The English Charity Commission Concept in the Canadian Context*

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[*In 1995 Arthur B.C. Drache, Q.C., was asked to research the role of the English Charity Commission and to give an opinion on the possibility of using a similar model within the Canadian context. Broadly speaking, his mandate was:*

- *to determine how the Charity Commission functions, both in terms of its formal and informal workings, with an emphasis on its role as a registrar of charities and its relationship with other government departments (notably Inland Revenue) and applicant organizations;*
- *to give a legal opinion as to whether a model based on the Charity Commission could be imported into Canada, and if so, what legal and procedural steps would have to be taken;*
- *to examine possible conflicts of interest which such a proposal might engender, especially with regard to Revenue Canada's role as administrator and gatekeeper at the federal level.*]

Introductory Observations

Before discussing the role and powers of the English Charity Commission, it is best to look first at the difference in the English and Canadian political settings. To all intents and purposes, the Charity Commission operates in a unitary state where there are no provincial or states' powers. Its only potential conflict situations arise with Inland Revenue, insofar as its decisions have an impact on the tax status of organizations, and with local authorities (municipalities) where the decisions may have an impact on rates (property tax) and, perhaps, local fund raising. Put in a Canadian context, it is a "federal" organization, responsible to Parliament.

Canada, as a multiple jurisdiction country, provides a much different context because under the *British North America Act*, the provinces have jurisdiction over charities. While it is true that most provinces use this jurisdiction sparingly, the main exception being Ontario, every province does in fact have

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*This article was developed from a memorandum for a client of Drache, Burke-Robertson & Buchmayer who has given permission for its wider distribution.

legislation affecting charities. And it is worth noting that, in my view, there is an increasing trend on the part of the provinces to use that jurisdiction. While only Ontario has an activist Public Trustee's Office charged with overseeing charities, Alberta is much involved with controlling fund raising on a province-wide basis while British Columbia is now looking at proposed legislation relating to conflict of interest affecting directors of charities.

It is important to note that the oversight of charities falls within the purview of the provincial Attorneys-General. When issues arise relating to the operation of charities or gifts to charities, it is the provincial attorney-general who, in some fashion, will be involved. This is true whether the issue is ensuring that charitable funds are being used for charitable purposes, whether a testamentary gift is charitable, or an application under the *cy près* doctrine.

On the other hand, Revenue Canada is the sole arbiter (subject to appeals to the Federal Court of Appeal) as to whether an organization will be registered for the purposes of the federal *Income Tax Act*. Such registration may or may not be necessary to confer tax-exempt status but is the *sine qua non* for an organization to be able to issue charitable tax receipts which permit (depending upon whether the donor is a corporation or an individual) tax deductions or tax credits for donations. Registration decisions are based on Revenue Canada's understanding of the common law of charity (which, I would note, does not always coincide with the provincial governments' interpretations).

The decision-making role is an uncomfortable one for Revenue Canada in that it feels bound by the case law and cannot (or will not) on its own try to expand the traditional categories of what is a charity. Thus, a sense of frustration has developed both within the charity community and, I daresay, within Revenue Canada because it is not prepared to recognize developing societal trends by registering new types of charities. At a recent Commons Finance Committee meeting, several umbrella organizations felt constrained to point out that Canada's federal rules were out of step with recent trends elsewhere. Of particular concern was Revenue Canada's refusal (based on case law) not to recognize entrepreneurial enterprises designed to train individuals and thus relieve poverty even though the creation of such enterprises has been a hallmark of many provincial and municipal initiatives. Ironically, such initiatives are often recognized by Revenue Canada if they are pursued abroad, but not if they are pursued in Canada.

Other areas of contention which have brought opprobrium on Revenue Canada for its conservatism include its refusal to recognize as charitable the amelioration of racial tension, the promotion of multiculturalism, the promotion of national unity or patriotism, or the promotion of environmental causes or action.

To some extent governments have acted to overcome specific problems. In the past 20 years amateur athletic associations and national arts service organizations have been legislated into "quasi-charitable" status under the *Income Tax Act*. In the February 1995 Budget, special tax treatment was given to "ecological" gifts, presumably as a way to deal with attempts to preserve ecologically sensitive land.

In a later part of this paper, we shall look at how the English Charity Commission has managed to extend the definition of charity while at the same time purporting to work within the traditional common law definitions.

Because the ability to issue tax receipts is central to virtually all fund raising, almost 75,000 organizations have been registered to date, ranging from individual houses of worship to multimillion-dollar foundations.

In the 1975–76 period, the *Income Tax Act* was substantially amended to try to ensure that any organization which was registered by Revenue Canada had to comply with various performance norms. These requirements included such things as annual reporting (through Revenue Canada), required disbursement quotas to ensure that by means of a fixed formula at least some minimum annual amount would be paid out for charitable purposes, and setting rules relating to the relationship between insider individuals and the charities. The basic penalty for contravening these rules is deregistration...loss of charitable (and thus, the right to issue receipts for tax credit) status and, in effect, a mandatory distribution of all assets to another registered charity.

As a consequence of the implementation of these rules, Revenue Canada has become a major player in overseeing the administration of charities, albeit with very different interests in most cases from those of the provinces. More to the point, because complying with the tax rules is crucial to virtually all charities in Canada, *de facto* Revenue Canada has become the most important overseer. On the other hand, many subjects which are of legitimate public concern, such as fund-raising solicitation, remuneration, and the quality of investments are not within Revenue Canada's purview.

There are some other problems. The Charities Division of Revenue Canada is very small and its audit division is minuscule. Thus, only a very few charities are closely examined each year, usually because of public complaint. Second, Revenue Canada does not function as a support organization for charities. While it will, of course, answer questions posed on matters within its jurisdiction, its role is not to be an advisor to charities (as is the case in England with the Charity Commission). Third, Revenue Canada officials will quickly admit (off the record) that as a government department it is subject to "too much" political pressure, a situation exacerbated by the confidentiality rules of the

Income Tax Act which preclude its discussing the affairs of "clients" with anybody, including members of Parliament. A fourth problem arises simply because of the workload which universal registration of charities for income tax purposes implies. Since all organizations which want to issue tax receipts must register, there is always a huge volume of work connected with both registration and oversight.

These problems have translated into quite low morale within the Charities Division of Revenue Canada, exacerbated by all the problems generally besetting government departments, including a loss of personnel and an inability to replace people who retire or leave for more attractive employment.

The confidentially issue is of more significance than one might think. Because of this rule, Revenue Canada is never in a position to explain publicly the reasons for its decisions in particular cases. This, in turn, means that it is faced with the same situations over and over again from different applicants. With no public record of decisions, advisors cannot give good counsel to clients which means that there are hundreds of applications which have to be dealt with which are "hopeless". Further, a public record of the reasons for decisions would help applicants to understand what is and is not acceptable and to prepare better applications. The English Charity Commission publishes its more noteworthy decisions and also publicizes changes in registration policy as well as issuing brochures warning about matters which are exciting concern.

Any changes to the Canadian system which would allow fuller publication of specific decisions (even if the names of applicants are deleted) would be a major improvement on the current situation where everything is done in extreme secrecy. I have had to use the Access to Information requests to get even basic guidance as to Revenue's internal policies with regard to the registration of different types of organizations. Secrecy of this type seems counter-productive.

The Charity Commission of England and Wales

The Charity Commission of England and Wales (Northern Ireland and Scotland use a somewhat different system) had its genesis in the *Charitable Trusts Acts of 1853* and *1860* but its modern existence effectively flows from the *Charities Act of 1960* which has, since 1990, been refined and somewhat modified.[1] In a Canadian context, the Commission may be seen as playing the dual role of both the provincial Public Trustees and the Attorneys-General and the federal role of Revenue Canada.

The Commission is, however, completely separate from Inland Revenue and has a separate existence. It reports to Parliament through the Home Secretary,

who appoints the Commissioners. Reporting is done by means of an annual report to the Home Secretary who tables it in the House of Commons. The commissioners and others who work for the Commission are considered to be employed in the British civil service.

The Commission is considered to be a government department without a minister, as is Inland Revenue. This status goes a long way towards eliminating political pressure. And, while it depends upon Parliament for annual funding, even in periods of austerity it has been (in the words of its own Chief Commissioner) "more than adequately funded".

What is more interesting is that all parties, the Commissioners and those dealing with it, agree that the Commission has achieved a "quasi-judicial" status even though this status is nowhere made explicit. In cases where there is an appeal from its decisions, the traditional courts have taken the view that the onus of proof is on the party appealing who must show that the Commission was wrong in its decision. Its pronouncements on how charities should operate and on the law (e.g., its views as contained in pamphlets) seem to be accepted by the courts as being correct, at least until a challenge can demonstrate that the view is in error. Like a court, the Commission is never a party to an appeal, though its decision may be the subject of the appeal.

A Brief Overview of the Role of the Commissioners

In the words of section 1 of the *Charities Act (1960)* their role is as follows:

> (3) The Commissioners shall (without prejudice to their specific powers and duties under other enactments) have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses.
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> (4) It shall be the general object of the Commissioners so to act in the case of any charity (unless it is a matter of altering its purpose) so as best to promote and make effective the work of the charity in meeting the needs designated by its trusts; but the Commissioners shall not themselves have power to act in the administration of a charity.

These objects have been carried forward into the latest version of the legislation, the *Charities Act, 1993.*

In my view, the key point is that major functions of the Commission are the promotion of the effective use of charitable funds and advising on administration. Put simply, in these regards the Commission is like a resource centre and it regularly advises charity trustees, both in response to individual queries and

through publications, how a charity should operate. No such public function is performed in Canada by either Revenue Canada or provincial authorities.

It also has the major role in overseeing charities (the provincial role in Canada) and, at least under our current constitutional framework, such a role would not be appropriate for a Canadian federal agency. For the purpose of this paper, we shall ignore the oversight function of the Charity Commission except as it relates directly to its function as a registrar of charities. (It is noteworthy that if there were any criticism amongst the people I met in England about the structure of the Commission, it stems from the dual roles of "helper" and "overseer" which are seen as often incompatible. This clearly is not a problem which we would face in Canada.)

Part II of the *Charities Act* requires the Charity Commission to maintain a public register of charities in England and Wales. While the register serves many purposes (including informing the public about the status of an organization), in the context of our examination, the main point is that registration is the equivalent of our registration for income tax purposes. Tax-exempt status and tax relief to donors follow from registration.

We would note that, unlike the Canadian situation, many organizations are exempt from the registration process. These include almost all universities and colleges, the British Museum, very small (in terms of endowment) organizations, the Church Commissioners and any institution administered by them (i.e., all Anglican churches) and others. We note these exceptions, not because they are specifically important to this discussion, but rather because there are many in Canada who believe that some alternative system should be found to deal with the thousands of "routine" charities (those which are already subject to federal or provincial oversight), and individual houses of worship. It is beyond the scope of this paper, however, to pursue this specific issue. In England, exempt organizations are automatically registered for income tax purposes by Inland Revenue so that gifts to these organizations qualify for the same tax benefits as gifts to charities registered with the Charity Commission.

The test of what is a charity is essentially identical in England and Canada, namely a test based on decided cases and common law. Yet, as we have pointed out, the Charity Commission has, in effect, broadened the definition in some cases (the most high-profile being organizations to promote racial harmony) while Revenue Canada has not been able, or at least not prepared, to do so.

There is, of course a converse to registration. Charities may be stricken from the register if, in the opinion of the Commission, they no longer meet the test

of being a charity at common law. Any person who might be affected by a registration, a refusal to register, or deregistration may appeal the decision of the Commission to the High Court. Appellants may include the Attorney-General, Inland Revenue, the organization affected, trustees, donors or potential donors, or the public, to the extent the individual can show that he or she is "affected".

Appeals are extremely rare. Inland Revenue has appealed only once in the past 15 years (it lost) and appeals by organizations are almost as unusual. The lack of appeals appears to stem from several factors. First, there is a continuing consultative process in all cases which are "controversial" and which includes Inland Revenue, the Commission and the organization along with organizations or individuals who may have a demonstrated interest. (This is in stark contrast to the Canadian situation where the very fact of an application is "confidential".) Thus, most decisions are consensual.

Second, the Commission has high status within the community and its decisions are very carefully reasoned, many of them published in plain English in a report that is available to the public. The quality of reasoning is very high and thus difficult to challenge. As mentioned earlier, the courts have effectively conferred a quasi-judicial role on the Commission by taking its decision as the starting point and placing the onus of proof on those who challenge it.

Third, the cost of an appeal is high. As in Canada, most organizations cannot afford an appeal. But what is surprising is that apparently Inland Revenue does a cost-benefit analysis before deciding to pursue an appeal. One of the determining factors is the extent to which a particular registration might, because of its precedential value, become costly in terms of foregone revenue.

According to the Chief Commissioner, Inland Revenue does not appeal just because there is some matter of "principle" to be determined.

The Decision-Making Process

In practical terms, applying for inclusion on the register (and thus obtaining tax-advantage status) is simplicity itself. As in Canada, there is a form to fill out and some basic documents to be filed. But, as in Canada, the more fundamental issue is what actually happens when the objects of the organization are such that there may be doubt that it is in fact a charity using traditional common law tests.

In practice, the legal department identifies the issues which an application raises in the context of traditional charity law. It prepares a memorandum which goes to the Commissioners who give their preliminary views, "yea" or "nay". They then communicate their intentions to Inland Revenue which gives

its views. The Commission may also contact "outsiders". For example, in its report on its decision dealing with an organization which wanted to educate the public about cults, the Commission took the initiative and publicized the application, inviting comment. Objections were received from The Unification Church ("the Moonies", a registered charity), The Scientologists (not registered, though currently an applicant) and the National Council of Hindu Temples. These were considered (and discussed in the final report on the decision) but, ultimately, the applicant organization was registered.

The Commission ensures (sometimes going as far as issuing a press release) that all opinions of potentially interested parties are canvassed and taken into account. This is in contrast to the position of Revenue Canada which, by law, has to operate in secrecy when dealing with an application.

It is important to note that there is no statutory provision which gives the Commission special power to "extend" the definition of what is a charity. Rather, the Commission uses analogies and other logical tools to move from the traditional approach to whether an organization is a charity to extend the scope of the term. Both the Commission and those who deal with it believe that the Commission is in fact extending the working definition of "charity". This seems beyond doubt. But the Commission feels that it is doing so carefully using well-reasoned arguments and that, because of this, its opinions are respected, particularly by the courts and by the public. (Publication of its decisions and the reasons for them is considered to be of great importance.)

Critics believe that the Commission is still too timid and could go a lot farther than it already has though at least one solicitor with whom I spoke feels that the Commission has struck the perfect balance "given the political realities" within which it must operate.

Issues which it has recently dealt with include registration of a Jewish self-protection organization ("vigilantes", some said) which got status as a group protecting minority rights, and an organization to promote better business ethics. Recent issues include determining whether the Church of Scientology is a religion and whether a bank whose shareholders are all charities could, in fact, be a charity. (In this case, the Commission was inclined to permit registration while Inland Revenue had serious reservations.)

It is hard to put down on paper just *how* the Commission's reasoning works, but a reading of the published reports does give one a flavour of the techniques used.

A Canadian Charity Commission

In my view, there would be some very real benefits in the establishment of a Canadian Charity Commission, under whatever name might be chosen. I hasten to add that such a body would only operate at the federal level and there is no suggestion that provincial powers be reduced. In a nutshell, I am suggesting that some of Revenue Canada's responsibilities be transferred to a new organization and that such an organization also take on at least two additional roles:

1. *Registration of Charities*

In my view, there are a number of benefits to be derived from shifting the process of registering charities for *Income Tax Act* purposes *only* to a Charity Commission. (I stress the limited purpose because of the general provincial jurisdiction over charities. This limitation reflects the current situation.)

The most important reason for such a body is that it could be given (either implicitly or explicitly) the right to "extend" the meaning of charity for income tax registration purposes. An independent body created with this as a part of its mandate could operate with much more vigour than can a government bureaucracy. It could, for example, "go public" on various issues of status, inviting debate and submissions on whether some particular activity should, in fact, be brought under the registration umbrella. Once a decision were made, it could issue specific policy guidelines for other organizations and publish its reasons for its decision.

I would assume that the real body would be required to consult with Revenue Canada on such decisions but would not be bound by Revenue Canada's views. On the other hand, I would envisage a situation where Revenue Canada as well as an aggrieved organization, would have the power of appeal to the courts. (I would, if the opportunity presented itself, change the appeal structure so that an appeal need not start at the Federal Court of Appeal, as at present, but at a lower level which makes an appeal more affordable.)

If this proposal were adopted, perhaps the legislation setting up the Commission could include exemption criteria which might eliminate the need for very small organizations or organizations which are under the supervision of other government departments to register.

I would leave Revenue Canada with responsibility for the audit process as it applies to charities and it seems appropriate that the annual reports (which can lead to audit) would continue to be filed with Revenue Canada. All existing registered charities would be "grandfathered" into the new procedure which would have the following benefits:

- Properly constituted and empowered, this Commission would have greater flexibility in recognizing changing conditions within society and "broadening" recognition of the charitable nature of various new activities.
- The process, freed from the statutory requirements of extreme secrecy which are embodied in the *Income Tax Act*, could be much more open and thus could have public input. Other government departments would also be in a position to have input on behalf of their clients and the issue of government policy could be one of the factors in decision making. Perhaps as important, decisions would be publicized and the public made aware of changing rules, something which does not happen at present.
- The process would be free of political pressure since, subject to annual reporting to Parliament, the Commission would be completely independent.

One other benefit would be that Revenue Canada could greatly reduce the size of its Charities Division as that division would simply become an auditing/enforcement group. On the other hand, an independent Commission could recruit and train a group of professional charity experts who could contemplate a career in the field. The current problem of frequent staff turnover and poorly trained examiners should therefore be ameliorated.

2. *Promoting the Charitable Sector*

I was most impressed with the fact that one aspect of the English Charity Commission mandate was the promotion of charitable activities and the better administration of charities. In my view, there is no government organization in Canada at either the federal or provincial levels which has such a mandate and, further, I believe that it is an objective which is worth pursuing.

None of the governmental organizations—Revenue Canada, the public trustee or the provincial attorneys-general—see themselves as having any sort of advisory role. Rather, they are charged with oversight and thus offer comments on *compliance* rather than help in an operational sense. This is not a criticism but simply an observation about their respective roles. Certain groups within government, such as Heritage Canada's Voluntary Action Program, have had some semblance of such a role but on a very small scale.

Charities, on the other hand, have usually had to turn to private sector advisors for advice on their operating problems — ranging from what investments they can make to what their constitutional documents should (or should not) contain and remuneration of employees or directors, fund-raising-related issues and so forth. I was much impressed with the English Charity Commission's

ability to answer individual queries and prepare "model" documents for public dissemination. It also produces brochures and pamphlets dealing with a range of administrative issues and holds seminars and other public information sessions which are open to charities and their trustees.

At a time when many Canadian charities are looking for help for organization or reorganization and are faced with multi-jurisdictional compliance issues, a national (federal) organization which offered advice and support would be both welcome and useful. Of course, care would have to be taken that this new advisory role would not bring the Commission into conflict with provincial bodies.

And that observation raises the possibility that a Commission could assume another role. Revenue Canada tries from time to time to co-ordinate its activities with provincial bodies but there are significant difficulties because its oversight obligations relate only to the *Income Tax Act* and not to the general administration of charities. The provincial bodies, conversely, are distinctly uninterested in Income Tax rules. A national Commission could act as a sort of discussion centre and clearinghouse for federal/provincial issues and *might* in due course be the forum which would allow greater co-ordination and harmonization of rules on a nationwide basis.

Finally, in my view, the Commission could fulfill the role of "voice" of the charity community in communicating with the federal government. As an independent commission, it would presumably have credibility with both the community and the government. Its annual report could be used to transmit government views and concerns (as well as those of the Commission itself) to the charity community *and* the community's concerns to the government. While I am not suggesting that it become a kind of lobbyist, it would be in a position to offer independent observations about the state of the charity community.

The effectiveness of this particular role would increase over time as the Commission developed its own expertise and reputation.

3. *A National Complaint Bureau*

One of Revenue Canada's problems is that every time a rogue charity's activities are "exposed" in the media (something which occurs with depressing regularity), it is called upon to comment or to launch an investigation. But the confidentiality rules effectively preclude substantive comment or any publicity about audit or other investigatory results. This in turn has created problems for "good" charities which end up damned with faint praise ("As far as we are concerned, CARE Canada is not in breach of any rules under the

Income Tax Act.") and a high level of frustration for the public which feels that legitimate complaints are not acted upon.

All parties with whom I spoke in England indicated that this was a particularly important role of the Charity Commission. It investigates complaints by the public (often those which appear in the media) and reports publicly. If there is a problem, the Commission itself has jurisdiction to deal with it. More importantly, when the Commission indicates that it has investigated and found no wrongdoing that is usually the end of the matter. The Commission's decision is viewed as being both impartial and authoritative.

Part of the Canadian problem stems from the fact that, in the eyes of most Canadians, Revenue Canada's charity branch is in fact *the* main regulator of charities when, in fact, the vast majority of complaints should be directed to either provincial Public Trustees or Attorneys-General.

A Charity Commission could take on the role of public complaints commission which could (within federal jurisdiction) offer a forum for dealing with accusations where both the "accuser" and the charity would have rights. I do not propose that the Commission itself have any power (beyond the power to deregister if federal or common law rules are breached) to impose penalties but it might well be that the public investigation of complaints would better public understanding of how charities operate. At the same time, the public could be satisfied that legitimate complaints have been investigated while charities would be aware that they would get a fair hearing and not be pilloried by uninformed media. (The existing analogy might be seen as provincial press councils which examine public complaints and whose findings are widely publicized.)

Adopting this role would give the federal government (through the Commission) a greater national role in *de facto* charity oversight and would go a long way towards eliminating public misconceptions about charities while, at the same time, posing a public threat to charities which strayed from the rule of law. We are now into a period where the public demands more accountability but the lamentable state of most provincial charity administrations (Ontario is the main exception) leads the public to believe that charities are unregulated and that Revenue Canada is an ineffective guardian of public interest — unfair as that perception might be. At the same time, since the Commission would not get involved in dealing with issues which are in provincial jurisdiction, it might lead the provinces to become more active in overseeing activities which *are* within *their* exclusive jurisdiction.

Procedural Requirements

It is beyond the scope of this article to "design" a Canadian version of the English Charity Commission in any detail, but in my view one could be created which fairly closely followed the English model. Ideally, it would be independent of any department of the government, reporting directly to Parliament through a designated minister, perhaps the Minister of Justice. The model of the CRTC comes to mind as a body which is independent, regulatory and policymaking, yet one which must co-operate with other departments and whose decisions can be appealed to the courts. (Since we do not have the concept of a "non-ministerial department", we cannot use that particular model.)

I would envisage a commission with a fairly small membership drawn from those with firsthand knowledge of the charity community, backed up by a team of technicians with the requisite expertise. At least some of these would presumably be drawn from existing departments so as to take advantage of the understanding of the Canadian charity sector which has been accumulated within the federal government and to involve those who have in-depth knowledge of sector issues. I would anticipate that, as in England, they would be "civil servants" and would continue to enjoy civil service pensions and other benefits.

Legislative Requirements

As anybody who has drafted legislation is aware, "the devil is in the detail" and many questions will not even arise, much less be answered until there is an attempt to actually draft the enabling act(s). However, I do have an opinion as to what legislation would be needed if a decision is taken to implement the suggestions I have put forward.

1. There would have to be federal legislation which would create a Canadian Charity Commission. This legislation would have to contain all the technical detail needed to set the Commission up and should, in my view, contain at least three key provisions. First, there should be a statement of its role. Second, when empowered to register a charity, the Commission should be given some guidance as to what criteria could be used to determine whether a proposed activity is of "benefit to the community", the catchall phrase which is found in the fourth of *Pemsel's*[2] categories of charity. Third, there should be an appeal process set out. While the English legislation does not have such guidelines, I feel that with a totally new body, powers of this sort would be useful.

There should also be specific provisions for consultation with other government departments, primarily but not limited to Revenue Canada. This consul-

tation process would be used to elicit departmental views on "client" problems and on policy issues which might be reflected in decisions.

There should also be explicit provision for consulting with the public and for publishing decisions and consultative documents. The role of the Commission as a source of aid to the charitable community should be made explicit and the Commission should be empowered to produce and distribute material to assist the charity community.

If the "complaint" function is to be adopted, some procedural rules (or alternatively, a grant of power to adopt such rules) should be embodied in the legislation.

2. There will have to be a number of amendments to the *Income Tax Act*, though the scope of such amendments would be determined by decisions about Revenue Canada's continuing role. The main change would be something to the effect that, where the Charity Commission has registered an organization as a charity, it will be deemed to be a registered charity for the purposes of the *Income Tax Act*. (An alternative approach is technically to allow Revenue Canada to "register" charities for Income Tax purposes but to say that the Minister "shall", or "may", register such organizations as are certified by the Charity Commission as being charities.) This is akin to the approach used in the current act for dealing with National Arts Service organizations.

My own preference is for mandatory registration (or recognition of the Commission registration for Income Tax purpose) but includes giving the Minister the right to appeal before any particular registration is accepted for Income Tax purposes. There also has to be provision for Revenue Canada to report breaches of the statutory requirements to the Charity Commission as a prelude to the Commission deregistering a charity.

It seems to me that the fundamental policy issue which has to be resolved before legislation can be drafted is whether *de facto* control of charities at the federal level is to be vested solely with the Charity Commission with Revenue Canada playing only an audit/compliance role (my choice) or whether there should be a dual role where both have registration responsibilities as is the situation now as between the Minister of Communications and the Minister of National Revenue when it comes to National Arts Service organizations. In my opinion, the current situation has not worked as well or in the manner that the original policymakers intended and the role of the Department of Canadian Heritage has been downgraded almost to insignificance *vis à vis* NASOs. Concurrent jurisdiction does not seem to work well.

3. Depending upon what is decided about the appeal procedure, changes may have to be made to either or both the *Tax Court Act* or the *Federal Court Act* to allow for appeals from the Charity Commission's decisions. This sort of technical change is relatively routine and was done recently, for example, when an appeal process was developed in respect of the valuation decisions of the Cultural Property Review Board.

I would point out that given the basic premise that the Charity Commission would operate solely within federal jurisdiction (primarily *vis à vis* the *Income Tax Act*), there is no statutory or constitutional need to deal with provincial authorities, though of course consultation prior to any major initiatives might be politic.

The Relationship Between Revenue Canada and the Canadian Charity Commission

Right now, Revenue Canada is both the arbiter of what organizations will be registered as charitable for Income Tax purposes and the body which oversees those organizations after registration...at least insofar as compliance with the *Income Tax Act* is concerned. Compliance requires meeting the requisite disbursement quotas, filing the required annual returns and not being in breach of various statutory prohibitions which range from engaging in certain types of political activity to acquiring control of business corporations to carrying on unrelated business activity. Part of the charity division is an audit group which conducts audits both on a random basis and as a result of "information received". If compliance is faulty, it is also Revenue Canada which has the power to deregister a charity for income tax purposes.

The relationship is always between Revenue Canada and the organization and there is no provision for any outside body to intervene, except when an organization (never Revenue Canada) appeals a decision and the matter goes before a court. This nexus stems primarily from the strict confidentiality provisions of the *Income Tax Act* which preclude Revenue Canada from ever discussing a specific file with an "outsider".

The Charities Division also prepares documents such as *Information Circulars* and *Interpretation Bulletins* (neither of which has the force of law) to explain its policies with regard to compliance issues. These are usually published only after consultation with the charity community, though this consultation is not a particularly open process and usually no public announcement is made. Publication of these documents is left to Revenue Canada's publications branch.

A blunt assessment of the current situation can be summed up by saying the group is overworked; has fallen behind in coping with its obligations (it often takes weeks to simply acknowledge receipt of a letter, much less act upon it); and has been almost paralyzed in making policy decisions. For example, a *Discussion Paper* published in December, 1990 which proposed significant policy changes after consultation, has not yet been acted upon simply because (in my view) the group is not able to devote time to true policy development while its energies are dissipated on day-to-day activities. Key issues "hanging fire" which were raised in this paper include rules regarding the carrying on of a business, rules regarding out-of-country activities, and public reporting issues.

A better division of labour would be to have the proposed Charity Commission take over the mechanics of the registration of charities. This group should also be the main developer of federal government policy with regard to charities. As such it should be charged with creating a more "realistic" policy towards registration, should develop policies relating to the current statutory requirements (such as what business activities are, or are not, acceptable), and should produce the policy papers and act as the consultative contact with the charity community. Presumably, these papers could be "cosponsored" by Revenue Canada and would form part of their own publication program of *Information Circulars* and *Interpretation Bulletins.*

All policy decisions would, of course, take into account Revenue Canada's views based on its experience. This role would be substantially different from the role currently played by the Department of Finance in developing tax policies. Finance determines such policies based, in part, on Revenue Canada's input and administrative capacities while Revenue Canada is the implementer and enforcer of the policies.

Proposals for statutory changes relating to the operational requirements of registered organizations as contained in the *Income Tax Act* would come from the Commission, going either to Finance or as suggestions to Parliament in the annual report. Nothing, of course, would preclude Revenue Canada from having input in this process or preclude it making its own suggestions in the same fashion as it does today.

If this role for the Charity Commission were adopted, Revenue Canada's role would be akin to its more traditional purpose, ensuring compliance with the provisions of the *Income Tax Act.* Thus, Revenue Canada would continue to receive and review the audited financial statements which have to be filed by charitable organizations while the Public Information Returns would go to the Commission which would have the facilities to make them available, on

request, to the public. Revenue Canada would also continue its audit function, as it does with all taxpayers, to ensure compliance.

Where there was breach of compliance by an organization, Revenue Canada would propose withdrawing its tax registration number which would in turn require the Commission to withdraw registration. If there were to be a disagreement between the Commission and Revenue Canada on such an issue, the registration would be withdrawn, the organization given the right to appeal, and the Commission could (if it so desired) support the organization in the ensuing appeal.

In my view, the registration process should be handled by the Commission but Revenue Canada would assign registration numbers for income tax for use on income tax receipts. As suggested earlier, Revenue Canada would have the explicit power to appeal a Commission registration before assigning a tax number to an organization. All aspects of donations, tax credit and deductions would, of course, remain with Revenue Canada as would policy issues relating to these particular matters.

I would propose that there be a formal and regular (every month or every two months) consultative meeting between Revenue Canada and the Charity Commission so that they could co-ordinate policies and exchange information. I would also assume that when the Commission is called upon to make a decision which might be controversial, Revenue Canada would be consulted.

In my view, the adoption of these policies would lead to a number of highly desirable changes:

- The Charity Commission would become the federal policymaker with regard to all issues relating to charities and their operations.
- Revenue Canada would retain its traditional role as the body which oversees compliance with *Income Tax Act* provisions.
- A cadre of federal charity specialists would be developed and the problem of constantly changing personnel overseeing charities and developing policies would be resolved.
- Revenue Canada could reduce its staff while maintaining a more effective oversight function.
- The split in responsibilities would lead to more effective consultation which would bring into the policymaking loop not only the charities but also provincial officials, all government departments which have interested client groups, and others who have a direct interest in tax issues affecting the sector. Currently, effective consultation is precluded by the confidentiality rules.

- A professional organization with a staff of experts would be able to streamline the registration process, the development of policy making, and consultation.
- Political interference (perceived or actual) would be minimized if registration and policymaking functions were vested in an independent body.
- The creation of a Charity Commission could also set the stage for both the educational and support function described earlier in this paper and the hearing of public complaints if that is considered to be a useful role.

Closing Observations

Broadly speaking, my mandate was to look at the English experience with the Charity Commission and to determine whether such a model would be useful within the Canadian context. While it is not possible in my view to create an identical body with identical roles, primarily because of constitutional limitations in Canada, my overall conclusion is that the English model *does* offer Canada an useful example of how the overall administration of charities within the federal jurisdiction, can be improved and made more efficient.

It is interesting to note that many other countries are looking at the issue of using a charity commission based on the English model. I am informed that Singapore has enacted legislation with a single commissioner. South Africa is on the way to adopting the English model as is Bulgaria. Further, as many of the newly emerging nations of the east bloc look to methods of encouraging a "civil society" and look to enacting enabling legislation, more and more of them are giving serious consideration to the charity commission model to determine what types of organizations will receive official recognition, primarily for funding purposes.

If a policy decision were taken to pursue this road, the next step would, I suggest, be consultation with the various players, starting within the federal government itself. If there were significant support within that government for such a change, a more specific set of proposals could be developed within a fairly short period of time, published, and publicly debated. There was one such consultative process in the 1974-75 period when the charity community was much less organized and still the whole process was completed in a year — from publication of the proposals to legislative action.

I suspect that proposals for a Commission would have broad support within the charity community and probably, if presented in a positive fashion, among the interested public as well.

A failure to take any steps whatever can only lead to two types of continuing pressure. First, there will be extreme unhappiness in the charity community and the interested public with the inability of organizations to hurdle the definition barrier required to be recognized as a charity for income tax purposes. Second, there is evidence that the pressure of work at Revenue Canada will only get worse, exacerbating its inability to deal with either registrations or major policy initiatives in a timely fashion.

The catalyst for these twin pressures will be government funding cutbacks which put new organizations at a disadvantage in fund raising if they cannot get charitable registration and a lack of understanding of the rules and policies as established organizations look to new types of money-raising activities such as partnerships with private sector groups, exploiting trademarks and copyrights, and the marketing of expertise.

Sooner or later, some action will have to be taken by government. I suggest that the time is right for government to take the initiative rather than being put into the position, in the future, of being forced to adopt crisis-inspired stopgap measures.

FOOTNOTES

1. [For background information see also C. Arthur Bond, "The Charity Commissioners for England and Wales" (1988), VII *Philanthrop.* No. 3, pp. 3–5.]
2. *John Frederick Pemsel* v. *The Commissioners for Special Purposes of the Income Tax Act*, [1891] A.C. (House of Lords) in which Lord Macnaghten found that "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads.