# Viewpoint*

## A Response to "Helping Canadians Help Canadians: Improving Governance in the Voluntary Sector"

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[This *Discussion Paper* resulted from a study of accountability by an independent panel commissioned by the Voluntary Sector Roundtable. It was released for consultation at the annual symposium of the Canadian Centre for Philanthropy in May 1998. The following article is based on a letter from Blake Bromley to the chair of the panel, Ed Broadbent, former leader of the federal New Democratic Party. The letter was written in September 1998 before release of the panel's final report. The principal proposal to which Mr. Bromley is objecting is one that would remove the interpretation of "charity" from the jurisdiction of the courts and place it in the hands of Parliament.]

It often plays very well to audiences in consultations to ridicule the *Preamble*[1] and the judges seeking to give it meaning over the centuries but I do not think anyone should either trash or trivialize the role of the courts in the history of the evolution of charity. The charitable trust, which the panel acknowledges as the oldest legal form of charity, was created by the courts rather than the legislature. The courts also accorded it significant legal privileges such as perpetual existence. The courts have a long and honourable record in not only protecting the charitable sector but gradually and prudently expanding objects which are to be considered charitable at law.

The *Discussion Paper* proposes to take this defining role away from the courts and give it to Parliament. The history of the law of charity makes it clear that the courts have been a far more faithful friend to the sector than the legislature. The *Statute of Elizabeth, 1601,* was not about defining charitable purposes, as they only appear in the *Preamble*, but curbing the abuses of Tudor

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* *Viewpoint* and *Counterpoint* provide a forum for informed debate of issues of wide interest in the philanthropic sector. The opinions expressed are those of the authors.

England. Henry VIII used Parliament to legislate changes to allowable charitable purposes so that he could steal the chantry endowments and monasteries and other charitable assets to distribute among his friends. Elizabeth I was trying to rebuild the trust of the citizen donors when she passed the *Statute of Elizabeth, 1601* which has the full title *An Acte to Redress the Misemployement of Landes, Goodes and Stockes of Money heretofore Given to Charitable uses.* Recognizing that Parliament had demonstrated that it could not be trusted, the courts were given inherent jurisdiction in all matters charitable as a bastion against abuse. The inherent jurisdiction of the courts is a concept which is designed to protect charities from government as well as from bad operators in the private and charitable sectors. It is disturbing that this concept is not even mentioned in a discussion paper dealing with governance and accountability.

The courts' inherent jurisdiction may be considered a concept which is centuries old and not relevant to contemporary Canada. That may be why the *Discussion Paper* says nothing about the decision of the British Columbia Supreme Court this year in *Nanaimo Community Bingo Association* v. *Attorney General Of British Columbia*[2] which ruled that the Government of British Columbia is guilty of violating section 207(1)(b) of the *Criminal Code* in wrongfully appropriating hundreds of millions of dollars which charities generated through bingo games. The Court also ruled that the Regulation passed by the Provincial Government which caused funds, which by law must only be used for charitable objects, to pass into the Consolidated Revenue Fund of the government, was *ultra vires.* Some may not think the courts are effective protectors of the rights of charities; however, on July 29, 1998, the Government of British Columbia passed legislation stating, "No action lies, and an action or other proceeding must not be brought or continued, against the government, the British Columbia Gaming Commission or any other person, for compensation, damages or any other remedy..." related to its violations of Section 207 of the *Criminal Code* and the *Lottery Act.* The government was worried enough that it abused its supremacy-of-Parliament powers to legislate that its immunity from lawsuits applied retroactively.

The *Lottery Act*[3] in British Columbia provides that the for-profit bingo operator will receive a commission of 40 per cent of the win on the first $700,000 each month and 30 per cent on the rest. Given that the *Discussion Paper* calls for provincial legislation to regulate commercial fundraising companies and simultaneously opposes percentage-based commission compensation, it would be useful for the panel to comment on these contradictions.

In a separate initiative this year, the Government of British Columbia has forced charities to turn over ownership of land and buildings and endowment

assets worth many millions of dollars as a prerequisite for receiving renewal of contract funding for their continued provision of social services. While these are not monasteries and chantry endowments, the primary distinction from the *modus operandi* of Henry VIII is that in this misappropriation of the assets of charities the Government of British Columbia used the tyranny of economic leverage rather than the legislature to effect its purpose.

Among the most publicized abuses of charitable funds in Canada today is the Nanaimo "Bingogate" scandal. This also is not mentioned in the *Discussion Paper* on accountability and governance although the principal operator is facing 64 criminal changes. While this scandal alleges the misappropriating of charitable funds for the New Democratic Party rather than the government, it does not inspire confidence in parliaments as protectors of things charitable to consider that the operator, David Stupich, also functioned as the Minister of Finance for the Province of British Columbia. While the examples of governments and politicians misappropriating charitable funds for their own purposes are many, I am not aware of a single example of such conduct by any court or judge.

The primary reason set out in the *Discussion Paper* for involving Parliament is to provide a statutory definition of charity. I find it disturbing that the Government of British Columbia's stated defence to the British Columbia Supreme Court for its having appropriated lottery funds into the Consolidated Revenue Fund is that "they will be used primarily for charitable causes, such as health care and education". My concern is increased when the *Discussion Paper* states that its ambit excludes "para-governmental organizations" and cites universities and hospitals as examples. It would appear that the panel and the government have a fundamentally different understanding of the sector, or is this proof that both see health care and education as "para-governmental" causes? Does the panel propose that the proposed statutory definition exclude universities and hospitals? Are the "parallel foundations" affiliated with such hospitals and universities to be excluded also?

The *Discussion Paper* does not make it clear in which statute Parliament will be invited to define charity. The most probable assumption is that it would be in the *Income Tax Act* as most of the discussion is related to tax benefits. If any other statute were used to legislate such a definition it would be *ultra vires* the federal Parliament as "property and civil rights". It would also probably be *ultra vires* because section 92(7) of the *Constitution Act* gives provinces jurisdiction over "hospitals, asylums, charities and eleemosynary institutions".

Presumably, this will lead to something comparable to the present situation in Australian law where the common law definition flowing from the *Pemsel*[4]

case applies in legal matters but a much narrower definition of a "Public Benevolent Institution" applies to which organizations obtain tax benefits. The *Discussion Paper,* however, proposes a wider definition for tax purposes. It does not appear to me that the *Discussion Paper* has contemplated the very real legal problems which result from using the *Income Tax Act* to broaden the statutory definition significantly beyond what the common law allows as charitable in areas such as advocacy. This would mean that such organizations would be "charitable" for legal purposes in courts determining, for example, which organizations could benefit under a will in which the executors are given discretion to distribute the estate for charitable purposes. If the panel's supporters do succeed in having the federal Parliament legislate a "non-charitable" definition of charity, it would be important, for example, to provide guidance to charities seeking to incorporate a charitable corporation in Ontario with broader objects clauses, as to the problems they can anticipate at the incorporation stage as well as their compliance obligations, if any, under the *Charities Accounting Act.*[5]

The *Discussion Paper* recommends excluding "organizations which receive substantial oversight from other bodies, notably hospitals, universities and colleges, schools and museums" from the proposed Federal Voluntary Sector Commission. The stated model for this is England. The oversight provided to organizations such as universities in England is the centuries-old concept of "The Visitor". As early as 1694 the courts held that The Visitor has exclusive right of oversight. In 1736 the courts held that no other court is permitted to hear any matter properly within the visitorial jurisdiction.[6] As recently as 1993 the House of Lords ruled that while decisions of Visitors could be subject to judicial review, that judicial review did not apply to any questions as to whether Visitors had made an error of fact or law but only whether they had acted outside their jurisdiction. Given my respect for the inherent jurisdiction of the courts in charitable matters, you will understand my concern about importing such mechanisms for accountability and governance without a vigorous and fully informed debate.

It is interesting to think about the proposal to create an independent federal-provincial agency modelled upon the Charity Commission of England and Wales. It is important, however, to note that even in a country as small as the United Kingdom the Charity Commission does not have jurisdiction in Scotland and Northern Ireland. The challenges are that much greater in a country as large and diverse as Canada with a federal system of government.

The panel apparently believes the definition needs to be patriated to Canada and determined through a democratic process. As democracies are ruled by majority decisions, one wonders if the resulting decisions will be more plural-

istic and inclusive than those of the courts. The sector will not be the winner if this descends into a partisan debate between the Reform and New Democratic Parties as to whether "intermediary organization" is a code word for "single-interest advocacy group". It is my belief that the current definition of charity arrived at by the courts is significantly broader than is the average person's understanding of charitable purposes. The panel and its sponsors should also prepare the public for the possibility that Parliament might choose to restrict the definition dramatically rather than broaden it.

I believe the creativity of the courts is demonstrated by a decision of the High Court of Australia in *Bathurst City Council* v. *PWC Properties Pty Ltd.*[7] It reiterated the principle "that the spirit and intendment of the *Preamble* to the *Statute of Elizabeth* should be given no narrow or archaic construction". The High Court of Australia went on to link that with a second relevant principle: "and that the understanding of judges in the community in which they live of what a particular activity ... involves may be accepted as a proper understanding of the nature of that activity". It is as if the judges in Canberra had been listening to the chair of the panel's complaint that ordinary people coming to the panel's consultations have complained about standardization of definition-making in remote Ottawa and a need for local input. The Court must have thought it was a valid point and therefore added local community conditions and attitudes as a relevant principle in defining charity. I find it hard to believe that Canada's federal Parliament would provide a statutory definition of charity which will allow the flexibility of local community standards. If there is any hope of senior officials in Ottawa adopting this point of view it will come primarily from the influence of the courts rather than panel consultations. A statutory definition in Australia would have no impact in Canada. However, with a common law instead of a statutory definition, it is possible to make the case both to Charities Division officials and Canadian courts that this decision by the highest court in Australia is relevant to the determination of the legal definition of charity in Canada as of September 30, 1998.

The *Discussion Paper* is dismissive of the Canadian courts' decision that a computer freenet is charitable because the information highway is analogous to highways in the *Preamble*. Consequently, the panel will no doubt be no more accepting of the High Court of Australia's finding a publicly accessible free car park as analogous to a "haven" in the *Preamble*. While it is easy to ridicule judges for stretching to find an analogy, it is intellectually dishonest to complain simultaneously that they are hopeless failures in the quest to modernize the legal definition of charity. It takes a certain degree of arrogance to suggest that a panel of temporary volunteers is better equipped for the job. On the other hand, it is positively frightening to turn the task over to a bunch of politicians who, by the panel chair's publicly stated recollection, never had

a serious debate about the charitable sector in all the years in which he was a member of Parliament.

The *Discussion Paper* notes that one of the problems in having the courts define charity is the question of which groups are a broad enough section of the community to meet the public benefit test. This is a problem which is much greater in Canada than in a country, such as the United States, where the rights of the individual are always supreme and the legal basis for the charitable sector is found in the First Amendment. Canada struggles ceaselessly with the issue of whether individual rights should be subordinate to collective rights in certain areas such as language. The most hard-fought and significant failure that I have experienced in seeking to obtain charitable registration in my 20 years of legal practice was trying to register an organization dedicated to preserving and promoting French language and culture in a small francophone community in British Columbia. (I am certain the decision to deny registration was made at a level far above Charities Division.) I made all the arguments I could about the need to ignore outdated English cases and follow the public policy on French language rights laid out in the *Official Languages Act* and even the Canadian Constitution. The political reality was that, had it I succeeded, then English language rights groups in Québec would also have been able to obtain charitable registration. If the parliamentary debate on "public benefit" and whether ethnocultural groups are a broad enough segment of the public turns into a debate about whether Alliance Québec should be eligible to be a registered charity, the panel will not have served the sector well by taking the definition question out of the courts and putting it into Parliament.

The Supreme Court of Canada has heard an important case involving the *Vancouver Society of Immigrant and Visible Minority Women*[8] and we are currently waiting for its decision on the legal meaning of charity. The Canadian Centre for Philanthropy and others have been working towards a statutory definition which they hope will be more generous in its allowance of advocacy. I have long argued that the sector is better served by a definition which does not increase the perception that organizations such as the Fraser Institute are the future of the sector. It would seem prudent to allow the Supreme Court of Canada to rule on the Vancouver case prior to giving up on the courts.

One of the reasons I am fearful of legislating the inclusion of advocacy is that I have an international perspective on the charitable sector. I do not see it just as "Canadians Helping Canadians" as stated in the title of the *Discussion Paper.* In recent years I have spent considerable time in countries such as Russia, China and Vietnam advising their governments on drafting laws to

enable the growth of a third sector now that they are moving away from a command economy. One of the most important assurances to give governments, nervous about political activities of social organizations, is that the law of charity forces citizens to carry on political activities through other vehicles or channels. This is becoming harder to claim as charities become publicly involved in more overt advocacy. The consequence has been that the laws created in these countries have frequently invoked the "accountability and transparency" provisions increasingly championed in the West to repress the very citizen action which is needed to build a civil society.

The *Discussion Paper* also advocates more and stronger intermediary organizations as well as increased government financial support for such organizations. Given the role of the Canadian Centre for Philanthropy in creating the panel, this is not surprising. I have never been on the board of the Canadian Centre for Philanthropy so will make no comment about it. However, I did serve for a period of time on the board of the Canadian Council of Christian Charities (CCCC), an intermediary organization which claims to have a national constituency consisting of over 1,200 registered charities representing about 3,000,000 members and supporters. My disagreement with the positions taken by that intermediary organization on many legal and policy issues was such that I resigned as a director some years ago.

This year CCCC has published and widely circulated a *Special Release* on "Detached Disinterested Generosity" based on the facts it has assembled as an umbrella organization. In my opinion, this document and its promulgation have been highly inflammatory and counterproductive to a harmonious and constructive relationship between the charitable sector and government. According to the most recent CCCC *Charity Alert*, it is seeking $2.5 million "to pay for the political and legal responses to Revenue Canada's challenges". I am certain that CCCC is not the only intermediary organization spending more money and energy on political and legal responses to government than on its charitable purposes. Since I oppose taxpayer-supported charitable fundraising to finance this type of political activity, I am not enthusiastic about the *Discussion Paper's* efforts to legitimize it by increasing the advocacy rights in the definition of charity. As a taxpayer, I believe that if the government is going to provide direct financial support to the charitable sector, it can find more worthy causes than intermediary organizations.

The board of the CCCC has made a formal recommendation that the panel nominate the Canadian Centre for Philanthropy as the national accrediting agency which is to have significantly greater powers than the new voluntary sector agency proposed in the *Discussion Paper.* However, that recommendation is only one of myriad points made in the CCCC's *Response* to the

*Discussion Paper* (as posted on their website[9]) which I would submit as evidence that the positions and policies promoted by intermediary organizations are not necessarily either wise or in the best interests of the sector.

It is not clear that it is always in the best interests of the charitable sector to receive government funding to support intermediary organizations. The name the paper chooses to use for the sector is the "voluntary" sector with the assumption that the name refers to the fact that volunteers work for charities. In fact, "voluntary sector" comes from "voluntas" as in "freewill", rather than "volunteer". Briefly, the word's history is linked to the disestablishment of the Protestant churches after the American Revolution when they relinquished rights to government money for carrying out social services and education. The people moved away from the coercion of taxes being reallocated to "established" churches to voluntary support coming from freewill offerings of parishioners and others in the community. Rebelling against involuntary funding and developing pride in the independence and integrity which they thought could only come from "voluntary" funding was a significant step towards becoming truly American and throwing off the influence of the "old country". There is a certain irony in the *Discussion Paper* rejecting the nomenclature of the charitable sector and substituting "the voluntary sector" while simultaneously moving away from the historical meaning of the term "voluntary sector" to propose involuntary tax funding through government grants rather than voluntary charitable donations.

The objects which would have been included as appropriate for the "voluntary sector" in colonial America would have been different from those proposed in the *Discussion Paper* as, at that earlier time, there was a much greater tendency to include public works projects whereas the *Discussion Paper* says that "is the proper role of governments". Unless we can be confident that today, Canada's Parliament and ordinary citizens have substantially the same understanding of the respective roles of government and the charitable sector in providing various types of services to the Canadian public, it seems risky to turn the definition of charity over to Parliament. When you leave these questions to ordinary citizens voting with voluntary dollars rather than electoral ballots, you will get more diversity in the answers as to what are allowable charitable objects. A small group of citizens has a much better chance of convincing a court to translate its vision into a legal object of charity than it does of persuading Parliament. Also, there is no comparison as to the cost of these alternatives.

Parliament is less likely accurately to reflect the difference in attitudes of citizens in different regions. The colonial voluntary sector may look substantially homogenous and similar from this distance; however, understanding the

varying attitudes to "voluntary" as opposed to government funding in the various colonies helps to explain why the Commonwealth of Massachusetts gave rise to privately funded Harvard College and the Colony of Virginia developed the government-supported University of Virginia. Some may consider these to be ideological differences which should be dictated by Parliament, but a truly mature democracy committed to pluralism allows its citizens, through the mediating forces of the bureaucracy and the courts, to sanction the diversity which bubbles up from the grassroots but would never command a majority vote in Parliament.

While I disagree with the panel's analysis, I agree with the sentiment that the charitable sector is important to democracy. In making this case historically we must always consider the writings of Alexis de Tocqueville. Although he wrote much about volunteerism in *Democracy in America,* I think that a much stronger theme is spontaneity. He celebrated the freewill of the sector and its ability to enable citizens to organize their affairs on the basis of their own agendas, independent of government. I would prefer to allow the courts to adjudicate on what freewill activities are worthy of tax support rather than have the agenda defined by Parliament. I certainly do not want to live under the threat of having the politicians, every 10 years or so, necessarily reviewing and revising the achievements of the citizens and the courts in defining what objects and activities can be considered to be charitable.

**FOOTNOTES**

1. *Preamble* to the *Statute of Elizabeth* (1601), 43 Eliz. 1, c. 4 (U.K.).
2. *Nanaimo Community Bingo Association* v. *Attorney General of British Columbia* (1998), 52 BCLR 284 (BCSC).
3. *Lottery Act,* RSBC 1996 c. 278.
4. *Income Tax Special Purposes Commissioners* v. *Pemsel,* [1891] A.C. J31 (H.C.).
5. *Charities Accounting Act,* R.S.O. 1990 c. C10.
6. *Regina* v. *Lord President of the Privy Council,* [1993] A.C. 282 (HL).
7. *Bathurst City Council* v. *PWC Properties Pty Ltd.,* [1998] H.C.A. 59.
8. *Vancouver Society of Immigrant and Visible Minority Women* v. *Minister of National Revenue.* [The Supreme Court of Canada has dismissed the appeal.]
9. The CCCC's website is http://www.cccc.ca. As of February 1999 the *Response* was not available on the site. The Canadian Centre for Philanthropy's site is http://www.ccp.ca.