Legal Developments

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This issue's report is longer than usual, because it contains a summary of the Ontario Law Reform Commission's *Report on the Law of Charities*. Before we get to that, however, some court decisions are of interest.

The Courts

The Supreme Court of Canada has granted leave to appeal in the case of *Vancouver Society of Immigrant and Visible Minority Women* v. *M.N.R*, a decision of the Federal Court of Appeal.[1] The Society was refused registration by Revenue Canada, and that refusal was upheld by the Federal Court. The Society's principal purposes are a) "to provide educational forums, classes, workshops and seminars to immigrant women in order that they may be able to find or obtain employment or self employment" and b) "to provide services and to do all such things that are incidental or conducive to the attainment of the above stated objects, including the seeking of funds from governments and/or other sources for the implementation of the aforementioned objectives".

Revenue Canada and the Court both rejected a claim for registration under the second head of charity—advancement of education—and the fourth head—other purposes beneficial to the community. Both also were concerned that the Society's purposes were not described with enough clarity, leaving the door open for it to pursue noncharitable as well as charitable purposes.

Having accepted this case the Supreme Court will be able, for the first time in many years, to say something about the law of charity. There are three areas that it is hoped the Court will pay some attention to. First, and most interestingly, it will have to deal with a claim that advancing the interests of a minority group, especially one composed exclusively of women, is a purpose beneficial to the community. In the Federal Court the applicants made an analogy to native peoples, invoking *Native Communications Society of B.C.* v. *Canada (MNR)*,[2] but this was rejected. Second, the Court will be able to say something about the scope and meaning of "education". While claims that the presentation of information and/or viewpoints to the public constitutes "education" have frequently been rejected,[3] what is described in (a) above is much more than that, even if it is not formal instruction in a "subject" in a formal educational institution. Third, with reference to the exclusivity point, it is to be hoped that the Court will say something about the distinction between charitable purposes

and "charitable activities". The latter is a confusing phrase, appearing in the *Income Tax Act* and frequently used by Revenue Canada and the courts when denying registration. The problem is that most charitable organizations perform numerous noncharitable "activities". An activity carried out by an organization should be acceptable if it pursues the organization's overall charitable purpose(s), if it is a means to an end. It may be that at the end of the day the Society pursues a mixed set of purposes—some charitable, some not. But the question of what the purposes are is the one that should be addressed, not that of what "activities" it may perform.

A few years ago the Ontario Court of Appeal dealt with the issue of discriminatory terms in trusts, striking down as offensive to public policy the Leonard Foundation scholarships which were restricted to white Protestants.[4] In *Re Ramsden*[5] the University of Prince Edward Island was given a bequest for the establishment of scholarships or bursaries to "protestant students". The case presents two interesting, inter-related problems. First, as it turned out, the bequest clearly contravened provincial legislation governing the University[6] and thus could not be accepted. Having made this straightforward finding, the Court went on to consider whether the gift could be applied *cy-près*. In fact it was probably wrong to go this route, as there was nothing impossible or impracticable about the trust—it merely lacked a trustee because the chosen one, the University, had effectively disclaimed. Thus we have another example of a court inappropriately using the term "*cy-près*" when it was merely making a scheme to carry out the clearly-stated charitable purpose.[7]

The Court then compounded its error by actually applying the property *cy-près*. Assuming there was an impossibility or impracticability which led to failure of the purpose, this was a case of initial failure (although the Court did not identify that fact) and thus it was necessary to find a general charitable intention before *cy-près* could be applied.[8] The Court had no difficulty in finding that general charitable intention, despite the specific nature of the gift—not only was it for Protestants but preference was to be given "to students intending to enter the field of ministry". The cases on general charitable intention make it clear that the more specific the gift the more difficult it will be to find a general intention. They also make it clear that where there is only one gift to a particular institution for a particular purpose it will be considered specific. In the result, the Court ordered the executors to find other trustees, since it was only the University that was precluded by provincial law from applying a denominational test.

The second issue that the case could have raised, but did not, was whether it is acceptable to create charitable trusts for public institutions that discriminate on religious lines. The Leonard Foundation case, the first in the Common-

wealth to strike down a discriminatory provision on public policy grounds, left unclear where the line would be drawn between acceptable and unacceptable discriminatory provisions. Here was an opportunity to consider that question which was missed.

It should also be noted that the Prince Edward Island Court's decision on the general charitable intention point is at odds with a recent Manitoba decision, *Re Charlesworth Estate*.[9] That case also involved a bequest that failed, specifically a gift to "a Roman Catholic orphanage in Hong Kong or Vietnam for the specific use and benefit of Eurasian children". The executrix was unable to find that any such institutions existed.

Beard J. held that the specificity of the gift, and the fact that it was not one of many charitable objects in the will, negated the finding of a general intention. In the circumstances this was surely the correct decision according to present doctrine.[10] But given the inconsistency of the cases in the area, it is surely time to adopt the 1984 recommendation of the Ontario Law Reform Commission's *Report on the Law of Trusts*, reiterated in the recent *Report on the Law of Charities*, that the requirement for general charitable intention be abolished.[11]

Ontario Law Reform Commission *Report*

The summer of 1997 saw the publication of the long-awaited Ontario Law Reform Commission *Report on the Law of Charities* [the *Report*]. It is a voluminous document, highly ambitious in scope, very thoroughly researched, and clearly written. It deals not only with the laws defining what charity is and the regulating of charitable organizations, but also in detail with such issues as the empirical makeup of the charitable and nonprofit sector and the economic, political and ethical arguments for the charitable preference. In this "Legal Developments" I will briefly summarize the content and principal recommendations of the 16 (of 19) chapters of the *Report* which are not concerned with the legal definition of charity. (Comments on the other chapters begin on p. 45.)

The two-volume *Report* is organized in four parts. Part 1, "Introduction and Background", consists of five chapters. The first, introductory, makes two particularly useful points. First, it notes the difficulty of separating "charities" from the "nonprofit sector" generally. That is, much of the law of charity grew out of the English (and later Canadian) courts' concern with trusts law. But many of the issues that now confront the charitable sector, and with which the *Report* deals, apply whether or not a nonprofit organization is one devoted to what the law terms "charitable" or to some other purpose, and whether or not an organization chooses the trust form or the corporate form (most choose the latter, of course). That is, "such matters as the regulation of fundraising, the

supervision of tax expenditures, the delivery of government-funded social and cultural services through the instrumentality of charitable and nonprofit organizations, and the relative efficiency of charitable and other types of nonprofit organizations" are ones that concern legally noncharitable but nonprofit organizations as much as legally charitable ones. As a result, "the scope of many of the laws considered" by the Commission "ought to be the nonprofit sector in general and not just charitable organizations" (p. 4). Second, the first chapter contains a very thoughtful discussion of why government might want to regulate the sector (pp. 14–17), and of why the sector might itself wish to be regulated (pp. 18–19). In the former case one important rationale noted is that governments increasingly deliver services through nongovernment agencies and thus require "responsible and effective charitable organizations that deliver on their promises" (pp. 16–17). Both of these sections, in a number of ways, provide the groundwork for what follows in subsequent parts.

The introductory part of the *Report* also has a useful survey of past scholarship on the charitable sector in Ontario and Canada (chapter 2) and an excellent overview of empirical information on the charitable sector in Ontario and Canada (chapters 4 and 5). The information available on the sector is, the *Report* tells us, "quite poor", for two reasons. First, it tells us much more about individuals than about corporations. Second, the collecting of information is "conceptually and/or methodologically weak". As a result, the *Report* makes recommendations for improving the collection and dissemination of statistics, especially with regard to corporate giving (recommendations 9 and 10, p. 626). But these difficulties aside, the *Report* does a masterly job of assembling and evaluating the information that is available. There is much food for thought here in the suggestion that Canadians' generosity is "stagnating" (p. 89), in the fact that while more Ontarians give to charity than do people in other provinces, they give less individually than donors in four other provinces (p. 98). More interestingly, when donations are considered as a percentage of average income, residents of the country's most populous and richest province are the ninth most generous in the country (pp. 99–100). And the figures on giving are presented in a variety of other ways as well—by type of charity favoured, by income group, age and occupation (pp. 101–112). Finally, the chapter contains information on corporate giving (small and declining through the 1970s and 1980s as a percentage of corporate profits) (pp. 118–122), on the makeup of registered charities (religious organizations continue to lead the way although their numbers are declining as a percentage of the whole) (pp. 122–128), and on charities' revenues, which come largely from government (pp. 128–130).[12] It is not possible to discuss here any of these findings in detail, but the increasing use of the sector to carry out government policies and the apparent

relative failure of the corporate sector and the better off to "pull their weight" must give food for thought.

Part Two of the *Report*, "Public Policy and the Charitable Sector", largely concerning the legal definition of charity is reviewed separately, beginning on p. 50, except for chapter 9, "Policy Perspectives on the Charity Sector", which consists of two parts. First, there is an excellent summary of the explanations, positive and normative, economic and political, offered for charity in the academic writing. As the *Report* notes, most of the writing in this area is American, and the very real differences between the two countries suggest the need for many more home-grown studies of the sector. Second, the *Report* discusses various "taxonomies" of the nonprofit sector, noting that it includes much more than organizations devoted to purposes which the law deems "charitable". It argues that the most useful taxonomy would be one that divided nonprofit organizations into religious, charitable, political, mutual benefit, and a "catch-all" category of "other purposes".

Part Three is entitled "The Income Tax Act: Reforming the Primary Regime of Supervision". That is, the *Report* correctly argues that the principal way in which charity in Ontario, and the rest of the country, is regulated is through the charities branch of Revenue Canada. There is a chapter on the history of this regulation (chapter 10), one on the current regime (chapter 11), and one on proposals for reforming that regime (chapter 12).[13] There is an obvious irony here, of course, for the *Report* is the creature of the Ontario Law Reform Commission and it is making recommendations which only the federal government can act on. Nonetheless, the *Report* does make a number of suggestions. Some of these relate to the need for a better-drafted statute, for dovetailing with provincial regimes, for enhanced information-gathering, and for publication of the Department's decisions and of the reasons for them.

There are other, more substantive, suggestions as well. These are founded on what the *Report* calls "the best general premise for federal ... involvement in the charity sector", which is that the sector represents "a third order of organization in society, one whose principal characteristic is that the people who work in it are motivated predominantly by altruistic purposes". Given this, and given that favourable tax treatment is a state subsidy, the role of the state "is to facilitate charitable activity and to protect the sector from waste, fraud and abuse" (p. 334). In the recommendations the same point is put thus: government regulation should "ensure that entities which avail themselves of the tax privileges are sufficiently loyal to their purpose and sufficiently effective in its pursuit to ensure that the tax privileges are merited" (recommendation 26 (3), p. 630).

In general, the *Report* argues, the federal "regime"—registration, limits on activities, disbursement quotas, the organization/foundation distinction, etc—is "sound", but there are "several areas where the legal regulation of charities at the federal level is seriously lacking" (p. 333). That is, the federal government should do what it tries to do better. There is not space enough here to discuss all of the recommendations; those relating to fundraising will demonstrate their general thrust. First, in this area and in others the *Report* argues for "optional quantitative rules" to make "compliance" easier. It notes that some existing "qualitative" rules are difficult to interpret, and argues that it would be possible for a charitable organization to show itself to be in compliance with a rule (such as the ancillary political purposes doctrine or a similar rule about fund-raising expenditures) either by meeting a qualitative test on a case-by-case basis or by simply complying with a quantitative rule laid down by Revenue Canada. Here, clearly, the attempt is both to keep organizations "loyal to the purpose" and to make compliance easier. Second, and in keeping with the fund-raising example, it argues for simplified definitions of fund-raising expenditures and for the prohibition only of "imprudent fund-raising ... expenditures", with such prohibition being supported by an annual reporting requirement. Third, there should be more financial and administrative support given to the division which oversees charities' registration, and a wider range of penalties available for non- or partial compliance—the only current sanction is deregistration, "which usually is too severe a solution". A similar approach is taken in a number of other areas where the *Report* argues for a more effective regime of supervision—commercial activity, activities and expenditures unrelated to the charitable purpose, conflict-of-interest problems involving fiduciaries, etc.

Part 4 of the *Report* deals with the provincial law governing charities. It begins by arguing that the regulatory objectives of provincial law should be threefold: "to facilitate charity by making available to it adequate legal forms, to protect charity from fraud and waste, and to aid in the pursuit of charitable purposes by compelling, in appropriate cases, charitable fiduciaries to fulfil their duties of loyalty and prudence" (p. 386). In addition, the Province should be interested in "policing the eligibility of entities for fiscal privileges" and in "fostering the health of the sector" (p. 386). As it turns out, this will require more rigorous regulation than exists, or will exist if the Commission's recommendations are adopted, at the federal level. The most noteworthy suggested change here is that the Commission recommends that a new provincial agency (the NonProfit Organizations Commission [NOC]) be established to consolidate the operations of various existing departments. This agency would deal with all nonprofits, not just charities.

The seven chapters in Part 4 are of two kinds.[14] Three chapters (13, 15 and 16) deal with the three principal legal forms through which nonprofits are organized—the trust, the corporation, and the unincorporated association. In each, the current law is reviewed and suggestions for reform are offered. Three other chapters, 17 through 19, discuss the supervision of the sector generally, under a series of thematic headings. In other words, the *Report* suggests keeping issues of legal form separate from issues of supervision that affect the entire nonprofit sector, no matter how a particular organization is constituted. As with the federal tax regime dealt with in Part 3, the reforms suggested do not add up to a radical change. As the *Report* notes, "we agree with the basic policy of the current law and therefore recommend reforms that improve and clarify its execution or modernize it by bringing it into line with developments in other related areas of law" (p. 386).

The three chapters (13, 15 and 16) on organizational form are devoted to explication of the current law and some reform ideas. In each case four themes are investigated. First, that of attributes of the legal form. Second, the issue of "formation and entry"—how does one go about establishing the form? Third, issues of governance are discussed. Fourth, questions relating to reorganization (change of purpose) and dissolution are considered (p. 389). This is a very useful approach, focusing attention on inconsistencies in the law. For example, if a charitable organization is a charitable corporation its officers (directors) are held to the standard of care expected of all directors, but if the organization is a trust, the higher standard for trustees is applied. This is not to say that the *Report* argues for the same treatment for all forms; indeed in the example given it suggests that the appropriate standard is the standard of the legal form, not that of "charity". But in some instances, instances unique to "charity", such as that of the treatment of charity property on "dissolution", the *Report* argues for common rules for all legal forms.

There is not room here for a detailed account of these chapters in the *Report*, but a few highlights are worth noting. Chapter 13 on the charitable trust advocates some loosening of the *cy-près* rules to make application to new projects easier (pp. 402–414), as well as a role for the NOC in the control of the conduct of trustees (pp. 418–428). Chapter 15 on the nonprofit corporation argues for more sweeping changes, notably the enactment of a new nonprofit corporations statute. This statute would be a "modern" form of corporations statute similar to those that now operate in the business corporation area. It would include classifications of types of nonprofit organization—preferably the scheme developed earlier in the *Report* which divided nonprofit organizations into five types. The new statute would include a complete code relating to issues of governance. As with charitable trusts, the NOC would have a substantial role in enforcing compliance. Finally, chapter 16 also recommends

a new statute, one codifying the rules relating to unincorporated associations and, again, one that would give the NOC a substantial role.

The final three chapters of the *Report* deal with provincial supervision of charities. Chapter 17 describes the existing regulatory framework (pp. 540–547) as well as that which is used in other jurisdictions (pp. 548–561) and, as mentioned, recommends the establishment of an agency to oversee all non-profits. In chapter 18 the *Report* assesses the "principal areas of regulatory concern"—fundraising, investments, political activity and international charity—and makes recommendations about the shape of the law in each case. The basic thrust of these chapters is that the law needs to be simplified and consolidated and made more effective rather than changed in any substantial way. This is to be achieved by repealing existing legislation, especially the *Charities Accounting Act* and the *Charitable Gifts Act*, and replacing them with new statutory provisions. Finally, chapter 19 deals with systems of accountability in government granting practices, a topic of considerable importance given the extent to which the sector is funded by government rather than by donations.

The area where the *Report* suggests a distinctly new approach is fundraising, where significantly more regulation than is currently in place is suggested. A new statute specifically directed to this would be enacted, and would operate primarily to require registration of campaigns and third party fundraisers. In addition, some "minimal point of solicitation disclosure" would be mandated. Regulation of fundraising, of course, would be done by the NOC and would incorporate regulation of charitable gaming as well.

It is not possible in these few pages to do full justice to a report as detailed and carefully argued as this one. Readers are encouraged to review for themselves what is, overall, an excellent piece of work—comprehensive in ambition, very thoroughly researched, well-written, and full of useful information, commentary and recommendations. The principal author, Professor David Stevens of McGill University,[15] is to be congratulated on this achievement, especially as, as the *Report* notes, "the charity sector in Canada has attracted comparatively little academic, political, or legislative interest" (p. 3) in the past.[16] This report thus fills a large gap and it is to be hoped that it will spur the production of further studies and focus public and political debate on the role of the sector and its regulation.

EDITOR'S NOTE

The *Report of the Ontario Law Reform Commission on the Law of Charities* is hard to find in printed form. Fortunately, it is available on the World Wide Web at http:www.gov.on.ca/ATG/english/olrc/charities/main.htm.

FOOTNOTES

1. (1996), 95 N.R. 235 (Fed. C.A.).
2. [1986] 3 F.C. 471 (F.C.A.).
3. See especially *Positive Action Against Pornography* v. *MNR*, [1988] 88 D.T.C. 7186.
4. *Re Canada Trust Company and Ontario Human Rights Commission* (1990), 69 D.L.R. (4th) 321; J. Phillips, "Anti-Discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts: A Comment on *Re Canada Trust Company and Ontario Human Rights Commission*" (1990), 9 *Philanthrop.* No. 3.
5. (1996), 139 D.L.R. (4th) 746 (P.E.I.S.C.).
6. *University Act*, R.S.P.E.I. 1988, c. U-4, ss. 3 (1) and 4 (f). Under these provisions the University is permitted to receive benefactions but not in such a way as to obligate it to impose any religious or political test on a student.
7. See generally D. Waters, *Law of Trusts in Canada* (2nd edition, Toronto, 1984), p. 620. For other recent cases in which *cy-près* has been given too broad a meaning see "Legal Developments" (1996), 13 *Philanthrop.* No. 3, pp. 35–36, and No. 4, pp. 64–66.
8. For general charitable intent see Waters, *Law of Trusts*, pp. 622–626.
9. (1996), 12 E.T.R. (2d) 257 (Man. Q.B.).
10. For a similar result see *McGillivray Estate* v. *Huntsville District Memorial Hospital* (1995), 8 E.T.R. (2d) 193 (Ont. G.D.).
11. Ontario Law Reform Commission, *Report on the Law of Trusts*, 1984, pp. 519–520; Ontario Law Reform Commission, *Report on the Law of Charities*, 1997, p. 405.
12. Government funding makes up over half of all charitable organizations' revenues, with over 70 per cent of that funding going to teaching institutions and hospitals.
13. Chapter 11 also contains useful sections on the tax treatment of charities in the United Kingdom and the United States.
14. Not included in this discussion is chapter 14, which deals with the noncharitable purpose trust and argues in favour of the current law that such trusts should not generally be legally enforceable.
15 [Readers of *The Philanthropist* may be interested to note that Professor Stevens is a member of the Legal Advisory Board of this journal.]
16. A review of the work that has been done appears in chapter 2 of the *Report*, with the Commission concluding that "recent government interest...in the viability, effectiveness, and honesty of the sector has been weak" and that for this reason "any reform of the laws governing charitable organizations that might result from this study should proceed with caution and only after substantial further consultation with the sector" (p. 21).