Report of the Senate Special Committee on the Charitable Sector – A Response

Title: Report of the Senate Special Committee on the Charitable Sector – A Response

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Published in: *The Philanthropist*

ISSN: 2562-1491

Date: June 22, 2020

Original Link: https://thephilanthropist.ca/2020/06/7910/

Date of PDF Download: July 13, 2020

The recently released Report of the Special Senate Committee on the Charitable Sector, "Catalyst for Change: A Roadmap to a Stronger Charitable Sector," puts broad charity law reform in sight. The Report – which is available online – provides a series of thoughtful recommendations touching on almost all the major difficulties with the existing federal charity regulatory regime.

Indeed, the Report goes beyond charities and provides ideas for handling problems in the regulation of non-profit organizations and a range of other groups that enjoy, or whose supporters enjoy, special tax treatment. Charity-like groups that receive preferential *Income Tax Act* (ITA)[1] treatment beyond the income exemption given to non-profit organizations are technically known as "qualified donees."

The Report features 42 recommendations, and while not all of them will be feasible to implement or are uncontroversial, taken broadly they present an opportunity to:

- Modernize the current regulatory system;
- Simplify or clarify various regulatory structures or requirements;
- Reduce unnecessary red tape for registered charities and other voluntary sector groups; and
- Better align Canadian regulatory practice with that of comparable

Major reform of the framework would also almost certainly lead to large efficiency gains both for the regulator and sector organizations.

This paper is a response to the Report. It begins by canvassing the broad political context in

which the Report is released. The Pemsel Case Foundation calls for the findings of the Report, which we note are evidence-driven rather than ideological, to be acted upon by the government. The paper then discusses some aspects of the regulatory context. It looks at the lack of a clearly articulated policy rationale for the regime, the purposes/activities problem, and the unresolved question of the relationship between the *Charter* and charity regulation under the ITA. These are areas that the Report doesn't delve deeply into, but which will be important concerns if broad regulatory reform is undertaken.

The next part of the paper highlights the recommendations that the Pemsel Case Foundation believes are most key and most urgent. It explains the merits of, and reasons behind, the various recommendations. If measures such as moving registration and revocation decisions to Tax Court and restoring of the Human Resources Council for the Voluntary Sector are taken up, that could prove pivotal for the sector.

The paper then covers some of the Report's less pressing recommendations, and some areas where further study has been recommended are described and explored. In the final section of our analysis, the Pemsel Case Foundation makes some observations about the feasibility, mechanics, and desirability of certain of the recommendations, and suggests options or improvements to what is proposed. Of particular concern are the calls for pilot projects and the questions around establishing and housing a Sector Secretariat in the federal government.

Political context

Whether the Senate Report spurs reform – and how it is shaped – may at first glance appear to depend heavily on the results of the 2019 federal election. Historically, and especially on certain high-profile issues, the views of the various political parties on the role of the voluntary sector, and how it should be regulated, have differed somewhat. This can be seen, for example, in contrasting approaches to the ITA political activities rules.[2]

But beyond a few provocative issues, party positions related to voluntary sector regulation are often not developed or formally stated. This is likely because these issues find limited resonance with voters-at-large. The norm, other than discussion focused primarily on tax credits as part of the annual federal budgetary process, is for sector concerns to draw little or no Parliamentary time. The amount of attention paid may increase if there is a charity or non-profit scandal or if a sector issue becomes a hobbyhorse for a politician or party, but this is the exception. Though the political activities reform is now in place, it is worth remarking that it took a successful court challenge[3] to the old ITA provisions under the *Canadian Charter of Rights and Freedoms*[4] (*Charter*) to prompt it. (For the broader implications of this ruling, see below.)

The arrival of the non-partisan Senate report, happily, gives the parties a welcome opportunity to adopt evidence-based, rather than ideologically driven, stances on the minutiae of voluntary sector regulation, and perhaps also, more generally, to revisit attitudes toward the sector and its work.

Regulatory context

A first step to reform, however, involves dealing with, or at least recognizing, some things that the Report doesn't tackle.

As was pointed out during the Senate Committee hearings, the framing of the charity regulatory regime[5] (and more broadly the nature of provisions of the ITA governing other voluntary sector groups) ought to be based on a prior determination of the underlying policy considerations. That will both help ensure consistent future development of law in this area and reduce the risk of overwhelming organizations that are often heavily volunteer-driven with compliance obligations. For the registered charity regime, several possible policy concerns (alone or in combination) are frequently mentioned:

- To preserve tax-assisted assets (for eventual use on public benefit purposes);
- To economize or limit a tax expenditure;
- To provide transparency with respect to tax expenditures through reporting and disclosure requirements;
- To allow the government to constrain conduct that it considers should not enjoy the preferential tax treatment afforded to charities or charity-like groups; and/or
- To justify and support some idea about what is legally considered

As the federal regulatory regime deals with both registered charities and qualified donees and in some cases applies different rules to them, the rationales for regulation may not be precisely the same across these groups. Another aspect of the regime is the regulation of non-profit organizations, which is significantly different from that of registered charities and qualified donees, and so also may have a quite distinct policy basis.

That said, the Pemsel Case Foundation takes the position that the legislative history[6] suggests the last of the bulleted points – promoting the legal concept of charity – is the primary, if not the sole, consideration for charity regulation. Other factors should clearly be recognized as subordinate or minor. As well, a distinction should be drawn between preserving tax-assisted assets for public benefit use (i.e., preventing fraud or abuse) and economizing or limiting a tax expenditure (i.e., restricting the eligibility of groups for cost rather than legal reasons).[7] Transparency and constraint of certain conduct are important, but secondary and derivative, policy concerns.

In Canada, since ITA amendments date from the 1930s, what qualifies as a registered charity has largely been defined through the common law – past rulings by judges about what kinds of philanthropic endeavours fall within the legal meaning of charity. But, because registered charities and their donors enjoy generous tax privileges, there has been ongoing debate over the extent to which ITA legislation should reinforce or modify the common law of charity – which allows for a wide range of altruistic, public benefit endeavours.

This debate has been fueled by legislation adopted over the last 75 years or so that has been interpreted (and sometimes misinterpreted) variously as entrenching, tightening or loosening the common law rules. Unfortunately, often the policy rationale for these added provisions has not been well explained, leaving a vacuum when the courts or the Canada Revenue Agency try to understand and interpret the legislation.[8]

Many government initiatives since the common law became a touchstone of registered charity status – for example, introduction of various types of qualified donees that are not charities at common law, and a deeming provision treating gifts to qualified donees as a charitable purpose under the ITA – signal an intention to build on the common law model. Other measures, such as introducing a disbursement quota, developing various categories of registered charities, and

rules around doing charity in political, business, and international contexts, are better understood as aimed at preventing diversion of resources to non-charitable purposes or providing easy to administer tests in the ITA. None of the refinements seem focused on significantly curtailing the availability of the tax expenditure.

Much of the friction associated with the existing federal charity regime stems from attempts to navigate real or apparent differences in policy goals. Typically, there is little or no statutory basis in which to ground arguments between competing policy priorities.

Among the most difficult ideas to grapple with in terms of its impact on the common law has been the introduction of the concept of "activities" into the regime. Over the years, activities provisions have been added to the ITA (or to CRA administrative rules) to monitor or control several types of conduct.

The majority judgment in the leading case in Canadian charity law, *Vancouver Society of Visible and Immigrant Minority Women v. Minister of National Revenue,* however, severely weakened – though it does not seem to have eliminated – the purposes/activities distinction when it held that the charitability of activities is determined by the purpose or purposes they are undertaken to further.[9]

As the common law and ITA approaches can be so inherently at odds, where authorities place the emphasis in reconciling them will obviously have a big impact on whether charities operate in an enabling or restrictive environment. The Pemsel Case Foundation's view is that the policy considerations underlying the regime ought to dictate how competing policy goals should co-exist. We submit that the foremost policy concern is promoting the common law concept of charity.

In the view of most legal scholars, once a group's endeavours (as set out in its purposes or objects) have been accepted, a charity can engage in whatever conduct it chooses so long as that conduct is not illegal, contrary to public policy, or otherwise at odds with its charitable character, and as long as the conduct can be reasonably interpreted as striving toward the charity's stated purposes. The common law sometimes allows for review of an entity's activities in determining whether it qualifies as a charity, but that is in very limited circumstances.[10] In contrast, it is routine under the ITA for certain transactions or types of transactions to be prohibited or constrained. Moreover, the ITA is based on a retrospective review of conduct, while the common law of charity is rooted in looking at an entity's future intentions.

In practice, at the registered charity application stage in Canada – in light of a low tolerance of risk and awareness of the limited value of information returns in identifying misconduct and an annual audit rate of less than 1% of registered charities – a major regulatory problem is detecting or foreseeing probable future non-compliance. This difficulty is compounded because the applicant is often not fully operational, and all or much of the applicant's work is not yet underway. So, a regulatory system relying exclusively on purposes, where acceptable purposes are available to the applicant in advance, potentially creates a rubber stamp front-end process. Revamping of the purposes/activity distinction will not be sustainable if this problem is not resolved.

The Pemsel Case Foundation, in one of its submissions to the Senate Committee, called for

systematically dealing with the purposes/activity distinction found in the current regulatory regime. Coming to grips with this is essential for improving the rules under which charities are established and operate. In the Foundation's view, so long as the purpose/activity distinction continues in its current form to be a defining feature of the regime, it is likely to result in over-emphasis by the courts and by the Canada Revenue Agency (CRA) on the importance of controlling the extent of the charitable tax expenditure. Shifting emphasis back to purposes would restore proper focus on the ITA being a mechanism for promoting an open-ended, dynamic and evolving concept of legal charity in Canada.

One way to understand this problem is that the difficulty stems not from the ITA regulating *activities*, but from its seeking to regulate *charitable activities*.[11] This requires registered charities to justify – both when they are established and when they are operating – the charitable nature of all their activities. Among the consequences this leads to are:

- Questions of whether common law assessment of certain conduct or a different ITA standard is the appropriate test to determine whether the conduct is charitable;
- The application of common law public benefit criteria at the activity level, rather than at the level of purposes; and
- Reporting or compliance conflicts where an activity may have a dual character[12] – for example an event that is both administrative and charitable.

Appropriate regulation of activities would clearly establish, among other things, how dual character activities ought to be treated, and what to do with activities that further charitable ends but otherwise seem to lack the hallmarks of charity. Doing so would require legislative measures to address well-defined policy concerns related to specific kinds of activities. This would entail explicit restriction or prohibition of certain types of conduct.

Aside from deeming provisions, the term "charitable activities" should be avoided in definitional provisions. The relationship between restrictive or prohibitory provisions and the common law should be made clear in the wording of the legislation. As well, any relevant indicia for assessing activities should be incorporated into the provisions, or at a minimum, carefully detailed in CRA guidance. Unless there are statutory provisions providing otherwise, any conduct should be evaluated based on whether it furthers a charitable purpose.

The Senate report nods to this concern, in one of its recommendation, which calls for the government to "consider which activities registered charities should not be allowed to carry out and proscribe them through precisely defined statutory provisions." As well, some other recommendations (e.g., those on business activities and activities abroad) have implications for the regulatory treatment of activities. If implemented, these moves would be improvements.

However, reform in this area would likely be best served if the matter was looked at comprehensively rather than piecemeal. A comprehensive analysis is key to revamping the way activities are treated at registration and in reporting requirements, which the Senate Report does not directly address.[13]

Finally, there is another "elephant in the room" that needs to be acknowledged, and which isn't dealt with in the Senate Report. That is the role of the *Charter* in sector regulation. Common law, like legislation, is subject to assessment on whether it infringes fundamental rights and freedoms, and whether in doing so, it is saved by the carve-out in the *Charter* for measures that

“can be demonstrably justified in a free and democratic society.”[14]

Charter jurisprudence dealing with the federal charity regime is quite limited. On the one hand, the Ontario Superior Court decision noted above suggests further cases could have a transformative impact with respect to at least some aspects of the statutory scheme.[15] On the other hand, there is strong authority for the proposition that federal charitable tax status is a privilege, not a right, and that this is a full answer to a *Charter* challenge with respect to achieving that status.[16]

Since charity essentially entails discrimination between beneficiaries and non-beneficiaries, it will inevitably raise *Charter* issues. One answer is the “privilege, not a right” argument. As well, the common law includes what has been dubbed a “stranger” criterion.[17] The requirement that charity benefit strangers provides a check – except for in limited circumstances spelled out in case law – on beneficiaries having ties that are too close to the charity or potential beneficiaries being arbitrarily discriminated against. It helps determine if, given how it intends to allocate its resources or operate its programs, an entity will be charitable. That said, as many models of charity pre-date contemporary conceptions of rights and freedoms (which under Canadian law potentially evolve over time), further conflict over charity regulation and the *Charter* is foreseeable.

Perhaps the best that can be done about this, until the Courts clarify the law in this area, is carefully ensuring *Charter* considerations are accounted for both in any statutory changes to the regime and in applying the common law related to charities. It is possible that the common law – and in particular the “stranger” criterion – will be found to be wholly inadequate to deal with the discrimination inherent in the work of modern Canadian charities, and that a *Charter*-proof statutory regime will have to be substituted for the system that has been in place for the past 75 years or so.[18] But that point has yet to be reached, and until it is we will presumably have to live with the elephant in the room.

Key recommendations

After these preliminary broader questions have been addressed or acknowledged, attention can be turned to the chapter and verse of the Senate report.

Importantly, the report endorses:

- A new Tax Court appeal process for charity registration and revocation decisions;
- A program to assist organizations in bringing those appeals;
- Reinstatement of the Human Resources Council for the Voluntary Sector;
- Streamlining of the categories of registered charity (from a charitable organization/public foundation/private foundation model to a public charity/private charity model);
- Development of a standardized reporting mechanism across departments and jurisdictions and improved treatment of overhead and infrastructure costs in government funding of sector groups;
- Reform and/or clarification of direction and control requirements (specifically, a move to an expenditure responsibility standard of accountability) and related business regulatory requirements; and
- Several operational improvements in the CRA Charities Directorate.

The Pemsel Case Foundation fully supports these suggested changes.[19]

A move of registration and revocation decisions to the Tax Court of Canada has long been sought by the sector. It was one of the few recommendations of the Joint Regulatory Table of the Voluntary Sector Initiative that was not implemented (although appeals from intermediate sanctions – ITA penalties short of revocation – were placed within the jurisdiction of the Tax Court when they were introduced in 2005).[20] The Tax Court would provide a cheaper, faster, and more accessible venue for registration and revocation appeals. Transfer of these proceedings to Tax Court should also be accompanied by a revamping of the ITA provisions to allow for a *trial de novo* of these matters. This would permit new evidence to be led in a case, and the CRA would routinely be tested against a higher standard than whether it had acted "reasonably."

The limited number of charity cases that have been heard by the Federal Court of Appeal over the past half century speak to the need for a litigation assistance program. As well as the benefit of ensuring fuller airing of issues in individual proceedings, more cases being brought will also foster the development of a more consistent and intellectually rigorous body of law on what qualifies as charity for purposes of the ITA.

Since the demise of the Human Resources Council for the Voluntary Sector, whose funding lapsed a few years ago, there has been little federal presence on sector workforce issues. The Report seeks to rectify that by calling for reinstatement of the Council.

The current artificial distinction between charitable organizations, private foundations, and public foundations has outlived its usefulness. Drawing a regulatory division between funder groups and operational groups no longer makes sense. Registered charities, no matter what their category, now commonly both hold resources and do programming. A better measure of how they ought to be regulated can be made based on whether their funding and/or governance is closely or widely distributed.[21]

Successful introduction of a common reporting template (better known as the Standardized Chart of Accounts)[22] across government departments and jurisdictions in Australia makes a compelling case for the development and implementation of a similar standardized chart of accounts in Canada. As well as making it easier (and likely less costly) for groups to report on their finances, this initiative would assist in efforts to promote transparency and consistent accounting treatment of revenues and costs by sector groups. Related to this – but included by the Senate Committee as a separate recommendation – is an improved approach to funding organizational infrastructure. One of the benefits of a standard chart of accounts is that it allows these types of costs to be easily identified and recognized in funding processes.

The report's call for revamping of both the direction and control requirements and related-business aspect of the current regulatory regime highlight badly needed reforms. The regulatory fetters in both these areas need to be loosened if partnering and sustainability objectives touted by other areas of government – such as Global Affairs Canada and Employment and Social Development Canada – are to be achieved. Specifically, current rules and policies limiting what revenue-generation Canadian registered charities can engage in are unduly strict, and don't facilitate the kind of self-funding which is a key feature of many charities in jurisdictions like Australia, New Zealand and the United Kingdom.

Moreover, current rules and policies dealing with how Canadian charities can work through intermediary organizations, whether internationally or domestically, are more restrictive than those of other jurisdictions.[23] The laborious and hierarchical requirements are outdated and not in keeping with contemporary approaches to international development and to working with marginalized communities in Canada. Any legitimate worry over diversion of charitable assets to non-charitable ends through partnership or collaboration arrangements can be satisfactorily dealt with through substitution of due diligence and risk management requirements for the current measures.

More generally, whether for engaging in related business or working through non-charities, the complex nature of the existing regime thwarts innovation and leads to unintentional non-compliance. These approaches need to be modernized and brought into better alignment with 21st century values and practices in comparable jurisdictions.

On an operational level, there is also value in the report's recommendation around functional improvements at the CRA. These include: better communication of CRA decisions, reduction of wait times, and enhanced collaboration with provincial and territorial counterparts. While to some extent the scope for improvement in the three areas identified is constrained by statutory or resource limitations, the changes suggested – especially in transparency about decisions and shorter turnaround times – could help overcome some of the inevitable distrust stemming from having a regulatory body whose primary focus is tax collection.

The report recommends many cross-cutting changes in the federal government's approach to registered charities and, more broadly, the voluntary sector. Some of these involve changes to the ITA, but many are administrative, involve departments other than the CRA, and/or are more generic.

Notably, featured in the report are calls for:

- More systematic and regular research on the sector;
- Regular review of ITA provisions governing registered charities and more precise drafting of legislation pertaining to them;
- Policy changes to promote giving and volunteering and an initiative to reduce or defray volunteer screening costs for sector organizations;
- Better support for charity and non-profit organization human resources including development of a portable pension plan for the sector;
- Measures to encourage diversity in sector governance;
- A commitment to federal funding practices based on longer timeframes and proportionate reporting requirements;
- Bringing sector organizations more fully into government innovation and procurement initiatives;
- More accessible capitalization for sector work and ventures; and
- Reform and clarification of certain rules for non-profit

Much of the research on the scope and the nature of the sector is well past its best-before date. Aside from annual data related to the charitable tax credit, some yearly aggregate data from T3010 registered charity filings, and the periodic Canada Survey of Giving, Volunteering and Participation, up-to-date statistical research on both charities and non-profit organizations is sorely lacking. This data is essential to developing appropriate policy and regulation for a major

part of the economy and a vital part of society. Given that, the report's call for a renewed commitment to gathering data on the sector, and for a process for determining priorities with respect to data is to be welcomed.

As noted above, typically little Parliamentary time is allotted to charitable and sector issues and legislation, so a regular review of the laws governing registered charities is another recommendation to be embraced. As with the hope for more legally congruous rulings through improved appeal processes, instituting a regular statutory review would help ensure more coherent and consistent ITA provisions. Importantly, taking up this recommendation would also foster more attention being paid to, and more appreciation of, the policy considerations underpinning the registered charity (and broader voluntary sector) regulatory regime.

Suggested measures to bolster giving and volunteering include statutory, policy and funding changes. Notable among these are development of a national volunteer strategy, recognition of volunteer-related costs in calculation of funding, and an effort to address voluntary screening costs. Another recommendation that touches on volunteers is a suggestion that diversity of Board members be tracked through federal tax filings.

As well, it is proposed that consideration be given to amendment of the existing charitable tax credit. A number of possible refinements are identified, and a review of whether and how it could be changed is among the things that the report suggests be referred to the newly established CRA Advisory Committee on the charitable sector. That Committee was announced by the government in March, but the membership was only established in August, and (at the time of writing in September 2019) the first meeting of the panel had yet to be held.

The details and rollout of the Report's recommended measures around promoting giving and volunteering will figure heavily in how they play out, but generally they promise positive change.

Also recommended are new initiatives exploring a pension plan for charity and non-profit workers as well as development and implementation of a sector workforce renewal plan. In the face of demographic changes and the ever-present sector issue of staff burnout, these proposals are timely.

In terms of government organizational dealings with charities and non-profits, improved funding practices (longer contract periods and more proportional reporting), and efforts to improve accessibility for sector groups to innovation and procurement programs are suggested. More broadly (and with potential for huge impact), there is an initiative to look at enhancing the ability of sector entities to raise capital.

While better measures to capitalize groups are to be commended, when market-oriented mechanisms are used to raise money for capitalization of charities (and their earned-income ventures) difficult questions arise about the quantity of permissible private benefit and about putting charitable resources at risk. These are questions that the existing regulatory regime does not yet have the means to satisfactorily resolve. That said, if these questions can be addressed, such measures would allow charities and non-profit organizations to participate more fully in the Canadian economy and, also, afford them greater opportunity to boost their sustainability through earned revenue.

For non-profit organizations, the Report includes a call to clarify the "not-for-profit rule"

requirement (essentially, providing more information on what disqualifies a group from this ITA non-profit status), and specifically for making clear to what extent it is permissible for them to hold surplus income. Further review of the ITA treatment and regulation of non-profit organizations – including a possible public benefit/member benefit distinction – is also recommended. In view of the major problems with the current non-profit organization regulatory and reporting regime, these recommendations ought to be taken up as soon as possible.

Other recommendations and calls for further study

As noted above, the Report recommends some matters be referred to the Advisory Committee on the charitable sector (for which, in one of its recommendations, it also endorses a broad and inclusive membership). These include some significant ongoing regulatory issues:

- The question of a statutory definition of charity versus continued reliance on the common law;
- Establishment of a clear policy rationale and a principle-based framework for qualified donee and other tax-assisted categories of organizations;
- The merit of changing the disbursement quota and whether it ought to be set by statute or in Regulation; and
- Exploring an appropriate regulatory approach to donor-advised

The Pemsel Case Foundation is on record as favouring use of the common law to develop the meaning of charity. The Report's recommendation for moving appeals to Tax Court buttresses our preference for this approach. That said, the Advisory Committee on the charitable sector will be well-positioned to monitor progress on charity law reform, and more particularly what happens with the Senate Committee's recommendations, so we support this question being a part of its mandate. It will be able to judge whether sticking with the common law is the best option given the evolution of the regulatory regime. It is also well-suited to tackle the principles and policy that should drive the development of the framework for qualified donees and other tax-assisted groups.

Referring the technical matters of how best to deal with the disbursement quota and the vexing questions around treatment of donor-advised funds to the Advisory Committee on the charitable sector are also suggestions that should be welcomed. However, if the Committee is to do all, or even a large portion of, the work envisaged for it in the Report, it is essential that it be adequately resourced to do so.

Further study is proposed for issues such as: the most appropriate regulatory regime for non-profit organizations that are not registered charities; what charities should report on the T3010, and public disclosure of sector ITA filings and decisions; and, the impact of anti-spam measures on the sector. These are all matters that the Pemsel Case Foundation believes warrant additional review before being decided on, so the Report's recommendations in that regard should be supported. The question of ineligible individual rules, which is also suggested for further study, falls in this category as well. However, there is little dispute that the existing ineligible individual provisions are too broadly drawn, and that the primary question in studying them should be how they can best be narrowed.

Final observations

Difficult implementation issues can be expected if some of the Report's recommendations are pursued. At times, the Report doesn't fully account for the jurisdictional, budgetary, and practical issues that are likely to arise in carrying out its recommendations.

For example, the Report proposes regulatory pilot projects dealing with:

- A destination of funds test;
- Permitting gifts to entitles other than qualified donees with appropriate safeguards; and
- Gifts of real estate and shares in privately held

The term "pilot project" is not defined. CRA may not have the needed authority to undertake the sorts of initiatives that are commonly understood as meant by this term. While it has wide regulatory discretion, it is isn't clear it can ignore legislation. Even if it could, allowing non-compliance among some organizations, but not others, will not sit well. An approach is required recognizing that in any kind of regulatory experimentation with fiscal implications, the Department of Finance needs to play a prominent role. So, the Pemsel Case Foundation proposes a refinement or alternative to the proposed pilot projects.

Time-limited trials were used for two proposed charitable donation rule changes – the five-year test period for the capital gains exemption of gifts of publicly-traded securities in the late 1990s and the 2013-2017 experiment with the super credit for first-time donors. The Pemsel Case Foundation believes this model, though it has not previously been used for measures related to registered charities' compliance obligations, is a better option. This would involve amending legislation to permit the previously disallowed conduct, followed by monitoring and data collection to assess the impact of the changes. All the areas identified as suitable for pilot projects in the Report could be tested in this way. After the stipulated time period for its trial had run out, each measure could be evaluated.

In another area, the practicalities of the suggestion to place a sector secretariat under the Minister of Innovation require further assessment. If the past is any indication, the types of entities promoted through the tax system is likely to continue growing. As noted above, having a sound understanding of the policy considerations underlying measures to promote various kinds of organizations is essential. Also, important will be structuring the regulatory system so that the public can easily understand the distinctions between different kinds of entities. Housing support and regulatory functions in the appropriate places will assist in the public keeping things straight.

In the United Kingdom, the experience has been that the Office for Civil Society had a higher profile and more influence when it was in the Cabinet Office, and saw its impact diminished when responsibility was shifted to the Secretary of State for Digital, Culture, Media and Sport. It is a given that in Canada sector groups deal if not with every, then almost every, federal department and are touched by countless programs and initiatives. The Pemsel Case Foundation takes the position that the secretariat needs to be housed in a part of the government, such as the Privy Council Office, where it is better able to take a whole-of-government (that is, cross-departmental) perspective.

Conclusion

All-in-all, the Pemsel Case Foundation sees the Report as charting an exciting path forward,

and we hope it will inform decisions on sector policy positions across party lines in the coming weeks, months and years. This is not an opportunity to be missed.

The article below was first published *in late 2019 by the Pemsel Case Foundation. Its publication in* The Philanthropist *was postponed owing to the need to focus in recent months on the COVID-19 pandemic and its financial fallout for the sector. Parliamentary and government response to the Senate Committee Report was also delayed as a result of shifting priorities in the face of the public health emergency, so comments made in the article remain timely.* The Philanthropist *will continue to monitor and report on any significant legislative or regulatory developments in the aftermath of the Report. The author is Executive Director of the Pemsel Case Foundation. He thanks the members of the Foundation's Board of Directors for their valuable insights, and their many contributions to this paper. The author is responsible for any errors.*

[1] RSC 1985, c 1 (5th Supp), as amended.

[2] While the Conservatives, when in power from 2006-2015, were concerned about the advocacy activities of sector organizations, and initiated a special audit project and more stringent regulation in this area as part of the 2012 federal Budget, the Liberals promised in their 2015 election platform clarification of the rules based on an understanding of the important contribution charities make to public policy discussion and revamped the regime through enacting Bill C-86, s. 17 in December 2018.

[3] *Canada Without Poverty v. AG Canada*, 2018 ONSC 4147.

[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[5] Canada, Parliament. Senate. Special Committee on the Charitable Sector. Evidence, First Session, Forty-second Parliament, April 8, 2019, Testimony of Professor Adam Parachin.

[6] Brooks, N., *Charities: The Legal Framework*, Secretary of State Department, Government of Canada, p.12. See also *Report on the Law of Charities*, Ontario Law Reform Commission [*OLRC*], v.1, pp.254-5. A Department of Finance Discussion Paper, *The Tax Treatment of Charities*, released as Appendix D to the June 1975 Budget, identifies certain abuses or potential abuses that need to be addressed legislatively, but does not discuss any need to systematically limit the tax expenditure.

It should perhaps be noted that, in a non-legislative context, there was a thoughtful discussion of the policy considerations and preferred regulatory approaches for tax concessions enjoyed by voluntary sector groups (and in some cases their supporters) in the *Report of the Royal Commission on Taxation*, vol. 4 at pp.128-144. The *Report* begins by observing that the policy considerations underlying tax treatment in some of these situations are not well articulated. It is supportive of tax concessions for public benefit endeavours (charities and certain others), broadly as identified through the legislation that existed at the time. It proposes establishment of a federal regulatory body to grant charitable status (the *Report* predates the CRA Charities Directorate), with reporting of an entity's activities being an element of the regulatory framework. It explicitly endorses charities being able to carry on their work either domestically or internationally. In analysis of problems with public benefit tax concessions, it typically calls for

taxing questionable income, rather than narrowing concessions. The *Report* suggests a couple of significant problem areas where the broad policy goal of supporting public benefit work isn't furthered. One is the potential for private benefit to accrue to individuals connected to voluntary sector groups. Where this issue arises with charities, rather than exemption limitations it suggests the best solution is taxing of benefits that leak out of the public benefit realm in the hands of those that receive them. Building on this concern, it also suggests a need to distinguish between public-benefit and member-benefit non-profit organizations in the regulatory framework.

The second area where concern is identified is charities operating businesses. Generally, it is suggested that charities should avoid active operation of a business (as opposed to passively holding investments in businesses). Where charities do undertake businesses, it is proposed that income from the business generally be subject to tax at corporate rates. Again, narrowing the exemption is not suggested to handle this problem. The *Report*, which dates from 1966, was prepared at a time when the realms of charity, government and business were much more distinct than they are today. Hence the *Report's* reasoning in this area may be somewhat dated. A more nuanced and contemporary solution to the question of charities and business is perhaps needed – as is illustrated by the practice in jurisdictions comparable to Canada, where facilitating revenue generation is recognized as key to ensuring the sustainability of charities and the charitable sector.

[7] In *Vancouver Society* and *A.Y.S.A. Amateur Youth Soccer Assn. v. Canada (Revenue Agency)* 2007 SCC 42 the Supreme Court of Canada considered the impact on the tax system in assessing whether a proposed change to the common law of charity was incremental or not. In both instances, they took fiscal consequences into account in finding that the suggested expansion was not incremental. There appears, however, to be no statutory basis or legislative history in which to ground this analysis. Rather, the most compelling justification for this approach is judicial deference to Parliament.

[8] Pemsel Case Foundation research has identified at least two instances of apparent misinterpretation. One example is the old political activities provisions, which were introduced as a relieving measure, but interpreted over the years as establishing a maximum amount of resources that could be devoted by a registered charity to non-partisan political activities. See Short, E., *Charitable Sector Reform: First Steps to Reality*, p. 13-4 at http://www.pemselfoundation.org/wp-content/uploads/2018/02/Short-First-steps-to-reality.pdf for a history of why the provisions were enacted. A second example is the "own activities" component of the charitable organization definition, which has been taken to require active management by registered charities of endeavours undertaken in collaboration with non-charities, rather than distinguishing between active and passive registered charities. For a fuller exploration of the second of these examples see Juneau, C., *Charitable Activities under the Income Tax Act: An Historical Perspective* at http://www.pemselfoundation.org/wp-content/uploads/2016/05/Juneau-Paper-July-16-2015.pdf .

[9] See [1999] 1 SCR 10 at para 152.

[10] See Garton, J., "Charitable Purposes and Activities", *Current Legal Problems*, Vol. 67, Issue 1, 2014 pp. 373-407, for a discussion on when activities can properly be considered when assessing eligibility to qualify as a charity. The First Tier Tribunal considered the question of the regulatory examination of activities in *Full Fact v Charity Commission for England & Wales*,

Case No. CA/2011/0001 available at http://charity.decisions.tribunals.gov.uk/Documents/FullFactdecision_26Jul11.pdf and held that it was appropriate to consider activities when there was uncertainty and ambiguity in the objects, but also to do an analysis and evaluation of activities and proposed activities when it is required to establish whether the objects are for public benefit.

[11] The following paragraphs build on an analysis by Professor Adam Parachin set out in correspondence with the author.

[12] See Cullity, M., *Charity and Politics In Canada* at http://www.pemselfoundation.org/new-site/wp-content/uploads/2016/05/M-Cullity-Charity-and-Politics-January-10-2014.pdf for a discussion of the dual character issue in the context of political activities under the now-repealed s. 149.1 (6.1) and (6.2) provisions of the ITA.

[13] See Juneau, C., *The Canadian Income Tax Act and the Concepts of Charitable Purposes and Activities* at http://www.pemselfoundation.org/wp-content/uploads/2016/10/Occasional-Paper-The-Canadian-Income-Tax-Act-and-the-Concepts-of-Charitable-Purposes-and-Activities-Final.pdf . An essential aspect of comprehensive reform would be removing the activities element in the ITA definition of a charitable organization.

[14] *Supra* note 4, s. 1.

[15] *Supra* note 3.

[16] *Supra* note 9 at para 207-209.

[17] For a detailed analysis of the "stranger" concept see *supra* note 6, *OLRC*, v. 1., chapters 7 and 8.

[18] For a contrary view, which suggests that there are common law tools that could be used to better resolve tensions between rights and putatively charitable endeavours, see Parachin, A., *Regulating Charitable Activities Through the Requirements for Charitable Purposes: Square Peg Meet Round Hole.* Forthcoming.

[19] The Pemsel Case Foundation's full written positions on various potential reforms may be found in its three submissions to the Senate Special Committee on the Charitable Sector. These documents are available at:

http://www.pemselfoundation.org/wp-content/uploads/2018/12/Special-Senate-Committee-submission-1-Reform-Recommendations-Oct.-22-2018.pdf ;

http://www.pemselfoundation.org/wp-content/uploads/2018/12/Special-Senate-Committee-submission-2-Meaning-of-Charity-Nov.-5-2018.pdf ; and

http://www.pemselfoundation.org/wp-content/uploads/2018/12/Special-Senate-Committee-submission-3-Political-Activities-Regulation-Nov.-26-2018.pdf .

[20] See Voluntary Sector Initiative (Canada), Joint Regulatory Table Final Report,

Strengthening Canada's Charitable Sector (Ottawa, March 2003).

[21] See Short, *supra* note 8.

[22] The Australian Standardized Chart of Accounts features common categories for revenues and expenses and a Data Dictionary to assist organizations in deciding the most appropriate account in which to enter information for a particular transaction.

[23] See Silver, N., *Regulating the Foreign Activities of Charities: A Comparative Perspective* at: http://www.pemselfoundation.org/wp-content/uploads/2017/07/Regulating-the-Foreign-Activities-of-Charities-July-25-2017.pdf .