
Chapter 4: Institutional Reform

Mandate of the Table

Among its duties, the Joint Regulatory Table was instructed to elaborate on the three models presented in *Working Together*, to consult on those models and report its findings by March 2003.

In fact, we have chosen to present four models for consideration. Our goal in presenting the models for consultation is to gain a better understanding of the implications of the various models, their potential costs and benefits and the degree of support for new institutional arrangements.

The *Working Together* models that we assessed are:

- an enhanced Canada Customs and Revenue Agency (CCRA) that proposes improvements to the existing Charities Directorate within the CCRA;
- an advisory body, the Voluntary Sector Agency (VSA), that would work alongside an enhanced CCRA; and
- a Charity Commission that would assume all regulatory functions currently carried out by the CCRA.

In addition to the three models above described in *Working Together*, we have also identified a hybrid model – very similar to the suggested Canadian Charity Tribunal.³⁷ This model would leave compliance and audit functions with the CCRA but transfer decision-making powers to register and de-register charities to a new body.

At this stage we are seeking the views of those in the voluntary sector, their advisors, federal and provincial government officials, people currently involved – directly or indirectly – in regulating or supervising charities and the general public on the models presented. It is important to point out that regulating the voluntary sector involves both federal and provincial/territorial governments.

³⁷ The Canadian Charity Tribunal was proposed by Arthur Drache and Laird Hunter in the article, “A Canadian Charity Tribunal: A Proposal for Implementation” (2000).

Historically, supervising and protecting charity has been the exclusive jurisdiction of the provinces and territories. At the federal level, supervision is focused more narrowly on making sure organizations that are federally registered as charities under the *Income Tax Act* meet their legal obligations, and continue to be entitled to favourable tax treatment. Therefore, we have focused our attention on issues connected with registered charities.

In examining federal regulatory models, the Joint Regulatory Table recognizes that the voluntary sector has regulatory relationships with other levels of government. These relationships have their own history and dynamics. We acknowledge the importance of these relationships and believe there is benefit in exploring opportunities to develop a better co-ordinated system of regulation. With this goal in mind, we welcome the views of interested provincial and territorial governments on the regulatory issues discussed in this paper.

We also recognize that the regulation of charity is not a matter involving only government and the sector. The public has an important “stake” in how charities are regulated.

Charities, as part of the broader voluntary sector, help to cultivate a strong civil society and a federal government connected to citizens. Charities also provide opportunities for individual Canadians to volunteer or work on issues of importance to themselves and their communities. Also, because donors to charities receive tax credits, all Canadians have a financial stake in who is allowed to issue charitable-donation receipts since it is not simply the donor who is giving money – it is also the taxpayer.

For many Canadians, the fact that an organization is a federally registered charity is a “seal of approval” although the government makes it clear that this is not the case.

In this light, we have released this consultation paper and intend to make it widely available. The paper represents our analysis of the issues and examines various models to reflect the range of options that exist. Certain aspects of the models are interchangeable – the task is essentially how best to arrange the various regulatory functions that must be in place and determining the advantages and disadvantages of having various bodies assume some or all of those functions.

How You Can Help

If we are to gain a better understanding of the implications of various approaches, their potential advantages and disadvantages and the degree to which the models meet the needs of various stakeholders, we need to hear from you.

To learn how you can provide comments and/or participate in the planned consultations, go to www.vsi-isbc or call collect at 0 (613) 957-2926.

Background

The Voluntary Sector

The voluntary sector is one of three pillars that make up Canadian society, together with the public³⁸ and private sectors. Voluntary sector groups touch all aspects of society from education, health, faith, human rights, social justice and environment to arts and culture, sports and recreation. They deliver services vital to Canadians, promote common causes, support economic and community development in Canada and abroad, and raise funds.

The voluntary sector, in its broadest sense, is composed of all not-for-profit organizations that exist in Canada. Some are incorporated; some are not. Organizations range from small, community-based, self-help groups to large, national umbrella organizations and include such organizations as neighbourhood associations, service clubs, symphonies, universities, schools, and hospitals. Some – perhaps most – are designed to provide some form of public benefit, while others are professional or member-benefit organizations. All are dependent on volunteers, at least on their board of directors.

There are two elements to the meaning of the term “not-for-profit.” First, the organization cannot distribute any of its income or assets to its members. Second, the organization exists for some purpose other than making a profit. The *Income Tax Act* uses both meanings in its

³⁸ The public sector includes all levels of government -- federal, provincial, territorial, regional and local.

definition of “not-for-profit organizations,” which are exempt from paying tax on their income.

Federally registered charities

Federally registered charities – currently numbering about 80,000 – are not-for-profit organizations in both senses of the term. They do not distribute any profits to members and they exist to serve a public benefit.

For an organization to be federally registered as charitable, it must also be devoted exclusively to charitable purposes.

To determine which purposes are charitable, the courts have relied on the Preamble to England’s *Charitable Uses Act* of 1601. The Preamble contains a list of purposes that were regarded as charitable in Elizabethan times. If the purposes of an organization are considered the same or similar to those in the Preamble, then those purposes are charitable. However, the law is not static and over the years the courts have added to the list of purposes which are accepted as charitable. In 1891, the court created four categories of charitable purposes³⁹:

- relief of poverty,
- advancement of education,
- advancement of religion, and
- other purposes that have been found to be of benefit to the public and which have been found by the courts to be charitable.

The classification has been used since as a matter of convenience but it is not a precise definition. The “definition” of charity can be found in the case law. There is no legislated definition.

Although the courts still use the four categories, they have long recognized that what is accepted as a charitable purpose must change to reflect social and economic circumstances. This means that a purpose is charitable not only if it is within the list in the Preamble but also if it is similar to any purpose either within it or since held to be charitable.

³⁹ *Income Tax Special Purpose Commissioners v Pemsel* [1891] AC 531.

For regulators, it means looking at (and regulators are required to determine) whether the proposed purposes of an organization applying for registered status are identical to, or similar to, purposes that a court has previously determined to be charitable.

Status of Regulation of Charities in Canada

As discussed earlier, the regulation of charities in Canada is a matter that involves both the federal and provincial/territorial governments.

At the federal level, rules about registered charities are contained primarily in the *Income Tax Act*. Charities and not-for-profit organizations do not have to pay tax on their income. Charities can also issue tax receipts to donors who may claim their donations to earn a tax credit that reduces donors' tax payable. Charities are regulated because of the benefits they receive in the form of tax assistance. In 2001, federal government revenue not realized as a result of the donation credit for individuals and the deduction for corporations was about \$1.5 billion⁴⁰.

The *Income Tax Act* is the legislative responsibility of the federal Minister of Finance. The Minister is responsible for bringing before Parliament proposed legislation that affects the tax treatment of charities, as part of the Minister's overall responsibility for fiscal policy of government.

Administration of the *Income Tax Act* is primarily the responsibility of the Canada Customs and Revenue Agency, formerly known as Revenue Canada. The CCRA, in turn, has established the Charities Directorate (formerly known as the Charities Division). It administers the *Income Tax Act* provisions dealing with registered charities.⁴¹

⁴⁰ This figure is a conservative estimate of the total tax assistance provided to charities as it excludes the sales tax rebates for charities and the benefits associated with the tax-exempt status of charities. If one were to include provincial revenue not realized, this figure could increase to \$2 billion.

⁴¹ The Charities Directorate receives approximately 4,000 – 5,000 applications for charitable status each year. On average, three of four or (75 percent) are registered. At present, less information is available about the remaining 25 percent that are not registered. Approximately 100 applicants are formally denied charitable status each year. In other cases, applicants are given what is called an "administrative fairness letter" which requests further clarification about the application. In the majority of those cases, the application is abandoned.

The Charities Directorate is responsible for maintaining a complete and up-to-date register of charities as well as ongoing monitoring and compliance. The Directorate receives applications from those seeking registered charitable status and decides, based on the common law, if they qualify for tax benefits available to them under the *Income Tax Act*.

The Charities Directorate also provides information and advice to registered charities to assist them in complying with the *Income Tax Act* and conducts audits to verify ongoing qualification for the status.⁴² The Directorate revokes the registrations of organizations which are no longer charities or which are not complying with the Act.⁴³

Provincial and territorial⁴⁴ governments also have responsibility for supervising charities within their territory. Constitutionally, it is the provincial governments that are responsible for the establishment, maintenance, and management of charities operating in and for the province, and Parliament has given the same jurisdiction to the Territories. This raises the question of who has responsibility for the regulation of charities that are not “in and for” a province⁴⁵. Ontario has the most developed system, whereby charities are under the jurisdiction of the Office of the Public Guardian and Trustee. Alberta, Manitoba and Prince Edward Island have passed legislation that deals with fundraising by charities (and others) but do not actively supervise charities in other respects. In fact, few provinces actively supervise charities.

Process Leading to Current Review

In 1995, 12 national umbrella organizations covering most parts of the voluntary sector came together as the Voluntary Sector Roundtable (VSR) to strengthen the voice of the voluntary sector. Its goals were to enhance the relationship between the sector and the Government of

⁴² Approximately 500 - 600 charities or 0.6 percent of charities are audited annually.

⁴³ The vast majority of the approximately 2,000 revocations taking place each year result from the failure of charities to file their annual information returns. Research undertaken by the Joint Regulatory Table found that relatively few charities are revoked for other causes. Over the last three years, on average 11 charities per year have been revoked for other reasons.

⁴⁴ Each Territory has an Act of Parliament which delegates authority to legislate – which essentially mirrors the division of powers that apply to the provinces. So, for example, the *Nunavut Act* gives the authority to the legislature to make laws relating to hospitals and charities.

⁴⁵ *Constitution Act*, section 92(7)

Canada, to strengthen the sector's capacity and to improve the legal and regulatory framework governing the sector.

In 1999, the VSR released the final report of an independent panel of inquiry it commissioned in 1997 to conduct research, consult with the sector and present recommendations about how to promote accountability and governance in the voluntary sector. Known as the "Broadbent Panel", the report it prepared was called *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*.

The report contained 41 recommendations dealing with a wide range of matters and included a recommendation that the federal government establish a new Voluntary Sector Commission⁴⁶ to provide support, information and advice to voluntary organizations and to the public. It was also proposed that this new body have a role in evaluating and making recommendations to the CCRA on applications for charitable status under the *Income Tax Act*.

During this same period, the Government of Canada was also looking at its relationship with the voluntary sector. The Government recognized the need for a strong, vital voluntary sector if it was to meet its goal of improved quality of life for Canadians.

Following the release of the Broadbent Panel report, voluntary sector members and federal officials met in three groups, called "joint tables" to make recommendations on sector/government relationships, to strengthen the voluntary sector's capacity, and to improve regulations and legislation.

Through this process, the Table on Improving the Regulatory Framework was established to explore ways to:

- improve the regulation, administration and accountability of charities and other non-profit organizations, and
- examine federal funding support.

⁴⁶ For the purposes of this report, the Broadbent model has been adapted as "Voluntary Sector Agency."

It considered the advisability of creating a new Voluntary Sector Commission as well as other possible models for federal supervision of charities.

On August 29, 1999, the three Joint Tables released their combined report called *Working Together: A Government of Canada/Voluntary Sector Joint Initiative*. *Working Together* presented three models for the federal regulation of charities and the voluntary sector:

- an enhanced Charities Directorate within the CCRA,
- a complementary advisory agency that would work alongside the CCRA (somewhat similar to the Voluntary Sector Commission recommended in the Broadbent Panel report), and
- a quasi-judicial model akin to the Charity Commission for England and Wales.

While the previous Table did not seek consensus on which model was preferred, the *Working Together* report states that “there was widespread support among voluntary sector members of the Table for moving regulatory oversight out of Revenue Canada.” Also, they tended to favour the establishment of a quasi-judicial commission, while “government members tended to conclude that any of the three proposed models would work.”

Objectives of the Voluntary Sector Initiative

The Voluntary Sector Initiative (VSI), announced in June 2000, recognizes that the voluntary sector represents a vital part of Canadian society. The voluntary sector generates key economic spin-offs and creates hundreds of thousands of jobs. It delivers vital services in each and every community across Canada.

The VSI acknowledges that more needs to be done to support voluntary sector organizations because they strengthen the social, economic and cultural fabric of Canada. At the heart of the initiative is the promotion of two fundamental aspects of a successful nation: economic prosperity and quality of life. The VSI recognizes that Canada’s success as a nation has come not only from strong economic growth but also from healthy and strong communities and the voluntary sector organizations that sustain them.

The underlying objectives of the VSI are to help the voluntary sector increase its capacity to meet the needs of Canadians and to work with the sector to improve the government's policies, programs and services to Canadians. These objectives recognize the sector's role in policy advice beyond service delivery.

Voluntary organizations are close to the experience, interests and concerns of their constituents and this connection gives them a unique perspective on policy issues affecting the lives of Canadians. Accordingly, the VSI reflects the voluntary sector's finely tuned understanding of the needs of the people it serves.

Another factor needs to be noted as the process leading to the current review is recounted.

Near the start of the Voluntary Sector Initiative and the work of the Joint Regulatory Table, the Charities Directorate received separate funding to modernize some of its operations and determine how to provide better service. Some dramatic improvements have been achieved. For example, a four-week "fast track" process has been established for the majority (70 percent) of applications that are fairly straightforward. The remaining 30 percent of cases, where there is some degree of uncertainty whether the organization meets *Income Tax Act* criteria, are now processed within three months. In the past, processing times ranged from six months to two years. Efforts are also underway to provide greater public access to information held by the CCRA about federally registered charities. It is anticipated that the annual information returns (T3010s) submitted by charities as well as internal policies and operational guidance will be displayed on an enhanced Website by late 2002.

While we have taken note of these administrative improvements, our own studies are conducted independently of those by the CCRA. Among other things our studies address institutional models, such as those described in *Working Together*, some of which potentially conceive a very different role for CCRA in the regulation of charities. The CCRA has indicated that it intends to deal with any changes resulting from our deliberations and recommendations, together with its internal administrative improvements, under the umbrella of the Agency's Future Directions initiative. This initiative is seeking to align

the long-term activities of the CCRA with the evolving needs of government and Canadians.

Characteristics of an Ideal Regulator

Scope and mandate

It is the responsibility of Parliament to set out the broad parameters in terms of the benefits it is prepared to grant the charitable sector. The role of the regulator – under any institutional model – is to reflect the intent of Parliament through how it administers the provisions of the *Income Tax Act*. Therefore, it is limited in terms of granting benefits but has few limits in terms of designing a supportive and effective regulatory system.

In designing the system, the regulator must strike a balance between maintaining the integrity of the tax system by protecting it from abuse and providing a supportive regulatory environment for charities. The regulator must also consider the cost of achieving those goals.

Another key issue affecting the design of the system is the desire to build and maintain public trust in the regulator and the charitable sector. **Public trust in the regulator** depends to a large extent on its ability to assure the public that charities operating in Canada are being regulated appropriately, coupled with public access to information. At the same time the regulator must minimize the cost of compliance on charities and ensure that resources are used to maximum efficiency.

Sector trust in the regulator is linked to its perception that the regulator is:

- acting fairly and consistently in applying the law,
- committed to keeping the concept of charity up to date and in line with current social developments, statutes and court decisions, and
- involving the sector in a meaningful way in developing administrative policy.

Public trust in charities is linked, at least in part, to their willingness and ability to comply with the law. Another factor is the extent to

which charities are seen by the public to be providing public benefit in exchange for tax assistance.

It is our view that the primary focus of the regulator should continue to be the administration of the *Income Tax Act*. At the same time, we have considered how the objectives of the VSI can be promoted through institutional reform, and what part the regulator plays in supporting the sector so that the sector can enhance the quality of life of Canadians.

We believe that in order to ensure there is public confidence in both the regulator and registered charities as well as to reflect the intent of the VSI, a number of core values are needed to guide the government in designing a supportive and effective regulatory system.

Guiding Values

For the Table, the objective of institutional reform is to have a regulator that is recognized and respected by charities, stakeholders and the Canadian public for its integrity, fairness, knowledge and innovative service delivery resulting in client-oriented service and improved compliance.

The regulator should have accessible, effective, progressive and clear policies that, within the legal framework, guide, support and inform the sector, the public and the regulator. Also, programs should be established that maintain the accuracy and integrity of regulatory decision-making and provide fair, timely and consistent dealings with the public and the sector. The system should encourage voluntary compliance with the rules and necessary sanctions should be applied in a progressive manner. The regulator's staff should be supported with the resources necessary to promote service excellence.

We have identified the following four core values, which we believe the regulator should have.

Integrity

The regulator should provide the highest level of expertise and reach decisions through an impartial, transparent and fair process.

Openness

The regulator should encourage a free exchange of ideas and promote open, timely and constructive communication with those whom it serves – the charities and the public.

Quality Service

The regulator should be committed to delivering high quality services to its clients. It should be the source of timely and authoritative information and advice.

Knowledge and innovation

The regulator should be forward looking and in step with society's needs and expectations. It should use new technology to ensure its services keep pace with changing needs. The regulator should be committed to building its capacities in the following areas:

- **Awareness and understanding of society's needs:** To be effective and relevant to Canadian society, the regulator must be able to gather information about changes that are happening in the environment around it. It should be aware of shifts in public values about what is and is not regarded as beneficial to the public and take this into account in shaping the legal understanding of charity in Canada.
- **Policy development:** To encourage broad participation, the regulator should see ongoing dialogue with the sector, other government departments and the broader community as an accepted way of doing business. The federal government is committed through the VSI to involve the sector in developing policy. A Code of Good Practice on policy development is being developed. The regulator should use this tool to guide its communication with the sector during the policy development process.
- **Continuous learning:** The regulator should have a good understanding of the things it does and does not do well. It should work to continually improve how it fulfils its mandate. To be innovative and responsive, the regulator should provide opportunities for the sector, its advisors and other stakeholders to participate in developing the regulator's priorities and reviewing outcomes. This participation also will provide the regulator with an opportunity to obtain expert knowledge to supplement its expertise.

Also, the regulator should promote staff training and professional development to maintain and improve internal expertise and quality of work.

Other critical success factors

A number of Canadian and international studies have looked at the range of powers and responsibilities for a charities regulator. A listing of these background materials can be found in Appendix 2.

We have reviewed this research and identified a number of common concerns discussed in all studies that must be addressed if the regulator is to be effective in fulfilling its mandate. We have also considered the concerns of some specific authors that go even further and offer our views on those concerns. Our assessment of the issues is provided below.

Support

It is in the interest of the regulator that charities have good administration practices and are effectively organized. This is particularly important since its primary role is to provide confidence that publicly donated funds are being used for charitable purposes. Constitutionally, the federal role in providing support to the sector is limited to compliance with the ITA. It is unclear, therefore, whether it is appropriate for the regulator to fulfil a support role that would go beyond a commitment to inform and assist its clients.

The Panel on Accountability and Governance in the Voluntary Sector suggested the regulatory body should have a nurturing function. We have reached a different conclusion.

Tension and even skepticism sometimes mark the relationship between a regulator and the regulated. There are few situations where a regulator is seen – or wants to be seen – as a “friend” of those it regulates.

This does not mean that the relationship consists of only formal encounters or that the regulator’s role is solely punitive.

It is our view that it is the responsibility of any regulator to ensure that those it regulates have the information and understanding they require

to comply with the laws and policies enforced by the regulator. Therefore, there is clearly an educational and support function that the regulator must take on. This function includes such things as making sure that the regulated are aware of the rules that govern them (such as ensuring directors are aware of financial reporting requirements) and have the assistance necessary to comply with those rules. It also includes providing information and advice to the general public and to donors who may wish to have more information about a charity or the tax treatment of their gift before making a donation.

Our recommendations on transparency deal, to some extent, with the awareness issue. Our proposal that operational policies be publicly available and that there be greater public release of information on how and why the regulator comes to its decisions will also help in that regard.

We expect, however, that any regulatory model chosen will go beyond that passive role and take an active role in making assistance available to charities. In England and Wales, one of the most popular activities of the Charities Commission is its regular series of site visits. Commission staff visit various locations throughout the country and meet informally with charities to discuss concerns, issues or questions.

We acknowledge that Charities Directorate staff have, in the past, conducted seminars across the country, largely around the T3010 annual reporting form. These trips are helpful, but do not do enough to address the information needs of charities.

In 2001, for example, 7,700 organizations requested an information session but only a third of these were able to attend one of the 66 sessions held that year. There are a number of reasons for this. The Charities Directorate has little funding to allow its staff to travel to other parts of Canada and it must rely on organizations in centrally located cities to offer space to host the sessions. More resources will be needed to make sure those regulated have the information they require to comply with the laws and policies enforced by the regulator.

Site visits and information sessions – particularly in a country as large as Canada – will not be enough. Whether through call centres, computer technology or otherwise, the staff of the regulatory body must

be available to provide answers – complete, timely and authoritative answers – on questions that are posed by the regulated.

Our view on nurturing should not be taken as a feeling that the nurturing role is not required – only that it is not appropriate for the regulator to fulfil this role.

Clearly, charities do require continuing education in matters of law and practice. Issues as complex as accreditation or best practices, and matters as simple as dealing with questions a charity does not want to put to its regulator, are realities in the voluntary sector. Similarly, the public may not want to put the future of a charity in jeopardy by reporting minor concerns to the regulator. There must be some place for the public and charities to go with such concerns.

In its report, the Panel on Accountability and Governance in the Voluntary Sector wrote at considerable length of the need for and value of umbrella organizations. We agree with those observations. While we understand one of the functions of a regulator is to assist its clients with compliance issues, we believe that there needs to be something similar to “industry associations” that help charities with issues beyond complying with the ITA.

A number of such organizations already exist in many of the fields in which charities operate. From the national umbrella groups to hospital associations to volunteer centres, some organizations provide ongoing support to their members. In many cases, however, these organizations cannot possibly be self-sustaining based on membership fees alone. The resources and diversity of the charitable sector in Canada – where 80% of charities have an annual income of less than \$250,000 per year – make it difficult for these umbrella groups to survive financially if they are to serve all charities and not just those that can afford to pay.

We further agree with the Panel on Accountability and Governance in the Voluntary Sector (PAGVS) on the need for a nurturing function. We suggest, however, that it be placed in adequately resourced umbrella organizations. We welcome views on this issue. We also note that there are some issues with the rules regarding the charity status of such organizations. Under current administrative policy, umbrella groups are only eligible if at least 90% of their members are qualified donees. Umbrella organizations also may be disqualified if

they only provide support services and do not deliver charitable programs themselves. We also look forward to comments on whether these are reasonable conditions for the type of supportive organizations we foresee.

Profile/Visibility of the Regulator

One of the purposes of any regulatory system is to assure the public that someone is supervising the activities of the regulated to ensure compliance with the applicable laws. While we know that Canadians have a high degree of trust in charities, we also know that they expect charities to be monitored. One of our concerns is that few Canadians know that there is any formal monitoring of charities and even fewer know who provides that monitoring.

In *Talking About Charities*, a study released in 2000 by The Muttart Foundation and the Canadian Centre for Philanthropy, more than half of the 3,900 respondents said they believed there was a body that was responsible for overseeing the activities of charities. Another 21% did not know whether or not there was such a body. Of those who did believe such a body existed, only 20% (or 5% of the total sample) knew that it was CCRA who had at least some such responsibilities.⁴⁷

A survey commissioned by the CCRA had similar results. The survey, conducted by Ipsos-Reid, examined public awareness, knowledge, and behaviour regarding charitable donations. The vast majority of Canadians (87%) said they were aware that charities must be officially registered before they can issue tax receipts.

However, the survey findings reveal that Canadians have little knowledge about other elements of charity registration. When asked to name the organization responsible for determining whether a charity qualifies to be officially registered, two in three respondents (65%) had no idea and only one in ten (11%) correctly identified the CCRA.

The findings also suggest that Canadians desire more information about the registration of charities. Six in ten respondents (62%) believe

⁴⁷ *Talking About Charities*, The Muttart Foundation and the Canadian Centre for Philanthropy, 2000. With the sample size in this study, results are considered to be accurate within plus or minus 0.8%, 19 times out of 20.

knowing the name of the organization responsible for registering charities is very important.⁴⁸

Public trust and confidence is minimized when there is limited knowledge that regulation exists. Therefore, it is important for the regulatory body to make sure that it has a public profile. Such a profile does not come only – or even primarily – from regulatory actions that are taken. There must be a determined effort by the regulator to appropriately establish its presence. Canadians must be aware that the regulator exists, what it does, and what registration as a charity does and does not mean.

Resources

To instil public confidence and trust, the regulator must have the physical, financial, human and technological resources to perform the duties expected of it.

In recent years, a number of concerns have been voiced about the service standards within the Charities Directorate and in particular, the speed with which applications are processed.

Since the announcement of the Voluntary Sector Initiative, there have been some promising signs. The Charities Directorate has received additional resources to allow it to undertake a “Future Directions” program – a modernization effort aimed at closing the gap between potential and current performance.

Yet much remains to be done. The Directorate’s offices are scattered around the National Capital Region. It has several computer systems that are not able to communicate with one another. The record-keeping technology has not been updated for many years and no longer meets the management needs of those in charge of the Directorate. It has little funding to allow its staff to travel to other parts of Canada.

What is of particular concern – and something that must be resolved whatever regulatory model is chosen – are the demands that are put on

⁴⁸ A total of 2000 Canadian adults were surveyed in two waves of telephone interviews between December 4 and December 13, 2001. The results are considered to be accurate within ± 2.2 percentage points, 19 times out of 20, with statistically reliable results for each major region of the country.

people who regulate charities, and the question of how the regulator can better attract and retain qualified staff.

One of the long-standing concerns of management of the Directorate, commentators and charities has been the relatively low classification level and pay of those who must decide on the registration or de-registration of charities.

In many – perhaps most – regulatory bodies, there is a firm set of laws and regulations that are enforced. Contrast that with the Charities Directorate, where there is no clear definition of what the word “charity” means.

Staff in the Directorate are asked to look at applications – many of them filed by well-meaning volunteers with little legal expertise – and determine whether the organization’s purposes are charitable. In doing so, they must know charity law well and be capable of taking a wider view of the social and economic circumstances of the day. This task requires considerable skill. Staff require not only suitable background, but also substantial expertise and ongoing professional development.

Few of the people who move into the Charities Directorate do so to make it a career. While staff turnover is common across government, it is particularly harmful for the client groups involved – including marginalized groups and vulnerable citizens. We have learned this is a concern in other countries as well and are looking for suggestions, including those from individuals working in the Directorate, on how this issue could be addressed.

Following the consultation process, we will incorporate these suggestions into our findings on the need for the regulatory body to have sufficient resources. This will include the need for re-examining human resource policies, including the level of pay staff receive and their opportunities for professional development and advancement.

Location of the regulator

There are some who argue that we should not examine any regulatory model that includes the CCRA. The assertion is that the CCRA, as a tax collector, has a conflict of mandates when it is also asked to consider an application that would exempt an organization from paying taxes and allow it to issue tax-credit receipts to donors.

We have included an analysis of what has been termed the “enhanced CCRA” model, both because our mandate directed us to do so and also because we have not found evidence to support the assertion that such a conflict does, in fact, exist.

CCRA administers some 62 statutes on behalf of a variety of government departments, ranging from immigration to agriculture. It collects fees and taxes and it waives fees and taxes.

The argument that CCRA is an inappropriate regulator of charities asserts that when considering whether to register an organization as a charity, examiners consider the foregone revenue that might otherwise be payable to government. In practical terms, this argument can only be about the tax-credits available to donors to charities, since the organization would be unlikely to pay taxes in any event. If it is not registered as a charity, it is likely to be a not-for-profit organization and therefore exempt from taxes.

We acknowledge the sincerity and the concern of those who make such arguments. Yet, we have seen no evidence that the arguments are borne out in practice. If any evidence does exist, we hope it will be presented during the consultation process.

In examining the models, we have considered some of the advantages and disadvantages of having some or all regulatory functions within an existing federal government agency or a standalone specialized entity such as a commission. While we do not believe there is a conflict in mandates in having the CCRA act as the regulator, there may be other inherent conflicts, which may have implications for the models. For example, placing regulatory functions within an existing government agency means the regulator has to meet a range of objectives – those linked to its purpose and mandate plus those of the agency in which it is located. A commission would have a singleness of purpose and limited management layers.

However, there is no guarantee that placing regulatory functions outside a government agency will create fewer administrative difficulties. For example, it has been argued that creating a standalone commission may improve staff retention rates. However, some individuals may feel there is greater opportunity for advancement within a larger government agency as compared with a small,

specialized commission. That being said, the profile and visibility of a standalone regulatory body may be greater than a small, operational unit within a larger government agency. Also, the commission may be able to provide more specialized services to its clients. A commission may also be seen to be more distant from both government and the sector perhaps increasing the perception of objectivity and impartiality in its decision-making.

At the same time, it should be noted that the regulator no matter where it is located would carry out all the same functions and have the same decision making powers as the current regulator. Also, there are a number of advantages to having the regulator within an existing government agency. For example, the regulator would be able to take advantage of existing government infrastructure and services such as legal advice, corporate services and information management systems.

Legal principles and powers to determine charitable status

A number of commentators have suggested the CCRA may be too conservative in its interpretation of the law and, in particular, in its approach to registrations. We have examined this issue. We found that the CCRA approves applications for registration at a rate that is comparable to other jurisdictions including England and Wales as well as the United States. However, similar complaints have been voiced in those jurisdictions as well. Also, varying rules in different jurisdictions make direct comparisons difficult.

One reason for being cautious when registering charities may be the fact that registrations are based almost exclusively on materials submitted by the applicant. There is no systematic process to identify and correct wrongful registrations. Also, there is little ongoing regulatory supervision once the CCRA makes a decision. The process really stops to a large extent at the decision to register.

Concerns have also been expressed about the current approach to political activities on the part of charities. The law states that a charity cannot have a political purpose or be engaged in partisan political activities. Engaging in political activities is allowed to the extent that those activities are non-partisan and a very minor part of the activities and purposes of a charity. This is a broad rule that has created some confusion about what is and is not permitted.

The definition of charity has also provoked much discussion. Some argue that there should be a legal definition of charity. The courts have said that they are ill equipped to make social policy and that those decisions should be made by Parliament or by elected officials. The Panel on Accountability and Governance in the Voluntary Sector proposed such a solution and recommended that Parliament reconsider the definition every 10 years.

The Supreme Court of Canada, in the *Vancouver Society of Immigrant and Visible Minority Women* case⁴⁹, also suggested that Parliament address this issue. Others in the charitable sector oppose such a definition, saying it would create too “rigid” a system and that it would lead to a situation where only “politically palatable” organizations would obtain registration.

The Department of Finance and CCRA are reviewing the administrative and legislative issues related to political activities and charitable status. They have met with representatives of the sector as well as a number of government departments to discuss concerns in this area.

At the same time, a separate, sector-side working group called the Advocacy Working Group, has been established within the Voluntary Sector Initiative to canvass the views of the sector.

The Institute for Media, Policy and Civil Society, in partnership with the Canadian Centre for Philanthropy, conducted consultations with the sector and released the report, *Let Charities Speak*, in March 2002. The report highlights the lack of clarity surrounding the rules on political activity and is critical of the way in which the Charities Directorate administers the *Income Tax Act*.

Many of the concerns described above are not matters of institutional reform, but rather how the regulator applies and interprets the law. The Directorate, acting on the same basis as the courts, works within and interprets the legal rules that determine whether an organization is charitable. These are mainly laid down in decisions of the courts on particular cases rather than set out in Acts of Parliament. Because there is not a precise definition of charity, the Charities Directorate must look

⁴⁹ *Vancouver Society of Immigrant & Visible Minority Women v. MNR*, {1999} 1 S.C.R.

closely at those purposes that have already been recognized as charitable.

There may not always appear to be any direct court precedent. In such cases, the Directorate then has to decide (using fundamental legal principles) whether efforts to address problems raised by changing social needs are legally charitable in the same sense as those already accepted as charitable. In reviewing applications, the Directorate must consider whether the court would or would not allow a particular organization to be recognized as charitable. The Directorate does not have the power to change the law beyond the flexibility that is implied in the decisions of the courts. Any changes beyond that would need to be made by the courts or by Parliament.

While in some cases a sufficiently close analogy may be found, in others an analogy may only be found by following the broad principles laid down by the court. Unfortunately, the small number of court cases dealing with what is or is not charitable in Canada does not give the Directorate the guidance it would have if a larger number of legal precedents were available.

Some of these concerns will be addressed through an improved appeals process and increased opportunities to create precedents (see chapter 2 for a discussion of our recommendations on the appeal process).

Co-ordinated Regulation

Regulation of charities is shared between the federal, provincial and territorial governments.⁵⁰

Constitutionally, the provinces have the authority to make laws regarding the “establishment, maintenance, and management of charities in and for the province” by the *Constitution Act, 1867*.⁵¹

The federal government’s regulatory involvement is premised currently on its authority to make rules regarding income taxes. Because donations to registered charities create a tax credit, the federal

⁵⁰ Some municipalities have enacted bylaws that also can impact the charitable sector, ranging from taxation of property to regulation of fundraising.

⁵¹ *Constitution Act, 1867, subs. 92(7)*

government, through the *Income Tax Act*, has developed a series of rules regarding the operation of charities.

Among the powers exercised by the federal government, a significant one for the sector is the power to determine which organizations can be registered as charities under the *Income Tax Act*. Supervising the sector at the federal level is focused on making sure organizations that are federally registered as charities under the *Income Tax Act* comply with the Act and continue to be entitled to favourable tax treatment.

In examining new institutional arrangements, we recognize the important role that provinces play in regulating the charitable sector. While our review focused on the situation at the federal level, it also examined areas where both levels of government are involved and found instances where regulation may not be consistent across jurisdictions. For example:

- An organization that is considered to be a charity under provincial law may not qualify for registration as a charity under the *Income Tax Act* and a federally registered charity may not be considered charitable for all purposes (e.g., gaming) in a particular province.
- The provinces have involved themselves in the regulation of charities to different degrees, ranging from virtually no regulation to a significant supervisory authority.
- The *Income Tax Act* does not define the term “gift” and organizations in Quebec are entitled to the application of the Civil Code in determining whether or not a contribution is a gift. This means gift can have a different meaning in different parts of the country.
- It is not clear who has jurisdiction for charities that are not “in and for the Province,” in other words, a national organization or an organization that operates in more than one province or on the Internet.

Multiple regulatory structures and rules can create an additional compliance burden on charities. This can also negatively affect public confidence by creating confusion about who is regulating the sector. There is potential for poor co-ordination and overlapping of duties.

A number of possibilities have been suggested. One option is to establish a national regulatory body through which federal, provincial and territorial governments could better co-ordinate the regulation of charities. Another possibility is for some kind of agreement between the federal and provincial and territorial governments, which would take into consideration specific needs of individual provinces and territories.

We are interested in hearing the views of others, including provincial and territorial governments, on these issues.

The broader voluntary sector

Unlike the Joint Regulatory Table that was confined in its mandate to focus on charities and regulatory reform, the Voluntary Sector Initiative was designed to look at more than just registered charities. It was designed to benefit voluntary-sector organizations, whether incorporated or not, whether a registered charity or not-for-profit organization that, for whatever reason, is not registered as a charity.

In the field of regulatory reform, this is a larger problem than, perhaps, it is in some of the other areas of the Voluntary Sector Initiative. It is, for practical purposes, impossible to develop a regulatory system that encompasses all charities and not-for-profit organizations that exist.

For example, some not-for-profit organizations could be registered as charities except for their political activities.⁵² In other cases, an organization may have no wish to accept donations for tax-credit purposes, but is clearly serving a public benefit. In still other cases, a group of professionals may band together for mutual benefit. Their interest, while private, is nonetheless acceptable for consideration as a not-for-profit organization. Comparing a condominium association with an organization whose members organize walkathons to raise funds for wheelchairs is difficult. Designing a common regulatory system borders on the impossible, at least within the time and resources available to us.

⁵² The Table does not comment on whether the existing rules related to political activities are appropriate or not. Indeed, it accepts that some legal advisors to charities advise their clients to register as both a charity and a not-for-profit as a matter of course.

As a result, we have concentrated our attention on issues that pertain to registered charities.

Potential Mechanisms

We have explored a number of administrative mechanisms through which the characteristics of an ideal regulator could be realized and the critical success factors identified above could be met.

Public consultation: The Charities Directorate has in the past often consulted with interested stakeholders prior to introducing new policies. However, we believe more could be done to identify areas of mutual concern and create more opportunities for dialogue and feedback, particularly in exploring the boundaries of what is and is not charitable. The regulator, for example, could broaden public input into the administration of charity law through widely advertised consultation. This consultation could take the form of exhibitions, displays and appearances. Regulatory staff should also alert organizations with whom they are dealing when they want to consult with them on a topic which affects the organizations.

Ongoing public consultation would also enable the regulator to identify new trends, contribute to available knowledge about the sector, gather intelligence on areas of concern and plan how to monitor Canadian charities with the input of those most affected.

Annual reporting: This could allow the regulator to communicate to stakeholders on its activities and performance. Such reporting could include:

- statistical information on charity applications, denials, registrations, trends, etc.
- results in aggregate of audits and compliance measures,
- extent of support provided to charities to assist them with compliance,
- outreach and communication activities, and
- levels of expenditure.

Other more general information such as trends in the type of organizations seeking registered status and reasons for de-registration could also be summarized. An annual report may also increase the profile of the regulator vis-à-vis the general public. Other ways to enhance access to information about the performance and activities of the regulator are discussed in chapter 1 on transparency.

Ministerial advisory group: It has been suggested a charities advisory group with membership from the voluntary sector and other government departments could advise the government on improving the policy framework. This body would report to a minister and would oversee a staff team who would be responsible for carrying out the charities advisory group's work plan.

The advisory group would play a key role in encouraging the free exchange of ideas and promoting open and constructive contact between the regulator and the regulated. Its guidance would help senior regulatory officials become sensitive to developments in the sector and make sure that all key internal and external groups are involved in policy development.

The members of the advisory group could represent a wide range of interests and multiple viewpoints, including:

- representatives from the sector,
- regions,
- the general public,
- allied professionals, and
- a range of government departments with a policy interest in the regulatory affairs of charities including, the Department of Justice, Heritage, Finance, Health and Industry Canada.

Officials have a conflict of interest between their duties to ministers and their responsibilities as members of advisory bodies. Public servants are required to provide advice only to a department and minister. To ensure government members have the opportunity to provide information and context for outside members, it is suggested they sit in an ex-officio capacity – meaning they would have no decision-making role. The ministers of the relevant departments

would have the authority to appoint employees to the advisory group. The government would appoint non-governmental members of the charities advisory group. These appointments would be part-time.

This consultative body would have a number of responsibilities and levels of involvement:

- **Administrative Policy Advice:** The primary role of the advisory group would be to provide administrative policy advice on such issues as mechanisms for achieving compliance, the interpretation of the law on charitable status and other areas under the administrative authority of the regulator.

The charitable sector is vast in terms of both numbers and operational practices. This body would provide those involved in regulation with a “touchstone” against which they can assess proposed policy initiatives, test new ideas and confirm the service required and delivered. As such, it could play a key role in the regulator’s cycle of planning, monitoring, evaluating and reporting of results through a minister to Parliament and citizens.

The advisory group would also have the authority to review in aggregate, registration decisions made by the regulator and provide comment on trends and the quality of decisions being made.

It has been suggested that the sector have an active interest in monitoring and reporting on illegal activities particularly when they affect the public’s perception of charity. The charities advisory group could be asked by the minister to provide advice on the administration of the sanctions regime once provided for in statute. For a discussion of our proposals for a sanctions regime, please see chapter 3.

- **Communication:** To promote open communication and transparency, the advisory group would report on its activities, initiatives and findings as part of the regulator’s annual reporting process.
- **Consultation:** The advisory group would take a lead role in assisting the regulator with prioritizing among various initiatives and ensuring development is timely, policy is written in a clear, concise manner and consultation begins early in the development cycle. The advisory group will assist the regulator to explore issues of concern and increase the capacity for institutional learning.

We have considered whether this body should be asked to review and provide direction on specific cases before a final decision is made by the regulator and, in this way, create an opportunity to resolve cases before turning to the courts. We have rejected this idea. It is our view that access to a fair and impartial review process is a more appropriate mechanism through which to resolve disputes and seek guidance. For a full discussion of our proposals for reform of the appeal process, please see chapter 2.

It should be noted that an advisory committee was created within the Charities Directorate in the mid-1980s, but it did not meet regularly, was not adequately funded and no longer exists. Its purpose was to provide the Charities Directorate with administrative policy advice and act as a sounding board for new communications initiatives. Representatives were selected from a cross-section of charities, sector umbrella groups, government departments and charity law specialists. We see a significantly expanded role for the charities advisory group. However, experience of the past illustrates the requirement that this advisory group, if implemented, be adequately funded and supported. To accomplish the tasks outlined for the charities advisory group, there is a need for a dedicated staff.

We are interested in hearing the views of others on the value of establishing a new ministerial advisory group on charities as well as on its structure, composition, role and the resources needed to support it.

Professional development: The need for staff to become more competent in interpreting the legal rules that determine whether an organization is charitable and the need to retain these experts on staff have been identified by us as critical success factors. Mentoring, professional exchanges and other methods exist in other parts of government and in other regulatory bodies to allow for ongoing professional development of regulatory employees.

We are interested in hearing views of the extent to which the mechanisms identified above would address existing concerns.

International Comparisons

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 de-registration 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 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. For a discussion of the distinctions between England/Wales and Canada, please see Appendix 1.

Under the *Charities Act*, 1993, 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, 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.

Proposed Institutional Models

Summary of models

We considered four models for the federal charities regulator. Three of the models are essentially identical to the three options recommended in the 1999 report “*Working Together*.” These are:

- Model 1 – CCRA, improved as a result of the Future Directions initiative currently underway and through options we propose (regardless of who the regulator is) for a new appeals process, new compliance measures, and greater transparency of the regulatory process;
- Model 2 – an enhanced CCRA with an advisory agency⁵³, as recommended in 1999 by the Broadbent Panel on Accountability and Governance in the Voluntary Sector and similar to the “agency” described in *Working Together*; and
- Model 4 – a Charity Commission that would assume all regulatory functions currently performed by the CCRA.

We have added a hybrid model:

- Model 3 – a combination of Model 1 and Model 4 that would leave administrative functions in the CCRA but create a Charity Commission to handle the adjudicative responsibilities involved in registering and de-registering charities.

The following description of the four models highlights how the various functions that must be in place have been arranged under each model and some considerations linked to implementing the models.

⁵³ This is not the ministerial advisory group discussed earlier.

The considerations identified are speculative. It is not possible to know with certainty how the models will work until implemented.

The functional descriptions of the models are followed by a list of evaluative criteria. The criteria are based on our identification of the characteristics of an ideal regulator, critical success factors and other considerations discussed earlier in this paper. We are interested to learn if these criteria are appropriate and if any additional factors should be considered in our final review of the models. A chart summarizing our assessment of the models against the evaluative criteria is provided on page 113.

In reviewing the models outlined below, it should be noted that we are aware that other models for enhancing the relationship between the Government of Canada and the voluntary sector are emerging under other aspects of the Voluntary Sector Initiative. Options under consideration include the appointment of a minister or group of ministers with responsibility for the voluntary sector at the federal level, a secretariat and a Parliamentary committee on the voluntary sector. It will be necessary to determine the interplay between the models described here and one or more of these bodies once recommendations from other Tables are finalized.

Description of Models

Model 1 - Enhanced CCRA

Of the models that we considered, this one is closest to the current arrangement. No regulatory functions would be removed from the CCRA. The CCRA would continue to be an administratively autonomous agency whose empowering legislation is under the policy direction of the Minister of Finance. In other words, the CCRA facilitates and administers the regulations in the ITA that pertain to the charitable sector, whereas the Finance Minister is accountable for the ITA itself including any changes to the Act.

The Director General of the Charities Directorate would continue to report to the Assistant Commissioner, Policy and Legislation Branch and through a chain of command to the Commissioner of the CCRA.

The role of the Charities Directorate would be to continue to reflect the intent of Parliament through its administration of the provisions of the

Income Tax Act pertaining to charities. The Directorate would apply the law in a fair, consistent and open manner through greater transparency of its decision-making processes, the publication of its reasons for decisions and greater emphasis on building the skills of its employees to deal competently with the complexities of charity law.

Applicants would be able to seek a review by an impartial authority of a decision to deny registered status. A description of the existing appeal process and our proposals for reforms are contained in chapter 2. The suggested appeals process is the same across all models.

A charities advisory group would be established to provide administrative policy guidance on such issues as the administration of the sanctions regime, mechanisms for achieving compliance and developments in charity law. It would also identify issues for consultation and strengthen the CCRA's ability to identify emerging issues and trends. As this body is not strictly advising on technical matters it would be advisory to the Minister of National Revenue.

The advisory group would consist of non-governmental charity law specialists and representatives of the voluntary sector. It has been suggested that the CCRA would benefit from involving officials from other government departments on the committee to provide technical advice. However, public servants have a conflict of interest between their duties to ministers and their responsibilities as members of an "independent" advisory group. Therefore, government officials could only participate in an advisory capacity.

Additional resources would be provided to allow the regulator to provide greater support to charities in understanding their legal obligations. Charities Directorate staff would visit various locations throughout the country and meet informally with charities and umbrella groups to discuss concerns, issues or questions. Also, the Directorate would broaden its outreach program to provide greater access to its educational seminars.

Additional support and information would be available through a quarterly newsletter and an enhanced Website. This would assist charities in understanding the rules that govern them federally and make sure organizations interested in seeking charitable status are aware of the application process and eligibility requirements.

Voluntary sector umbrella groups would provide support and assistance to charities with concerns not related to the ITA.

The profile and visibility of the Charities Directorate would be enhanced through a greater presence on the CCRA's Website, annual reporting to the public through its Website on its program activities and achievements, and increased participation in sector and allied professional conferences and symposiums.

Service improvements would also be in place as a result of the Future Directions initiative, now underway within the CCRA. Performance indicators would be established with input from the charities advisory group on registration, policy and communication, compliance, returns and client assistance. Annual reporting on the service expected and delivered would be made publicly available.

The CCRA would also retain responsibility for providing information about charities and the charitable sector to the public. Through its Future Directions initiative, the Directorate would develop and maintain an enhanced Website with a searchable database that would provide greater public access to information about charities including current status, reasons for registration, annual information returns, and any compliance actions taken. A more thorough description of our proposals for enhancing the transparency of the regulator can be found in chapter 1.

Considerations

Since this model is closest to the current administrative structure it is the least costly and least complex to implement. While legislative amendments would be needed to implement our recommendations on transparency and the appeals process, no significant statutory provisions would need to be introduced to implement this model.

At the same time, the Charities Directorate is a very small operational unit within the largest department of government and there is a long history of it being neglected in terms of resources. The Charities Directorate would need additional resources to enhance its operations and profile as well as meet performance expectations.

The CCRA is recognized for its ability and expertise in interpreting and applying the *Income Tax Act*, including the administration of a number

of social benefits such as the Canada Child Tax Benefit. The Directorate's policy development capacity and external consultation program would need to be enhanced.

Model 2 - Enhanced CCRA + Voluntary Sector Agency (VSA)

Under this model, two institutions would have complementary mandates. The CCRA would continue to administer the ITA and make the decisions; the VSA would conduct outreach with the voluntary sector and the public and advise the CCRA on administrative policy. To fulfil such a mandate, the VSA would report to Parliament through a minister.

The VSA, as an arm's length body, would have a presiding board composed of part-time members supported by a professional staff. The latter may be public servants appointed under the *Public Service Employment Act*, but they could also be employed by the presiding board. The head of the staff could be appointed by either the Public Service Commission or by the Governor in Council⁵⁴ and the head would answer to the chair of the presiding board. The chair would have statutory authority for the management of the staff and the financial affairs of the agency.

The length of term, for which appointees would serve, reporting relationships, eligibility for re-appointment and conditions under which they could be removed would be set out in legislation.

The VSA would have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration and by giving charity trustees and directors information or advice on any matter affecting charity (exceeding federal regulatory requirements and including, conceivably, in

⁵⁴ Appointments by the Governor in Council are those made by the Governor General on the advice of the Queen's Privy Council of Canada represented by Cabinet and are handled through a distinct process which recognizes the Prime Minister's prerogative to co-ordinate or determine all appointments. The Prime Minister is supported by the Director of Appointments within the Prime Minister's Office who, in consultation with Ministers' offices, is responsible for identifying high calibre candidates who could be considered for such an appointment. The Privy Council Office plays a supporting role to both the Prime Minister's Office and the Clerk of the Privy Council on Governor in Council appointments, and works co-operatively with the Director of Appointments in identifying vacancies and interviewing potential candidates. The Privy Council Office ensures that statutory and procedural requirements are met, and advises on issues of feasibility, remuneration and conditions of appointment.

fundraising, governance practices, and other matters that may fall within provincial jurisdiction).

The VSA would assume the CCRA's compliance education function within its broader education role. The VSA would essentially be a one-stop clearinghouse of information about the entire sector and on best practices in voluntary sector management and administration. This is the only model that includes the mandate to serve the broader voluntary sector and not just registered charities. The CCRA would be called upon to provide advice on developing and implementing the VSA's compliance education program for charities.

The VSA would also act as a champion and promoter of the sector. It would be an interface between government and the sector and represent the concerns of the sector to government. The VSA could potentially pull together support and consultation functions carried out in other government departments, such as Heritage, Human Resources Development Canada and Health. The VSA would also assume part or all of the CCRA's current responsibility for providing public information about charities.

This is the only model without an advisory group because it is assumed that the VSA will perform the advisory function itself. The VSA would provide the CCRA with administrative policy advice and would have the authority to review all decisions made by the CCRA and provide comment, in aggregate, on trends. It would not, however, have the authority to review specific cases.

The VSA and the CCRA would develop guidelines on information sharing and the ability to confer and consult at various organizational levels.

Considerations

The VSA could foster the development of the voluntary sector in Canada by increasing the profile of the sector and creating a central point of contact for information about the sector. However, there may be considerable scope for conflict between the VSA and the CCRA. Although not a decision-making body, the VSA's recommendations would carry significant weight. At the same time, the ability to comment on cases, even in aggregate, without having authority or responsibility for their disposition may create some tension between the

two institutions should the VSA disagree strongly with a CCRA decision and/or its approach to charity files. On the other hand, this input may be useful in helping the CCRA identify issues of concern to the sector and explore possible solutions. Also, having an agency dedicated to voluntary sector issues may encourage greater discussion on the health of the voluntary sector in general and the status of charity law in Canada.

It has been suggested that the VSA act as an interface between government and the sector. This could further enhance the relationship between the sector and government. However, this model may duplicate efforts. While the VSA could potentially pull together support functions in other government departments making it easier to gather information, it may be more desirable to have individual departments with technical and experiential knowledge continue to provide support and information to parts of the sector they deal with most frequently. In addition, the sharing of best practices in voluntary management, for example, may be more effectively and efficiently undertaken by existing sector umbrella groups. At the same time, it should be noted that a number of potential roles described for the VSA are not currently being performed, such as the policy co-ordination and champion roles. Others are under-resourced. The question of roles and resources is presently being discussed in terms of the future governance of the Voluntary Sector Initiative and there is recognition that these new roles have resource implications regardless of the institutional model.

Model 3 - Enhanced CCRA + Charity Commission (Commission)

As under model 2, there would be divided responsibility for the regulation of charities. The Charity Commission would assume most responsibilities associated with administering the ITA as it relates to charities. The CCRA would provide compliance monitoring and auditing functions.

The role of the commission in this model is somewhat narrower than the commission model outlined in the 1999 Report of the Joint Tables. In *Working Together*, the role of the commission was described as follows:

“A quasi-judicial commission would undertake most of the functions currently carried out by the Charities Directorate. It would provide authoritative advice to the voluntary sector, and expert adjudication of appeals on decisions by its Registrar. At the same time, such a commission would have a support function not unlike Model B’s agency.”⁵⁵

The Commission described here and in Model 4 would have a narrower role than as set out in the previous Table report. It would not have a support function beyond compliance; an impartial authority outside the commission would perform expert adjudication of appeals. The commission would simply assume the current regulatory powers of the CCRA to administer the law. At the same time, it has been suggested that one of the overall purposes of the commission would be to re-examine the issue of registration.

The Commission would not be able to create legal precedent or recognize new charitable purposes where an analogy to a previously recognized charitable purpose cannot be found or developed. However, as in Model 1, applicants would be able to seek a review by an impartial authority of a decision to deny registered status. The Minister of National Revenue could also initiate reconsideration of a charity’s registration by applying to the commission but the commission would make the final determination as to conferring status. The Minister of National Revenue would have the right to launch an appeal if the Minister disagreed with a decision of the commission.

As in Model 1, an advisory group would provide policy advice but in this case to the presiding Commission. This is an unusual feature of the model since generally multi-member boards and commissions see themselves as capable of seeing the viewpoints of the sectors involved. It has been retained to ensure the commission has a sense of the full diversity of the charitable sector.

As in Model 2, as an arm’s length body, this model would have a presiding commission supported by a professional staff. The latter may be public servants appointed under the *Public Service Employment Act*, but they could also be employed by the presiding commission. The head of the staff could be appointed by either the Public Service

⁵⁵ Model B referred to in *Working Together* is equivalent to our Model 2.

Commission or by the Governor in Council and the head of staff would answer to the chair of the presiding commission; the chair would have statutory authority for the management of the staff and the financial affairs of the agency as a whole. The length of term appointees would serve, reporting relationships, eligibility for re-appointment and conditions under which they could be removed would be set out in legislation.

Members of the presiding commission could be drawn from the institutional community (charity law specialists, senior voluntary sector officials, etc.) and have some level of expertise from a legal, sectoral or government perspective. Specific commission composition requirements could be laid out in statute.⁵⁶ The day-to-day work of the commission would be carried out by a staff complement of comparable size to the Charities Directorate.

Considerations

It is difficult to predict whether the residual role of the CCRA for compliance monitoring and audit would pose undue problems. There are concerns that if the CCRA is pursuing its own statutory-based, program responsibilities this may result in conflict between the two organizations. There is, however, an example in the ITA of where responsibility for administering tax law for a particular domain has been divided between two institutions. The Canadian Cultural Property Export Review Board (CPEERB) may provide a partial model for retaining a role for CCRA in administering charities' compliance with all aspects of the tax law.⁵⁷

To encourage philanthropy the ITA and the *Cultural Property Export and Import Act* provide tax incentives to persons who wish to donate

⁵⁶ For example, the Canadian Human Rights Commission has up to eight appointed members. The Chief Commissioner and Deputy Chief Commissioner are appointed for seven years. The other Commissioners have their own professions and contribute to the work of the Commission on a part-time basis. The Commissioners come from different parts of Canada and a variety of backgrounds. There is a balance of men and women. Commissioners meet regularly throughout the year to review cases and discuss the work of the Commission. Another example is the Canadian Cultural Property Review Board whose nine members are also appointed by government. Four are drawn from museums and galleries while the remaining members represent the private sector, collectors, appraisers and dealers. If however, one were not limited by the need for geographic representation, the members of the Commission could be few in number. The Charity Commission for England and Wales, for example, operates with five commissioners, two of whom are part-time.

⁵⁷ The CPEERB reviews 1500 applications per year.

significant cultural property to Canadian custodial institutions⁵⁸, which have been designated⁵⁹ to receive or purchase such property. The CPERB is an independent tribunal of the Department of Canadian Heritage, which certifies cultural property for income tax purposes. In addition to certifying whether or not such property meets certain criteria, the Board may also determine the fair market value of the property. Like the CPERB, the commission would make determinations for the purposes of the ITA and provide advice to government on matters under its jurisdiction.

There has been a suggestion that the commission should report directly to Parliament and not to a cabinet minister. Delegating regulatory powers to a new body with direct access to Parliament may increase its visibility and profile through more public reporting to Parliament. It may also increase its independence from political interference. However, there are very few examples of arm's length regulatory bodies reporting directly to Parliament, except on issues of national importance such as access to information and privacy issues, and it would be very difficult to achieve in the short term.

Finally, charities may seek advice more readily from a body not actively involved in monitoring compliance but having two federal bodies involved in regulation may create confusion.

Model 4 - Charity Commission

The Commission described here, as in Model 3, would have a narrower role than as set out in *Working Together*. It would not have a support function beyond compliance; an impartial authority outside the commission would perform expert adjudication of appeals. The only difference between this commission and the one described in Model 3 is that it would assume all current regulatory powers of the CCRA to administer the law. This model differs from Model 1 only in terms of its governance structure, visibility and cost. There would be no direct residual role performed by the CCRA.

⁵⁸ Generally, Canadian museums, art galleries, archives and libraries.

⁵⁹ Institutions and public authorities, which meet the legal, curatorial and environmental requirements for designation, and have been so designated by the Minister of Canadian Heritage.

However, it must be assumed that co-operative information linkages would have to exist, since many aspects of compliance work, such as the checking of tax receipts, would be severely compromised if there were no communication between the Charity Commission and the CCRA. Care would need to be exercised to ensure that such routine exchanges not affect the independence of the Commission.

Considerations

The stand-alone commission model resolves the problems of divided responsibility. Otherwise, the characteristics and comments about the commission in the preceding model apply.

It is important to reiterate that regulatory bodies, no matter how much at arm's length from government, are bound to apply the law as passed by Parliament and elaborated through regulation (where authorized). There is no formal barrier to a minister – or a commission – exercising a more interpretive, flexible regulatory authority provided Parliament grants the necessary authority. If this authority were thought appropriate, because of the need for transparency and objectivity, it may be preferable for it to be assigned to an arm's length body such as the Charity Commission described here and in Model 3.

Overview of Regulatory Functions

	Model 1	Model 2	Model 3	Model 4
	Enhanced CCRA	Enhanced CCRA + Voluntary Sector Agency	Enhanced CCRA + Charity Commission	Charity Commission
Registration/ Sanctions (including de- registration)	CCRA (with advice from the sector)	CCRA (with advice from the Voluntary Sector Agency)	Commission (de-registration on application by CCRA)	Commission
Compliance Monitoring (T3010s)	CCRA	CCRA	CCRA	Commission
Audit	CCRA	CCRA	CCRA	Commission
Administrative Policy	CCRA with advice from charity advisory group	CCRA (with advice from Agency)	Commission (with advice from CCRA and charity advisory group)	Commission (with advice from CCRA and charity advisory group)
Compliance Education & Training	CCRA	Voluntary Sector Agency	Commission	Commission
Non- compliance support & nurturing	Voluntary Sector Umbrella Groups	Voluntary Sector Agency	Voluntary Sector Umbrella Groups	Voluntary Sector Umbrella Groups
Public Information	CCRA	CCRA <i>or</i> Agency re: specific charities; Agency re: sector	CCRA <i>or</i> Commission re: specific charities; Commission re: sector	Commission

Advisory Committee	Yes to the CCRA	Voluntary Sector Agency performing this role	Yes to Commission	Yes to Commission
Reports to:	Minister of National Revenue (MNR)	<u>CCRA</u> : MNR <u>Agency</u> : MNR <i>or</i> Another Minister <i>or</i> Parliament	<u>CCRA</u> : MNR <u>Commission</u> : MNR <i>or</i> Another Minister <i>or</i> Parliament	MNR <i>or</i> Another Minister <i>or</i> Parliament

Assessment of the Institutional Models

Introduction to evaluative criteria

We have been tasked to elaborate on the institutional models, to consult on those models and report on our findings by March 2003. In meeting this objective, we have reviewed a wide range of issues that may need to be considered in improving the regulatory arrangement for charities at the federal level.

As stated earlier, our objective in conducting this review is to have a regulator that is recognized and respected by charities, stakeholders and the Canadian public for its integrity, fairness, knowledge and innovation resulting in client-oriented service and improved compliance.

Using the models found in *Working Together* as the place to start, we advance for discussion our own formulations of possibilities by which the supervision of charities might be improved. As earlier noted, the mechanisms and structures could be further “mixed and matched” to create another expression of the optimal institutional method of regulating charities. In one sense, the task is how best to arrange the various functions that have to be in place to ensure public confidence in the regulator and the regulated.

We have identified a number of core values and critical success factors in our evaluation of the characteristics of an ideal regulator. These are summarized below to assist readers in forming an opinion about the implications of various models, their costs and benefits and the degree to which the models meet the needs of various stakeholders. Different people will weigh these criteria in different ways.

We wish to hear views on the appropriateness and usefulness of these criteria and the assessment that follows in creating a better understanding of the implications of the models. The input will be incorporated into our report to ministers in the spring of 2003.

Evaluative Criteria

The following evaluative criteria do not appear in any particular order of preference.

Focus of mandate

This criterion speaks to purpose of a regulator under each model. We have suggested that the mandate of the regulator should continue to be the administration of the charities program of the ITA but some additional functions are suggested under one of the models that may broaden the concept of purpose.

Integrity

This criterion highlights the capacity of the regulator to make decisions through an unbiased, transparent and fair process and provide fair, timely and consistent dealings with the public and sector stakeholders.

Openness

The regulator should be open and approachable. While it is not expected that the regulator will always accept the ideas or suggestions put to it, it must communicate what it is doing and the reasons for its decisions. The regulator should encourage a free exchange of ideas and promote open and constructive communication with those whom it serves.

Quality service

The regulator should be committed to delivering high quality, cost-effective services to its clients and should have the means to continually improve its services by seeking to learn both from the things it does and does not do well. Also, the regulator should provide the highest level of expertise available and provide authoritative information and advice to organizations seeking status as well as those it regulates.

Knowledge and innovation

This criterion speaks to the ability of the regulator to be a dynamic, learning institution. To be effective and relevant to Canadian society, the regulator must be forward looking. It should have mechanisms that

allow it to gather information about changes that are happening in the environment around it, including, for example, societal developments than may affect the boundaries of what is and is not considered to be charitable. In addition, the regulator must have the capacity to exploit new technology so that its service keeps pace with changing client needs and public expectations.

Support

It is the responsibility of any regulator to ensure that those it regulates have the information they require to comply with the laws and policies enforced by the regulator. Therefore, there is clearly an educational and support function that the regulator must take on. This function includes such things as ensuring that the regulated are aware of the rules that govern them and have assistance necessary to comply with those rules.

Public profile/visibility

Public trust and confidence is decreased when there is limited knowledge that regulation exists. Therefore, it will be important for the regulatory body to ensure that it has a public profile. Such a profile does not come only – or even primarily – from regulatory actions that are taken. There must be a determined effort by the regulator to establish an “institutional” identity; Canadians must be aware that the regulator exists, what it does, and what registration as a charity does and does not mean.

Resources

This financial criterion addresses two levels of consideration: the direct expense required to establish the new institutional elements and the additional costs to operate that system in comparison to the current arrangement.

Legal principles and powers to determine charitable status

The courts have, throughout the years, said that what is accepted as charitable must change to reflect social and economic circumstances. This criterion speaks to the ability of the regulator to develop further the boundaries of what is and is not charitable.

We have also suggested that the trust of the sector in the regulator is linked in part to the regulator's commitment to keeping the concept of charity up to date and in line with current thinking. This is certainly the case in England and Wales where institutional effort is focused on ensuring the law evolves by eliminating outdated purposes, developing analogies and creating legal precedent in consultation with the sector, Inland Revenue, non-governmental specialists in charity law and other important stakeholders, including the general public.

Co-ordinated regulation

A significant part of the authority to regulate charitable activity is vested in the provinces and territories. This factor speaks to the ease and ability of the institutional arrangement to accommodate or work with provincial and territorial authorities to foster a consistent and coherent set of rules for charitable regulation across jurisdictions. It has been included to gather input from the provinces and others about whether this would be useful and how best to accomplish it.

Broader voluntary sector

The VSI was designed to look at more than just registered charities. It was designed to benefit voluntary sector organizations. While at the federal level supervision is focused more narrowly on charities and we have therefore focused our attention on issues connected with registered charities, we recognize there is an important support role that could be played outside the regulator. This criterion captures support that would be available to the entire sector beyond the assistance provided by the regulator to help charities comply with the ITA.

Transition challenge

There is an element of complexity involved with managing the change implied under each model. This criterion speaks to challenges of improving service levels, transferring regulatory functions and/or creating new institutions as you move across the range of possible models.

Introduction to Analysis Matrix

The following table takes the various models that are described and tests them against the evaluative criteria we have identified. As noted

elsewhere in this paper, the models are not mutually exclusive. It is possible to take some aspects from various models and piece them together to create a regulatory body, that is not specifically outlined in this paper.

It is important to note that in some cases our assessment of a model is necessarily speculative. For example, in the case of the Charity Commission (model 4), much will depend on who the Commissioners are and the rules that they formulate. Similarly, it is not possible to predict how the Charities Directorate's "Future Directions" initiative will affect its ongoing operation.

Assessment of Models

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Commission	Model 4 Charity Commission
Focus of mandate	Focus is administering the law	Different mandates for different institutions: CCRA focused on administering the law; VSA focused on support, information provision and nurturing the sector	Focus is administering the law with responsibilities shared between two institutions	Focus is administering the law
Integrity	Regulator would apply and interpret the law acting on the same basis as the courts. Decisions would be subject to review by an impartial authority.	Same as Model 1	Same as Model 1	Same as Model 1.
Openness	Possible through advisory body, public consultation, annual reporting, and a Website where T3010s, the decisions and policies of the regulator, impending legislative amendments, and a searchable database of	Perhaps greatest potential in that organizational focus of VSA is advice and communication	Same as Model 1	Same as Model 1

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Commission	Model 4 Charity Commission
	court decisions are displayed			
Quality Service	Possible, performance indicators would need to be established.	Same as Model 1 – in addition, the VSA could provide a watchdog role	Same as Model 1	Same as Model 1
Knowledge and innovation	Possible through greater connection to other government departments and the sector vis-à-vis the advisory body, roadshows, consultations, attendance at annual sector conferences, staff development opportunities, etc.	Gathering and sharing information would be key role of new VSA	Perhaps greater opportunity (as a new body) than in Model 1 to be innovative and tailor its organizational culture to its organizational mandate	Same as Model 3
Support	Possible through site visits, call centres and enhanced Website. Support and education limited to compliance	Perhaps greatest under this model. In addition to compliance support provided by the CCRA as in Model 1, VSA would provide capacity building and nurturing function and could potentially coordinate support functions in other	Same as Model 1	Same as Model 1

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Commission	Model 4 Charity Commission
		government departments		
Public profile/visibility	Possible through website, annual report and increased communications capacity	Greater than in Model 1 due to presence of new Agency and requirement to report to Parliament either directly or through a Minister	Similar to Model 2	Similar to Model 2
Resources	\$10M in addition to current resources being spent	Higher operational costs than in Model 1 because of new nurturing function and emphasis on broader voluntary sector and not only charities. New infrastructure would be needed for a separate Agency	Greater than Model 1. Operational costs expected to be slightly higher than in Model 1. Also, there would be a one-time cost associated with creating a new Commission	Same as Model 3
Legal principles and powers to determine charitable status	Possible -- capacity to determine charitable status, but cannot make	Same as Model 1	Same as Model 1	Same as Model 1

	Model 1 Enhanced CCRA	Model 2 Enhanced CCRA plus Voluntary Sector Agency	Model 3 Enhanced CCRA plus Commission	Model 4 Charity Commission
	authoritative decisions			
Co-ordinated regulation	Possible – has already demonstrated a capacity to coordinate in area of tax collection with some provinces and territories	Possible	Possible	Possible
Support of broader voluntary sector (non-profits that are not charities)	Not included	Included as nurturing and support function provided by VSA	Same as Model 1	Same as Model 1
Transition challenge	Minimal	Moderate -- Not much change on the regulatory side. New support function developed and placed inside new Agency	Complex -- Most regulatory functions (with the exception of compliance monitoring) transferred to new body	Complex -- All regulatory functions transferred to new body requiring the development of new practices and procedures