Viewpoint*

A Response to the Panel on Accountability and Governance in the Voluntary Sector

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The Panel on Accountability and Governance in the Voluntary Sector (the Broadbent Panel) undertook a massive task. Charged with developing guidelines that could have an impact on some 178,000[2] organizations across the country, it has proposed a variety of solutions – some creative, some brilliant, some less-than-brilliant – that it suggests could make the voluntary sector more credible and more effective.

While no one will agree with all of the proposals, that does not change the fact that, for the first time, we have a document that can serve as the basis for discussion of issues that have been apparent for some time. For that alone, the Voluntary Sector Roundtable and the blue-ribbon panelists deserve the thanks, not only of the sector, but also of the public that supports and benefits from the activities of voluntary organizations.

Some of the conclusions reached by the Panel and the corresponding recommendations are very creative, particularly the Panel's call for financial disclosure by profit-oriented businesses that wish to compete against charities, an increasingly common phenomenon. So, too, the recognition that government is starting to compete with the sector for donations, demonstrates that the Panel members were definitely thinking outside the box.

It was also gratifying to see that the Panel's report had toned down considerably the enthusiasm it showed in its *Discussion Paper*[3] for the use of outcome measures. While still in favour of using such measures, the Panel's report recognizes the ethical as well as logistical problems associated with mandating this type of evaluation activity. Its call for widespread discussions of these issues echoes comments from some leading evaluation practitioners.

All of that notwithstanding, some of the Panel's discussion strikes me as based on untested assumptions – assumptions which, if they prove to be invalid, could lead to a considerable waste of personnel and Board time.

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Whose Accountability Agenda?

The most significant topic addressed by the Panel (at least in terms of pages) is accountability. Its concerns that the voluntary sector be transparent and responsive have led it to recomend a form of reporting that closely resembles that required of publicly traded companies on the Toronto Stock Exchange (TSE). The recommendations call for charities with annual revenues of $200,000 or more to file comprehensive reports running the gamut from strategic planning processes and transparency processes to methods for board successions and diversity of representation.[4]

These recommendations come after the Panel notes that "... in many respects, organizations in the voluntary sector already have to meet more and higher standards of accountability than in the private sector."[5] Why, then, are we talking about increasing those requirements for accountability? Is it because, as the Panel states, the sector recognizes that it must "prepare itself for a new reality in which, we believe, high standards of accountability for all three sectors will be expected and closely scrutinized"?[6]

The Panel suggests that these reports be filed with Revenue Canada's Charities Division as well as with a proposed Voluntary Sector Commission and that they be available for public scrutiny.

These reports are not likely to be written in an hour or two. They will require significant effort. While TSE companies often have corporate secretaries' departments that look after matters of this kind, few charities – even those with revenues of more than $200,000 (which would include virtually every foundation in the country) – have comparable assistance. Thus, someone is going to have to be taken off necessary regular duties to spend valuable time detailing the good governance and stewardship practices of the organization.

To what end?

The Panel offers no rationale for its conclusion that higher standards of accountability are likely to be required in future, nor does it suggest who is going to make those demands. I consider it unlikely that the individual who gives $10 to a charity because a neighbour is canvassing is likely to express much interest in a charity's strategic planning process or its plans to reflect the diversity of the community it serves. Nor can I imagine a donor wishing to assist in delivery of disaster relief services, in Canada or elsewhere, calling anyone to determine the intended outcomes established by the charity involved.

There is no evidence that people are knocking down the doors at Revenue Canada to see the information returns now filed by charities. Who, then, is seeking this information?

It is true that a few politicians and journalists have engaged in "charity-bashing" over the past few years, often based on little in the way of accurate or

complete data. To suggest that the voluntary sector – even if only the largest agencies – should have to pull staff away from existing duties to prepare reports for so few people is, it seems to me, a bit excessive. If any new reporting requirements are to be introduced, it would seem to me that those described as "basics" by the Panel are preferable to the extensive requirements that followed.

While I thus disagree with the Panel's proposed new reporting requirements, I have no similar disagreement with its description of the constituents of good governance and stewardship. Indeed, the Panel's outline of the tasks of a charity's board of directors provides an important model that should be adopted by all organizations – not just those in the voluntary sector.

Accreditation and Codes of Conduct

I applaud the Panel's enthusiasm for peer-driven accreditation processes. Organizations identified by the report and others have demonstrated that these reviews and "seals of approval" are possible and effective. Similarly, the Panel's approval of the ethical fundraising code developed by the Canadian Centre for Philanthropy (and its proposal that adoption of the code be a condition of charitable registration) is to be commended.

I am concerned, however, by one sentence in this part of the report. Referring specifically to the Centre's code, the Panel states: "A voluntary code places the onus on individual organizations to act appopriately, rather than on monitoring and sanction by an external agency."[7] It is not clear whether, in saying this, the Panel is suggesting that there should be no consequences for failure to comply with the code. The code itself makes no provision for sanctions, although that issue is currently being studied.[8]

The Panel notes that, in part, the effectiveness of the code depends on "raising public awareness and expectations that this is the standard of behaviour".[9] If that is true, then surely there must be some means of enforcing that behavior, even that as minimal as withdrawing the right of a charity to hold itself out as having adopted the code. Without a process to provide for such sanctions, the code will cease to be a "seal of approval" or "seal of compliance" and "good" charities – those that do comply – could be tainted by the actions of others.

Definition of Charity

The Panel is not the first group – nor will it be the last – to abhor the current state of the law as it relates to determining what organizations should qualify for treatment as – or akin to – a charity. Its answer is to develop a list of "public benefits" organizations that would have the same tax treatment and benefits as charities. This list would then be passed by Parliament as an amendment to the *Income Tax Act* and reviewed every 10 years.

The recommendation has not won universal acclaim. Blake Bromley, a noted authority on charity law, refers to this proposal as part of what he terms the "dumbing-down" of charity law.[10]

One can be pleased that the Panel did not call for a commission to develop a new definition of charity, a process that has met with something less than sterling success in other common-law jurisdictions. However, it is not clear to me that its proposal is any more likely to result in acclaim – or success.

Even assuming that there is a political will to undertake such a significant amendment to the *Income Tax Act* – an assumption I am reluctant to make – I am not convinced that a debate between five political parties as to what will or will not benefit the public will do anything to improve the community. Indeed, I fear it would be more divisive than unifying.

I suggest that the problem is not the *Statute of Elizabeth (1601)*, or with the *Pemsel* case, but rather with the narrow interpretations that have been placed on them by Revenue Canada and the Federal Court of Appeal. Those who looked to the *Vancouver Freenet*[11] case as a hopeful sign of forward thinking by the Federal Court of Appeal have been disappointed by subsequent decisions. This disappointment does not, in my view, necessarily mean there is merit in developing a list of organizations that don't qualify under one of the four *Pemsel* heads and giving them the same status as charities. Rather, it suggests that perhaps Revenue Canada should be more creative in looking for the type of anlogies that Hugessen, J.A. made in the *Freenet* case. It might also examine its other administrative "tests" in assessing applications for charitable registration.

The deficiencies in the current definition of charity are fairly evident: they relate primarily to groups engaged in public education and advocacy activities, to multicultural and ethno-specific groups, to sports and recreation organizations and a handful of others, including those involved in the national-unity issue. These problems can, I suggest, be addressed by building on the existing common law definition of charity, rather than creating a wholly new definition of "public benefit" organizations. [For further discussion of this issue see also Arthur Drache's discussion of the decision in *Vancouver Immigrant Women*, in (2000), 15 *Philanthrop.* No. 2, at p. 14.]

Voluntary Sector Commission

Probably the most disappointing aspect of the Broadbent Panel's report was its proposal for a new Voluntary Sector Commission. In contrast to some of its more creative recommendations, the Panel elected to recommend a body that is neither fish nor fowl, one that would serve as an adjunct regulator as well as a clearinghouse, facilitator and advisor.

One can understand (without necessarily agreeing) the reason the committee rejected the idea of a revamped Charities Division within Revenue Canada. But one is left to speculate on why it opted against recommending a body similar to the Charity Commission for England and Wales. While the issue of constitutional jurisdiction is mentioned and may well have played a part, there is no indication that some form of federal-provincial arrangement would be impossible or even undesirable. This is particularly true since, in reality, only one province, Ontario, exercises its jurisdiction over charities in any significant way.

It is clear that the type of services the Panel envisaged being within the mandate of the proposed Commission are needed. The support function can easily be created within such a Commission, although some of that support activity could – and perhaps should – be carried out by Commission support to intermediary organizations.

To limit the Commission to the mandate proposed by the Panel, and to have often parallel processes remain within Revenue Canada, would seem to be exactly the type of duplication of effort and expense that the Panel discourages elsewhere.

The Provinces

Since the publication of the Boardbent Panel's report, three Tables have been formed to discuss the Panel's recommendations. These Tables bring together people from the federal government and the voluntary sector. They are charged with putting forward recommendations for Cabinet consideration.

Absent in this process – as well as in the consultations, based on the list contained in the Panel's report[12] – are representatives of the provinces. This seems more than a little unusual, given the provinces' exclusive jurisdiction over charities. Even in light of the suggested weariness of politicians and citizens alike with constitutional discussions, the reality is that there is a limit to what the federal government can do unilaterally. While Ottawa can amend the *Income Tax Act* to give tax-credit capabilities to other types of organizations, its authority to provide oversight over other aspects of a charity's operations is seriously constrained.

We already have some examples of different federal and provincial interpretations of what is charitable.[13] Increasing the extent of those differences is highly undesirable. There is a real risk that a "done deal" developed by the federal government and the charitable sector will not find favour with the provinces. The voluntary sector does not need to find itself in the middle of that sort of constitutional debacle.

The Panel's report does not make clear whether it actively sought out provincial input, but it would be a mistake, in my view, for the provinces not to be

consulted well in advance of submissions being made to Cabinet to change the structures that surround charities.

I do not suggest that there is any pressing demand – or even benefit – for provinces to emulate Ontario and exert their authority over charities. I have seen no compelling case that additional aspects of regulation are needed. Rather, in my ideal world, the provinces would contract with Ottawa so that the new regulatory body would act in the provinces' place as the sole regulator. To the extent that some provinces feel a need to legislate, such as Alberta has done in the area of fundraising, it would appear that is no more complicated a process than Ottawa's current collection of provincial income taxes under a number of different statutes.

A Final Note

I consider it unfortunate that the Broadbent Panel made few comments about foundations as charities, instead choosing, in the main, to lump them with other funders.[14] There are certain regulatory, capacity and accountability issues that are – or should be – of concern to foundations, whether private or public and that differ in some significant respects from those faced by other types of charities. Given the assets that are held by foundations, it would have been useful for the Panel to explore some of the issues and would have provided at least a starting point for discussion of them.

Similarly, the Panel's only passing reference to "institutional charities," such as hospitals and universities, leaves large gaps. Removing those types of charitites from the purview of a new regulatory body would, in my view be a mistake. I accept the Panel's point that there are other provisions for oversight of these bodies, but they do not deal with the charity aspects of such institutions.

In sum, the members of the Broadbent Panel did a truly remarkable job. They took on a difficult task and, in the main, exceeded most of our expectations. While one can always hope for more, let nothing be said to devalue an important contribution to improvement of the voluntary sector for the benefit of all Canadians.

FOOTNOTES

1. The opinions expressed are those of the author and do not necessarily reflect the views of the Foundation's Board of Directors.
2. This is the Panel's own estimate, composed of the approximately 78,000 registered charities plus an estimated 100,000 not-for-profit organizations that are not registered charities. In fact, the number of not-for-profit organizations in the country is a matter of much speculation, there being no good data that allow a more precise estimate. [Revenue Canada, as readers are no doubt aware, recently changed its name to the Canada Customs and Revenue Agency.]

3. [This article continues our discussion of the "Boadbent Report". Readers may wish to review Vancouver lawyer Blake Bromley's response to the original *Discussion Paper* in (1999), 14 *Philanthrop.* No.4, at 17.]
4. *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector,* Panel on Accountability and Governance in the Voluntary Sector, 1999, pp. 30-32.
5. *Ibid.*, p.12.
6. *Ibid.*
7. *Ibid.*, p.46.
8. The Muttart Foundation has made a grant to the Canadian Centre for Philanthropy to review the question of enforcement of the code, as well as to provide charities with information about the code's provisions and their impact on a charity's operations.
9. *Supra*, footnote 7.
10. Blake Bromley, *Dumbing-Down The Law of Charity in Canada*, a speech to the Pacific Business & Law Institute, Charity Conference, May 1999. [See also, Bromley, *supra*, footnote 3.]
11. *Vancouver Regional Freenet Association* v. *Minister of National Revenue*, [1996] 3 S.C. 880, *Preamble* to the *Statute of Elizabeth (1601)*, 43 Eliz. I, c. 4 (U.K.), *Pemsel* v. *Special Commissioners of Income Tax,* [1891]. A.C. 531.
12. Only one provincial government department is listed in the appendix to the report indicating it submitted a brief in response to the Panel's *Discussion Paper*, however, the province is not identified.
13. In Alberta, for example, daycare centers, even if registered charities, are not considered charities for the purposes of bingo and lottery licences. Conversly, some groups that qualify for gaming licences are not eligible for registration as charities by Revenue Canada.
14. There are some exceptions, including the call for foundations to establish an intermediary organization representing all Canadian foundations.