should be established. The Regulatory Framework Table also recommended the use of alternative dispute resolution procedures as an alternative to court proceedings.

Patrick Monahan ("Federal Regulation of Charities" (2000)) regarded the current appeal process as anomalous and outdated. In his view, it places a considerable financial burden on an organization, requiring the organization to retain legal counsel and prepare significant documentation. The Federal Court of Appeal itself, he noted, had questioned a process that asks it to "review relevant questions of law and fact without the benefit of any findings of fact by a trial court and indeed without the benefit of any sworn evidence."[1] Monahan considered that a special tribunal to hold a hearing *de novo* would be the best option, but doubted that there would be sufficient workload to justify appointing such a body. Instead, he opted for the Tax Court as the logical place for hearings, with the organization having the option of using that Court's informal procedures.

[1] *Human Life International in Canada Inc. v. Minister of National Revenue* [1998] 3 F.C. 202.

Intermediate sanctions

All previous commentators have pointed to the need for intermediate sanctions, and have offered varying suggestions as to the form such sanctions should take.

The Ontario Law Reform Commission's *Report on the Law of Charities* (1996) proposed using penalty or excise taxes, either against the charity or culpable fiduciaries, and taking into account the importance of the provision in question and the severity of the non-compliance. Taxes collected in this way could go either to defray the cost of administering the legislation or to other charities in the sector. The *Report* also noted that the CCRA would have an effective lever to encourage compliance if charities had to get their blank donation receipts from the CCRA. The *Report* criticized the existing revocation tax as inconsistent with provincial trust law provisions. It recommended instead that a court transfer the assets of deregistered charities to another charity, and that these assets be protected in the meantime by making a type of sequestration or receivership available to the CCRA.

The Panel on Accountability and Governance in the Voluntary Sector (the "Broadbent Report," 1999) emphasized the need for the CCRA's compliance program to educate charities and give them a chance to resolve identified problems. It proposed a range of compliance actions, including providing information, publicity, and fines, before resorting to deregistration.

The Table on Improving the Regulatory Framework made a number of suggestions in *Working Together* (1999). It proposed that a dispute resolution process should be available when the infraction is due to ignorance or when the infraction itself is in dispute. Among possible intermediate sanctions, *Working Together* recommended that:

- monetary penalties apply only where a donor or a charity realizes an unlawful monetary gain;
- the right to issue official donation receipts could be suspended;
- publicity can be a powerful sanction and could be combined with a system of formal orders directing a charity to comply; and
- any intermediate sanctions should be accompanied with an appropriate appeal mechanism.

In his paper "Federal Regulation of Charities" (2000), Patrick Monahan endorsed the proposals put forward in *Working Together.* Arthur Drache, in "Intermediate Sanctions" (1999), suggested a number of possible financial penalties. As a general rule, he would impose the penalty against the organization, rather than the directors or employees. However, if the non-compliance involved an improper transfer of property from the charity, the sanction should be on the person receiving the property.

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