Federal Regulation of Charities*

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Introduction

There are a number of significant concerns and difficulties with the existing regulatory framework governing charities at the federal level in Canada. There is a lack of transparency and accountability in the process for registration. Decisions by the Charities Division are not regularly reported or widely understood and appeals to the courts are rare. The result is that decisions over entitlement to charitable status are essentially unreviewable and there is no mechanism to ensure consistency and fairness in the administration of access to this important tax expenditure. Further, the Charities Division does not have any effective enforcement mechanism for requiring charities to observe the requirements of the *Income Tax Act* (*ITA*), apart from the draconian decision to deregister the charity. Clearly, significant reforms to address these difficulties are needed.

A. Recent Proposals for Reform

(i) *The Ontario Law Reform Commission (OLRC)*

While the Ontario Law Reform Commission's 1996 *Report on the Law of Charities*[1] did not propose extensive regulatory changes at the federal level in relation to charities, it did offer a careful, comprehensive and balanced analysis. The *Report* concluded that the recent history of the federal government's involvement in the charitable sector has not been an entirely positive experience, suggesting that the sector requires some persuading that the government can play a supportive role. The Commission stressed the need for greater transparency in the federal administration of the charity sector. It recommended that Revenue Canada, now the Canadian Customs and Revenue Agency (CCRA),

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publish an annual report summarizing the more important registration decisions for the year and other important aspects of its oversight of the sector. It concluded that, as the decision to register or deregister a charity is of general public importance, it should be accompanied at the initial stages by greater publicity. The Commission recommended that the existing appeal to the Federal Court of Appeal be replaced by an appeal to the Tax Court of Canada. It also recommended that provincial authorities and third parties be given a right to participate in the decision-making process both at the administrative level, i.e., while a matter is under consideration by the CCRA, and at the judicial stages.

With respect to the question of what body should be vested with the authority to decide which entities are charitable, the *Report* noted that it does not appear possible to adopt the model of decision-making employed by the Charity Commissioners in the United Kingdom:

> The Charity Commissioners are a body whose origin and mandate sit squarely in the law of trusts and whose tax-law functions are important but clearly secondary. The Commissioners have a long and distinguished history and very rich experience from which to draw. It does not appear possible, however, to adapt that particular model of decision-making, as effective and sound as it is, to the Canadian context, since it makes no sense delegating the tax-law registration and revocation decisions to twelve different provincial and territorial authorities, where the trust-law responsibilities currently are located. The Canadian situation is exactly comparable to that in the United States, with exactly the same consequence. It is clear that reform of the registration and revocation decision-making process, if it is to occur, must occur entirely at the federal level. This approach runs the risk that the body of law dealing with the issue of definition will be too oriented to tax-law considerations and fiscal consequences. The risk is unavoidable but capable of being managed effectively. Additionally, it runs the risk that there will be two or more definitions of charity – provincial and federal – with the consequence that the sector will be subject to two or more incongruent legal regimes. This risk can be largely avoided.[2]

However, while the Commission recommended against delegating authority over tax registration to provincial authorities, it does not appear to have expressly considered the possibility of a separate quasi-judicial agency at the federal level with jurisdiction only over the tax status of charities.

The Commission also undertook a thorough and thoughtful analysis of the common law definition of charity and the political purposes doctrine.[3] It noted that despite many calls for a statutory definition of charity, the common law categories established originally in the British case of *Pemsel* v. *Special Commissioners* of *Income Tax*, [1891] AC 531, had proven themselves to be flexible and adaptable to changing circumstances. It also noted that any attempt to codify a definition of charity would probably produce a great deal of litigation as government, the charitable sector and the courts would necessarily

have to work out the meaning of the statutory definition. Since the Commission was of the view that the existing common law definition was functioning well, it saw little basis for attempting to enact a new definition.

The Commission agreed with the basic premise of the political purposes doctrine that there is a fundamental distinction between charitable purposes and political purposes. However, it also pointed out that political activities that are ancillary to a charitable purpose should properly be regarded as charitable; considered in isolation, these activities are political in form and content, but considered in their whole context they are merely a means of carrying on charitable activity and are subordinate to *bona fide* charitable purposes. At the same time, the Commission was critical of Revenue Canada's approach to the "ancillary and incidental" principle, particularly its rule that only 10 per cent of a charitable organization's resources can be devoted to political activities. The Commission pointed out that this rule appeared overly rigid and inflexible and that its application in certain cases would restrict ancillary or political activities that should be permitted. It endorsed the American rules as a better and fully optional quantitative approach, as using a "percentage of total expenditures" test is clearer and easier to apply. If such an approach is adopted, the Commission suggested that it would make sense for the *ITA* to be more definitive and precise in the description of what is ancillary and/or incidental and what is merely apparent political activity and therefore permitted without restriction. The Commission recommended that stricter regulation of political activity in the case of private foundations and laxer regulation of political activities in the case of social welfare charities might be implemented. Partisan and other unrelated political activity would remain prohibited in all cases.

(ii) *The Drache Proposals*

Following the publication of the *OLRC Report*, Arthur Drache produced a working paper recommending significant changes, including a proposal for the statutory enactment of a new definition of which organizations should issue tax receipts for donations.[4] According to Drache, there is a pressing need for a new definition of "charity". In his view, the existing common law definition fails to reflect our current societal values and also fails to respond to the fact that the state is shrinking and government is looking to the nonprofit sector to assume many of the tasks formerly performed in the public sector. However, Drache's concern is with "the art of the possible" not with "what might be considered an ideal system". He does not believe it is possible to redefine the term charity "in an acceptable way for all purposes". Therefore, in his view a preferable approach is to abandon the term "charity" altogether as a primary descriptive word under the *ITA* and to replace it with the term "public benefit organization". This term is advanced because it has "no common law legal baggage and it ties in with international usage in many non-common-law countries".

Surveying the international experience, Drache notes that the term "public benefit organization" is commonly used in many Western European countries. Yet, as he himself points out, this term is usually applied to organizations which are tax exempt, not to organizations with the right to issue tax receipts for donations. In Drache's view, "there is no benefit in examining the legal and tax minutiae" and it is more important to "focus on the common approach".

Based on this analysis, Drache proposes that any organization, substantially all the resources of which are devoted to "public benefit activities", be entitled to issue receipts for donations.[5] "Public benefit activities" are defined as "actions designed to promote activities or provide services which are intended to improve the quality of life of the community or of a group within the community". The term "group within the community" is further defined as a group of individuals who have in common "one or more characteristics including age, nationality, race, ethnicity, country of origin, gender, marital status, sexual orientation, residence in a geographic location including a province, municipality or neighbourhood, a physical or mental disability, a physical or mental illness or disadvantaged economic status...". Just in case this definition is not sufficiently broad, Drache then includes a list of 27 specific categories of activities that are "deemed" to be of public benefit, including such matters as "advocacy activities", "the provision of legal advice to those who cannot afford it", the "promotion of values associated with the Canadian Charter of Rights and Freedoms", and "other activities within the spirit of or analogous to the foregoing".

Drache acknowledges that this would broaden significantly the range of organizations to which tax deductible donations can be made. However, he justifies this on the basis that "the playing field will be leveled and people will vote with their wallets". The expansion of the definition can be viewed as an "exercise in fiscal participatory democracy with a major increase in eligible candidates...the widest possible spectrum of organizations should qualify to issue receipts for donations which give tax relief".[6]

Two general comments are in order here. First, Drache's proposed definition of "public benefit organization" would largely dissolve the distinction between nonprofit organizations and charitable organizations under the *ITA*. This would involve a major policy change which, far from reflecting international experience, is directly contrary to it. Most tax regimes make a fundamental distinction between those organizations which are tax exempt and those which are entitled to issue receipts to donors, with the second category being much more narrowly defined than the first.

Second, far from reflecting an exercise in "participatory fiscal democracy" in which taxpayers vote "with their wallets", this proposal would have the opposite effect. The granting of a tax deduction for a charitable donation is

essentially a matching grant scheme in which the donor requires the state to contribute an amount out of general tax revenues to match the amount that the donor has contributed on an after-tax basis. The donor is voting with other people's wallets, not just with his or her own. Moreover, the taxpayers who are being conscripted in the funding of the charity selected by the donor are never given an opportunity to indicate whether they are in favour of providing funds for this purpose. Indeed, they are never even informed that their tax dollars are being devoted to this purpose. The existence of this charity and its funding are unknown to the general taxpayer. Thus, it is difficult to see how such a process could possibly be described as an exercise in "fiscal participatory democracy".

(iii) *The Broadbent Report*

Following the 1997 federal election, in which the federal government had campaigned on a promise to "work in partnership with the voluntary sector to explore new models for overseeing and regulating registered charities and enhancing their accountability to the public",[7] a group of voluntary organizations appointed a six-member Panel on Accountability and Governance in the Voluntary Sector, chaired by Ed Broadbent. The Panel released its final report, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector*,[8] in February of 1999.

The Report argues that there is a need to "modernize" access to the federal tax system. Relying on the 1997 study by Arthur Drache,[9] the Report concludes that "by most accounts" Revenue Canada tended to adopt a narrow or restrictive approach to the interpretation of a charitable purpose, which is "as one would expect of a tax-raising department". Based on consultations that the Panel conducted with the voluntary sector, there is a "consensus within the sector" that the definition of charitable organization should be broadened. The only sector members who do not share in this consensus are "a few lawyers firmly rooted in the common law tradition". The Panel concluded that the determination of which organizations get the full benefits of the federal tax system "should be decided as public policy by legislatures, not by courts".[10] The Panel stressed that it was not proposing to redefine the term "charity". Rather, it endorsed the "charity plus" model advocated by Arthur Drache in his 1997 paper.[11] It proposed that a task force involving representatives of government and the voluntary sector, "with the voluntary sector as a full and equal partner", be established to prepare a new statutory definition of those organizations which would be eligible for tax credit status under the *ITA*.

The Report also recommended a new institutional framework for making determinations as to which organizations would qualify under the new legislative definition. Although Revenue Canada would retain ultimate decision-making authority, an independent agency, the Voluntary Sector Commission (VSC) would be established to provide guidance to the Charities Division. The VSC would supplement, rather than replace, the monitoring role of Revenue Canada,

evaluating and making recommendations regarding registration for new applicants. The Panel considered and rejected a proposal to transfer decision-making authority over registration to an independent, quasi-judicial agency such as the Charity Commission operating in England and Wales.

The Report envisaged that the VSC would report to Parliament through a Minister and table an annual report in Parliament on its activities and outcome and that it would be funded by the federal government. It would establish an effective working relationship with the charitable sector by hiring a number of key sector employees and by working collaboratively with the sector. The agency would also work closely with Revenue Canada, as the VSC would only have the authority to make recommendations with respect to registration, the ultimate decision remaining with the Charities Division. In encouraging compliance with federal laws and regulations, the agency would work co-operatively with Revenue Canada in helping charitable organizations to meet informational requirements and other regulations and to determine when to hand over cases to Revenue Canada when compliance was not forthcoming.

The strengths of this proposal were thought to include the agency's independence and connection to both government and the sector and increased accountability in the regulatory framework leading to greater transparency and consistency in the registration process and greater public confidence in the sector. Public information and accessibility to knowledge about the charitable sector and its regulation would increase as the agency would assume an active advisory role similar to that of a Charity Commission, promoting better administration of the sector and conducting remedial hands-on work in overcoming problems. The built-up expertise with respect to the law of charities would lead to respected decisions on registration which could acquire precedential value and significantly reduce the uncertainty currently inherent in this process.[12]

The Broadbent Report also proposed an easing of the restrictions on political advocacy by charities. While recommending that partisan activities should continue to be forbidden, the Report noted that "the right of bearing public witness on an issue affecting the very purpose of a charitable organization should be affirmed".[13] The Report recommended that rules governing advocacy activity be clarified in ways that can be better understood, that militate against arbitrary application and that cohere with the values of a healthy civil society:

> Policy dialogue and advocacy are often important aspects of charitable work and contribute to a healthy democracy with active citizens who understand and are willing to debate values and fundamental policy issues. Given that public policy advocacy is closely linked to the core mission of many voluntary organizations, it may seem strange to address issues of advocacy in the context of the regulation of financial management. Advocacy is regulated, however, by limiting the amount of

an organization's resources that can be spent on it. Indeed, under the rules which Revenue Canada must administer, the capacity of charities to engage in non-partisan political activity is quite limited and has become even more restricted by the recent decision of the Federal Court of Appeal in the Human Life International case. In our view, the ten per cent rule is badly formulated, poorly understood and potentially highly arbitrary in its application by Revenue Canada. An inappropriate political burden is placed on tax officials.

The Broadbent Report concluded that the 10 per cent rule should be regarded as an approximate standard only, as allocations under it are extremely difficult for a registered organization to calculate or for Revenue Canada to measure: "the important tests are that the rule not be applied in an arbitrary or unduly restrictive manner".[14]

(iv) *The Joint Tables*

In March of 1999, 14 Government Ministers and Secretaries of State and 22 representatives of voluntary organizations met and agreed to establish three "Joint Tables" to pursue discussions on issues raised by the Broadbent Report. The Joint Tables, were to address three areas: building a new relationship, strengthening capacity, and improving the regulatory framework.[15] The objective of the Regulatory Framework Joint Table was to consider improvement to the regulation, administration and accountability of charities and other non-profit organizations, including the proposal to create a VSC.

On August 28, 1999, the Joint Tables released their Report, entitled *Working Together: A Government of Canada / Voluntary Sector Joint Initiative*.[16] The Regulatory Framework Table considered a new framework for regulatory oversight and presented three possible models: an Enhanced Revenue Canada Charities Division, an Advisory Agency and a Quasi-Judicial Commission. While the Table did not seek a full consensus on a preferred model, the Report states that "there was widespread support among voluntary sector members of the Table for moving regulatory oversight out of Revenue Canada". On balance, voluntary sector members of the Table tended to favour the establishment of a quasi-judicial commission. A quasi-judicial commission was viewed as the mode best situated to ensure public confidence in the sector. It was also seen as the model best able to integrate the "compliance" and "nurturing" functions which the sector representative on the Joint Tables argued should be played by the regulator. However, the nurturing role that an advisory agency could play and the opportunities it could offer for entering into partnerships with other stakeholders, were seen as attractive by sector representatives. Government members of the Joint Tables were reported to be of the view that any of the three proposed models would work.

There was a general consensus over the need to provide for increased transparency surrounding the registration process, a greater effort to ensure compliance

and a more accessible appeal process. The Joint Tables proposed that making available information respecting the registration process (beyond that provided for in the 1998 amendments to the *ITA*), be considered.

With respect to the issue of advocacy or political activity by charities, the Joint Tables Report argued that the act of advocacy is an "essential part of democracy and therefore intrinsically beneficial to the public". After concluding that the law lacks clarity in giving guidance on what constitutes political activities, the Report recommended that section 149.1 of the *Income Tax Act* be amended to permit advocacy by charities in particular instances. To this end, it proposed that consideration should be given to clarifying, in the *Income Tax Act*, that a charity may engage in both certain political activities and other forms of advocacy provided that: the activities relate to the charity's objects; there is a reasonable expectation that they will contribute to the achievement of those objects; the activities are nonpartisan; the activities do not constitute illegal speech or involve other illegal acts; the activities are within the powers of the organization's directors and are not based on information that the group knows, or ought to know, is inaccurate or misleading, and are based on fact and reasoned argument. Such activities should be permitted as long as they "do not predominate in the agency's work". With respect to the existing "10 per cent" rule for political activities, the Joint Tables Report was of the view that "the ten per cent ceiling allows far too narrow a scope as a general guildance".[17] However, it is not clear whether the Joint Tables were opposed to any alternative quantitative rule on political expenditures, although the Report stated that there was "little merit" in quantitative limits on expenditures.

Finally, the Joint Tables Report recommended that nonprofit organizations that do not primarily promote their members' interests and that engage in advocacy activities should receive "more public support than they do now". The only reasoning advanced in support of this proposal is that the cost of advocating or lobbying by business is normally treated as an expense for the purpose of corporate income tax, thus reducing the net cost of such activity substantially. "In part to compensate for higher net costs", the Table "submits for consideration" a proposal that nonprofit advocacy groups that do not qualify for registered charitable status be eligible for registration as a "deemed charity", resulting in similar or identical access to the tax system as is accorded to registered charities. However, only certain types of advocacy activities would be entitled to such favoured tax treatment. The list of preferred advocacy activities set out is: promoting tolerance and understanding within the community of groups enumerated in the Canadian *Human Rights Code*; promoting the provisions of international conventions to which Canada has subscribed; promoting tolerance and understanding between peoples of various nations; promoting the culture, language and heritage of Canadians with origins in other

countries; disseminating information about environmental issues and promoting sustainable development; and promoting voluntarism and philanthropy.

(v) *Summary*

As this review indicates, there is a broad consensus about the need to provide for a more transparent process for the registration and revocation decisions of the Charities Division. There is also a consensus about the need to reform the current appeals process and to provide for greater flexibility in the sanctions available to the Division. There is a lesser consensus about whether the existing responsibilities of the Charities Division in relation to registration and revocation decisions should be transferred to some other body. Similarly, there is no consensus over whether the current definition of charitable purpose should be modified to permit political or advocacy activities by charities, or whether certain advocacy groups should be eligible for registration as "deemed charities".

B. Analysis

(i) *Establishing an Agency or Commission*

The question of whether to establish specialized administrative tribunals to deal with discrete issues of law or policy is one that has arisen in different areas of the law. In his comprehensive review of the legal framework governing charities in 1983, Neil Brooks identifies the following considerations as being relevant in determining whether a specialized tribunal should have power to adjudicate the question of whether a particular purpose is charitable:

1. Whether the method of reasoning adopted by, and the institutional characteristics of, the courts are well-suited to resolving the kind of questions raised in the adjudication of cases involving the definition of charity.

2. Whether prevailing political doctrine should be considered in the detailed rule-making. The courts tend to be more insulated from prevailing political doctrine than administrative tribunals. Judges are, for example, appointed for life and thus do not need to be concerned about the favour of dominant politicians... .

3. Whether judges are likely to be sympathetic to the broad social purpose to be achieved...The question here is whether judges have revealed any systematic biases that should disqualify them from determining whether particular purposes are charitable.

4. Whether the pretrial procedures and the trial-type hearing provided by the courts are necessary... .

5. Whether the adjudicative body should have functions other than the adjudication of individual disputes... . If it is desirable for the adjudi-

> cative body to be able to initiate action, to exercise continuous expert supervision, or to be able to formulate broad policies then the courts are clearly not a suitable tribunal".[18]

Note, however, that the issue that Brooks is addressing in this discussion is whether an administrative tribunal should be established *in place of the courts* in the adjudication of disputes over charitable status. It is important to distinguish this kind of change from a similar but significantly different proposal that has been raised in the context of the most recent discussions of this issue in relation to the charitable sector. What is currently being proposed is not simply to transfer the jurisdiction of the courts to adjudicate disputes over charitable registration to a quasi-judicial tribunal. In addition, it is proposed that power to make an initial determination as to whether an organization should be registered should be transferred from the Charities Division of the Canada Customs and Revenue Agency (successor to Revenue Canada) to an administrative tribunal.

This kind of change – transferring the administrative responsibilities of a government ministry to an independent tribunal – is much less common than transferring the quasi-judicial responsibilities of a court to a tribunal. However, such a transfer of responsibility has occurred in situations where the independent administrative agency is in a more effective position to administer and enforce the regulatory scheme as a whole.[19]

The 1983 Brooks study did devote some consideration to the possibility that the administrative responsibilities of Revenue Canada be transferred to an independent agency. Brooks noted that it was sometimes argued that Revenue Canada was an inappropriate body to make initial decisions on registration since it "is only concerned with the collection of revenue".[20] Brooks rejected the argument, however, on the basis that "in most jurisdictions the question of whether an organization is charitable is initially made by revenue officials". In Brooks' view, it was essential that the government's oversight of charities be "non-partisan, objective and non-ideological", and he regarded Revenue Canada as being non-partisan in its determinations on charitable registrations. He concluded that "little might be gained, and a considerable amount risked, if the function of registering charities were transferred from Revenue Canada".[21]

In fact, the only example of a jurisdiction similar to Canada which has delegated authority to determine registration issues to a separate agency is England and Wales. However, that Charity Commission makes registration decisions as part of a broad-ranging jurisdiction over charities in general. In this sense, the delegation of registration decisions can be justified on the basis of the expertise that the Commission has developed in relation to charitable matters as a whole. It is merely one aspect of a broader regulatory scheme in relation to the charities sector, just as securities commissions make adminis-

trative decisions with respect to issuers of securities as part of a general regulatory mandate over the sector. In this context, the transfer of the administrative role of a government ministry to an expert agency can be justified on the basis that the agency is in a better position to provide efficient and effective regulatory oversight.

For constitutional reasons, this kind of role for an independent administrative agency is simply not possible in relation to the charitable sector in Canada. The constitution allocates primary jurisdiction over charities to the provinces, with federal authority existing merely as an incidental feature of its taxation jurisdiction. Of course, it would be theoretically possible for the provinces to delegate their jurisdiction over charities to a national charity commission. If this were a practical possibility, there would be a strong case in favour of transferring to such an agency the entire federal jurisdiction over charities as well, including the power to make the initial determination on applications for registration under the *ITA*. However, all of the recent studies that have considered this issue have assumed (rightly in my view) that the provinces would not be willing to delegate jurisdiction over charities to a federal charities agency, or even to one jointly constituted by Parliament and the provinces.[22] Therefore, what is being proposed is an agency that would have an extremely narrow regulatory responsibility involving initial determinations in relation to registration as a charity under the *ITA*. In fact, not only would this new commission not have any other regulatory role in relation to charities, it would not even be vested with the entire federal taxation jurisdiction in relation to charities. The various proposals that have been made in this regard have assumed that the audit function in relation to charities would continue to be the responsibility of the Canada Customs and Revenue Agency (successor to Revenue Canada), as would the overall administration of the provisions of the *ITA* relating to charitable donations. In effect, the administration of the tax aspects of charitable organizations would be divided between the new quasi-judicial commission and the Canada Customs and Revenue Agency (CCRA).

I am unaware of any international precedent for establishing a quasi-judicial agency with this narrow mandate. Certainly no such precedent has been identified in the recent studies and reports that have considered the matter. In fact, the international experience points precisely in the opposite direction, i.e., in favour of leaving the initial decision as to registration with the revenue-raising authority of government. Governments quite rightly take the view that the administration of the tax system is a matter properly left to a professional and impartial branch of the civil service; otherwise public confidence in the integrity and impartiality of the tax system, which is the essential cornerstone upon which its functioning depends, might be undermined.

If an independent agency with jurisdiction only to make decision on registrations for charitable purposes were established, the danger is that such an agency

would be exposed to intense political pressure from those seeking registered status. This political pressure would be all the more difficult to resist since there would be little incentive for the agency to make a negative decision in close or difficult cases. The agency's narrow mandate would mean that it would not have any reason or incentive to take into account the significance of its decisions for taxpayers and for the functioning and operation of the tax system as a whole.

CCRA's critics often argue that it is an inappropriate decision-maker precisely because it does approach its responsibilities with this broader perspective in mind. In this view, the problem with leaving decisions on registration to the CCRA is that the Agency will be concerned only with maximizing tax revenue, such that "exemptions from tax will be granted reluctantly".[23] (As we have already seen, Revenue Canada approved approximately three-quarters of the applications for registration it received and thus there is little evidence to suggest that the Charities Division is refusing to register charities in appropriate cases.) But there is a more fundamental point that the critics of the CCRA fail to take into account. This point is simply that there is a tax cost associated with the decision to modify or expand the definition of charitable status. That tax cost is the revenue that is foregone in the form of a tax expenditure whenever the definition of charitable purpose is broadened and which must be made up by other taxpayers. In my view, it is entirely appropriate and indeed essential that this consideration be taken into account in the decision-making process for charitable registration.

This is not to suggest that in reviewing applications for registration, the revenue authority does not, or should, take a narrow approach and automatically reject applicants in close cases. The revenue authority takes its instructions from Parliament and from the government and must interpret and apply the law in an impartial manner in accordance with those instructions. My point is more limited: decisions on registration are not without cost to taxpayers and should not be approached as if they are. It is obvious that the revenue authority will factor this cost into the decision-making process, since the revenue authority is well aware of the fact that if revenues are foregone in one area they must be made up in another, either in the form of increased taxes or reduced government expenditures.

It is fair to assume that an independent tribunal, charged solely with the power to make decisions on applications for registration, would not approach issues from this broader perspective. In fact, a primary assumption underlying proposals to establish a quasi-judicial commission seems to be that it will expand the definition of charitable purpose precisely because it will not be concerned with the tax impacts or costs of such decisions. This is reflected in the fact that it has been proposed that the members of the tribunal be composed of individuals who have experience in the voluntary sector. Moreover, the tribunal would

be encouraged to take a creative view of the definition of charitable status, reviewing all of the existing interpretations developed by Revenue Canada and developing new ones, "whether or not there is a new legislative framework".[24] Such a mandate will inject substantial uncertainty into the law and produce significant costs for taxpayers. Moreover, once such novel interpretations of the definition of charitable purposes have been adopted, they will be extremely difficult to reverse. Since the original deduction for charitable donations was enacted in the early part of this century, there has never been an instance where the definition of charitable purpose has been narrowed by Parliament. In fact, on the relatively few occasions when Parliament has intervened, it has been to overturn court decisions which have given a narrow or restrictive interpretation to charitable purposes. Thus the evolution of the definition has been in one direction only, towards expansion of the range of the purposes that qualify as charitable under the *ITA*.

Of course, it must be remembered that CCRA's role is simply to make an initial determination in relation to applications for registration. Those decisions are not final or dispositive and remain subject to review by the courts. In the event that the revenue authority has taken an inappropriately narrow view of the matter, its decision can be challenged on appeal and possibly reversed. It is true that this has not occurred frequently in the past since there have been very few appeals taken from Revenue Canada decision on registration. This has produced an unfortunate situation where Revenue Canada's decisions have been *de facto* unreviewable. But the solution to this defect is to reform the appeal process rather than to remove the Agency from the process entirely.

In his most recent discussion of this issue, Arthur Drache has suggested that the Cultural Property Review Board, appointed under the *Cultural Property Export and Import Act*,[25] provides a model for an independent charity commission at the federal level with responsibility for determining charitable registrations.[26] The Cultural Property Review Board is given authority to determine the fair market value for tax purposes of certain culturally significant property.[27] Such a determination affects the taxable income of the donor of such property. Drache proposes this model as an illustration of an arm's-length body with responsibility to make decisions which have a cost to the federal government in terms of reduced tax revenues.

In fact, however, the analogy between the Cultural Property Review Board and the proposed charity tribunal is not a particularly close one. For example, while the Review Board does have the authority to make determinations of fair market value for tax purposes, its mandate is much broader. It was created in the mid-1970s, pursuant to international agreements entered into between Canada and other countries designed to limit the illicit international traffic in significant cultural property.[28] Thus, determinations of fair market value for tax purposes are part of a broader regulatory mandate assigned to the Board,

as opposed to its sole or primary purpose. Contrast this with the extremely narrow and limited jurisdiction that would be exercised by a commission whose sole responsibility was to determine whether applications for charitable registration were valid.

Furthermore, it is evident that those competent to make determinations of the fair market value of works of art need not have any legal training. This is evident from the *Cultural Property Export and Import Act* itself, which states that the members of the Cultural Property Review Board are to have expertise in fields relevant to appraising art.[29] This is a reflection of the fact that principled reasoning by analogy, which is the core legal expertise of courts, is not a necessary attribute of the members of such a tribunal. The determination of the validity of applications for registration as a charity, by contrast, has always been regarded as an issue that is subject to principled reasoning by analogy. It is for this reason that Canada, along with numerous other countries, has defined the issue as a legal issue and assigned responsibility over it to the courts.

I conclude that the argument in favour of transferring CCRA's existing jurisdiction over registration decisions to an independent administrative tribunal is not strong. What of the alternative proposal, advanced by the Broadbent Report and by the Joint Tables, to create a tribunal with advisory powers only, with the final determinations on registration remaining with the Agency?

Apparently this proposal received only lukewarm support in consultations conducted by the Broadbent Panel with the voluntary sector.[30] It has been criticized on the basis that "it gives no real power to the Commission, [because it] acts only in an advisory role to the Charities Division, which keeps all the legal powers involved in registration and deregistration".[31]. Notwithstanding these negative reviews, the establishment of such a Commission, even with only advisory powers, would inject an important new element into the registration process. Since the Commission would not have any decision-making responsibility, it would have even less incentive to take into account the interests of taxpayers than would a quasi-judicial commission with actual decision-making powers. It is likely, therefore, that such an advisory body would tend to favour registration in close or difficult cases. This would put pressure on the Charities Division to accept these recommendations and would also be influential with the courts in the event that the Charities Division rejected the advice. It is therefore likely that, over time, the existence of such an advisory body would lead to a significant expansion of the definition of charitable purpose (although probably not as quickly as under a scheme in which the actual decision-making authority were transferred directly to an independent administrative agency).

A central consideration in evaluating the proposal to create such an advisory body is whether it would enhance the impartial and even-handed administration of the *ITA* in relation to charities. While there is no clear answer to this question (since the performance of the agency would ultimately depend on the independence and impartiality of the particular individuals who were appointed to it), there is good reason to be skeptical that such a positive outcome would be produced by this reform. This is because there is a significant danger that the advisory body's overriding loyalty would be to those groups and organizations seeking registration as charities under the *ITA*. Given its lack of decision-making responsibility, there would be a strong tendency for such a body to function as a critic of the CCRA and as the "voice" of the voluntary sector. In fact, the Broadbent Report emphasized the importance of the "nurturing" role that the VSC would play in relation to the charitable sector. As such, the creation of such a body would tend to politicize the process whereby organizations are considered for registration.

It has often been argued that decisions on charitable registration are really social policy decisions involving an evaluation of the kinds of organizations and activities that we value as a society. This is certainly true at the level of policy, i.e., in determining what sorts of organizations should qualify for subsidy through the tax system we are making a collective social policy decision. But having made that social policy choice in setting a general standard for registration, the question is whether the application of that general standard to individual applications for registration should be approached in the same manner. My view is that it should not, for the simple reason that there is a difference between formulating policy and applying it. Decisions on the application of the general standard to individual cases should continue to be regarded as a legal question rather than as purely a matter of social policy and those charged with making such decisions should strive to approach them in as even-handed and objective a manner as possible. I do not mean to suggest that the application of a generalized standard such as "benefit to the community" is a purely objective or neutral exercise, but neither should the exercise be approached as if each application for registration as a charity involved an opportunity to make new social policy. The danger is that such a process becomes highly politicized and biased in favour of those groups able to marshal media attention and partisan political support.

If the desire is to provide for some independent advice and review of the decisions of the Charities Division, this can be accomplished without the necessity of creating an entirely new administrative agency. For example, the CCRA has recently created an Appeals Advisory Committee which includes individuals and representatives from Canadian companies and the tax community, to regularly review the operation of the internal appeals process within the Agency. Appeals from adverse decisions on charitable registration are not

currently subject to this appeals process and are therefore outside the jurisdiction of the Appeals Advisory Committee. However, assuming that the Agency's general appeals process is made available to organizations seeking registration as charities (as all recent studies have concluded should be the case), the Appeals Advisory Committee could be expanded to include representatives of the voluntary sector. The advantage of such a reform is that the views and perspectives of the voluntary sector could be brought to bear on the process, while at the same time ensuring that the perspectives of other groups and interests in society are also taken into account. Alternatively, a separate Advisory Committee for charitable registration matters could be established within the CCRA.

I conclude that there are relatively few potential benefits and some material uncertainties and risks associated with the creation of an advisory body such as the Voluntary Sector Commission proposed by the Broadbent Report. Moreover, the voluntary sector can be provided with a role in the registration and appeals process through membership on the existing Appeals Advisory Committee within the CCRA or on a separate Advisory Committee that could be created for this purpose. I am therefore of the view that the government ought not to proceed with the establishment of a separate agency with an advisory role in the registration and revocation process.

This leaves the possibility of creating an administrative tribunal in place of the courts in order to review registration and revocation decisions of the CCRA. The merits of such a proposal can only be assessed in the context of possible reform to the registration and appeals process more generally.

(ii) *A Reformed Registration and Appeals Process*

There seems to be a broad consensus on the elements of the necessary reform of the registration and appeals process. As the Joint Tables Report noted, there is a pressing need to bring greater transparency to the process whereby decisions on registration are made by the CCRA. The recent amendments to the *ITA* do permit additional information such as the registered charity's application for registration and its corporate documents to be released; however, applications for registration that are not accepted cannot be disclosed. There is also no systematic publication of decisions by the CCRA in relation to registration which makes it extremely difficulty to ascertain the precise manner in which CCRA is exercising its discretion.

The Joint Tables Report recommended that the *ITA* be amended to make applications for registration, publicly available, including proposed objects and activities, along with reasons for decisions. In order to address the legitimate privacy concerns of applicants, the Joint Tables also recommended that any release of information relating to the registration process be made subject to the provisions of the *Privacy Act* and the *Access to Information Act*. The

solution proposed by the Joint Tables seems a reasonable balancing of privacy interests against the need for greater publicity and transparency surrounding the registration process.

Another major difficulty is the lack of any systematic reporting of significant decisions of the CCRA. This could be remedied if the CCRA were to undertake publication of a bulletin, similar to that published by other regulatory agencies, in which significant decisions on registration as well as other matters of interest to the sector would be published.

The Joint Tables Report proposed a number of options for intermediate sanctions, including monetary penalties in cases where an unlawful monetary gain was realized by a donor or charity; the power to suspend tax privileges through administrative order; and the power to issue other remedial orders. In fact, not only are these kinds of intermediate sanction clearly necessary and appropriate in order to secure compliance, but there is no reason why monetary penalties should only be available in cases where an unlawful monetary gain has been realized. Under United States law, there are various kinds of monetary penalties applicable, depending on the kind of offence and the nature of the organization involved. In fact, Congress has recently substantially increased the fines applicable to organizations which fail to file complete and timely information returns or which fail to permit disclosure of their information returns to the public.[32] There does not appear to be any reason why similar penalties should not be available here in order to assist in compliance, so long as they are subject to an appropriate dispute resolution process, appeals and judicial review.

There is currently no internal appeal process within the CCRA applicable to charitable matters. Under the recently revised appeals process that applies to other taxation matters, steps have been taken to improve the independence of appeals officers within the Appeals Branch of the Agency. Appeals officers have greater discretion to seek legal advice during the objections resolution process and also receive training designed to emphasize their independence from other branches of the Agency. An Appeals Advisory Committee of nongovernmental representatives has also been formed to regularly review the operation of the internal appeals process. The Joint Tables Report indicated that there is a consensus that this general appeals process be made available to all applicants for charitable registration. As discussed earlier, the membership of the Appeals Advisory Committee could be expanded to include significant representation from the voluntary sector, or a separate advisory committee could be formed to review appeals on charitable registration matters.

It is clear that the current appeal to the Federal Court of Appeal has not worked effectively, given the very small number of appeals from the many thousands of adverse registration decisions in the past 15 years. There is no doubt that the existing appeal procedure needs to be replaced. The issue is whether an appeal

should be directed to the Tax Court of Canada or to a separate administrative tribunal.

The practical difficulty with the tribunal option is simply that it is unlikely that there will be sufficient workload to justify the appointment of such a body. The experience in other jurisdictions suggests that the number of appeals from adverse registration decisions will not be large even if the process is made more accessible and informal. Thus, even if there were to be a dramatic increase in the number of decisions under appeal, it is difficult to imagine more than a dozen such cases annually. Given this small workload, it seems unrealistic to contemplate the establishment of a tribunal dedicated exclusively to dealing with such matters. Further, the Tax Court of Canada has established a strong reputation in the tax community as an efficient, fair and independent adjudicator. The Tax Court would have the added advantage of being able to bring to bear its general expertise in tax matters to the resolution of disputed issues in the charity sector. An appeal to the Tax Court should be by way of a hearing *de novo* and should be subject to the Court's informal appeal procedure, at the option of the applicant.

(iii) *Clarifying Limits on Political Activities*

The prohibition against charities engaging in political activities is not unique to Canada. All of the other jurisdictions which we examined had a limitation on political activities that was broadly similar to the Canadian rule. Moreover, the definition of "political activities" as including attempts to influence legislation or public opinion on a controversial public policy issue, is similar in all the jurisdictions surveyed. However, the rule appears to be more strictly applied in Canada than it is in other jurisdictions. In particular, the so-called "10 per cent rule", according to which a charity is only permitted to devote up to 10 per cent of its resources to political activities, seems more narrowly drawn than restrictions in place elsewhere.

Both the Broadbent Report and the Joint Tables Report recommended an easing of the existing restrictions on political activities by charities. For example, the Joint Tables recommended that charities be permitted to engage in political activities provided that a number of conditions were satisfied, including that the activities relate to the charity's objects and that there be a reasonable expectation that the activities will contribute to the achievement of those objects. The Joint Tables also saw little merit in quantitative limits on the extent of advocacy activities.

The Supreme Court of Canada's decision in *Vancouver Society*[33] has the potential to materially broaden the scope of advocacy activities which are open to charities. This is because of Iacobucci J.'s recognition that political purposes and activities which are merely "ancillary and incidental" to charitable purposes are themselves charitable. This means that resources devoted to such

activities are properly characterized as being devoted to "charitable" rather than to "political" purposes. As Iacobucci J. indicated elsewhere in his judgment, an activity is "incidental" to a charitable purpose when it is being undertaken in fulfillment of that purpose, rather than as an end in itself.[34] Assuming this condition is met, then a charity should be free to engage in any such activities, regardless of the amount expended in a given year, therefore any quantitative limit which might continue to apply to charities in relation to political activities should be optional as opposed to mandatory. A charity should be permitted to argue that its ostensibly political activities meet the "incidental and ancillary" test as elaborated by the Supreme Court of Canada and are therefore permissible, without regard to any quantitative threshold.

At the same time, there is an important value in keeping in place a quantitative test for expenditures on political activities, albeit on an optional basis. The existence of a quantitative limit provides charitable organizations with a measure of certainty as to the manner in which the CCRA will exercise its discretion. This certainty would be sacrificed if the existing 10 per cent rule were abolished and not replaced.

However, there is a strong argument in favour of easing the existing 10 per cent rule in favour of a more flexible standard. The United States approach in this regard seems clearly preferable – a sliding scale used to measure permissible charitable expenditures on political activities. If this model were adopted in Canada, charities would be permitted to spend up to 20 per cent of their "exempt purpose" expenditures on political activities up to a certain threshold. Amounts above that threshold would be subject to a lower allowable percentage for political activities.

These changes should be reflected in amendments to s. 149.1 of the *ITA*, with the revised quantitative expenditure thresholds set out in regulations under the *Act*, rather than as an administrative interpretation by the CCRA.

(iv) *Registration of "Deemed Charities"*

The Joint Tables Report recommended that certain nonprofit advocacy groups be entitled to registration as "deemed charities" and be entitled to similar benefits to those currently accorded to registered charities. The only justification advanced in support of this proposal was that the cost of advocating or lobbying by business is normally treated as an expense for the purpose of corporate income tax. The registration of "deemed charities" would supposedly level the playing field by reducing the net cost of such activity for selected nonprofit organizations; however, only certain types of advocacy activity would be entitled to such favoured tax treatment.

There are a number of substantial difficulties with this proposal. First, the analogy that is drawn between the deductibility of lobbying expenses by business and the proposal to register "deemed charities" is invalid. Nonprofit

organizations are already exempt from income tax. They are thus in a more favourable tax position than businesses which are still required to pay corporate income tax despite the deductibility of expenses incurred to earn income.

If the concern is that the deductibility of lobbying expenses by business produces an inappropriate dominance of the political process by business groups, the remedy is to disallow such deductibility (as has occurred in the United States), rather than to establish a special class of "deemed charities". In fact, the proposal to register "deemed charities" would be discriminatory against individual taxpayers, who would be required to subsidize the advocacy activities of the "deemed charities" (through the tax expenditure associated with the deductibility of donations to such organizations) without being permitted to deduct expenses which they themselves incur through political activities.

In assessing the proposal to register "deemed charities" it is also relevant to consider the history of government grants to support advocacy activities by nonprofit organizations. In the 1970s and 1980s, the Department of the Secretary of State provided grants to a wide range of advocacy organizations involved in promoting the interests of minority official language groups, women, multiculturalism, persons with disabilities and aboriginal groups. However, beginning in the early 1990s, such programs were cut back dramatically. In the December 1992 Economic Statement and the April 1993 Budget, the Mulroney government significantly reduced grants to such advocacy groups.[35] The February 1994 Budget announced further reductions in these grants and undertook a general review of such funding, with a view to "reducing [the] overall level of support and encouraging greater reliance on funding from other sources".[36] In announcing the review, Finance Minister Paul Martin noted that a particular concern is that certain "special interest groups" that had received funding were committed to a "narrower and more special interest agenda". Eventually, the Department of the Secretary of State was eliminated and its programs either wound down or transferred to other departments.

The Broadbent Report reviewed this history and maintained that "we are [not] suggesting a return simply to the old grants making programs of the Department of the Secretary of State, created for a different style of governance".[37] Yet, while there were clear problems of lack of accountability on the part of the advocacy groups under the Secretary of State program, it at least had the significant virtue of enabling the government to control the overall amounts devoted to such purposes. There was also a measure of public accountability in that the existence and amount of the funding involved were a matter of public record. It was thus possible to subject the program to some form of meaningful public scrutiny and debate – scrutiny which eventually led to substantial reform.

Even this minimal form of public accountability would be largely absent from any program designed to subsidize the advocacy activities of "deemed chari-

ties". There would be no line budget item identifying the amount of subsidy provided to various advocacy groups because the funding would occur through the operation of the tax system in the form of tax credits provided to the donors to the various organizations involved. Thus the amount of funding provided to each organization, as well as the total amount spent, would not be publicly known.

What of the argument that it is desirable to fund certain advocacy organizations in order to provide a "balanced" public debate on certain policy issues? Even assuming the desirability of such a policy (which is controversial to say the least, as the experience with advocacy funding by the Secretary of State indicates), such a "balance" would not be achieved through the registration of "deemed charities". This is because the allocation of the funding would be determined by the preferences of individual donors to the various advocacy organizations as opposed to through the conscious policy choice of the government. There is thus no guarantee whatsoever that the various organizations who receive funding will promote greater "balance" in public debate.

Quite apart from these objections at the level of principle, the proposal as formulated by the Joint Tables Report raises a host of practical difficulties. For example, the Report recommends that only advocacy in relation to certain subjects or issues would be entitled to funding. This means that government officials would be faced with the difficult and controversial task of determining whether a particular organization fell within the parameters of the program. To illustrate the difficulties, consider the first category of "deemed charity" identified by the Joint Tables: groups that promote "tolerance and understanding within the community of groups enumerated in the Canadian Human Rights Code". Various jurisdictions in Canada, both at the federal and provincial level, have adopted "employment equity" programs designed to increase employment opportunities for certain "designated groups" that have been subject to historic discrimination in the workplace. Would an organization opposed to the enactment of such legislation (for example, on grounds that the legislation in fact involved discrimination against other individuals outside of the "designated groups") be entitled to registration as a "deemed charity" under this provision? In order to answer this question, government officials would be required to take a position on the debate over the merits of employment equity legislation. This task would be complicated by the fact that government officials would have some difficulty in adopting a position that was contrary to that of the incumbent government. In effect, far from promoting balanced public debate over an issue, the registration of "deemed charities" could become a mechanism for channelling taxpayer dollars to groups which endorse the positions of a current government, without any meaningful form of public scrutiny or debate.

I conclude that the proposal to register "deemed charities" is ill-advised, on both principled and practical grounds and should not be pursued.

FOOTNOTES

1. Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ministry of the Attorney General, 1996).
2. *Ibid.*, Vol. 1, at page 341.
3. *Ibid.*, Vol. 1, chapters 6 – 8.
4. A.B.C. Drache with F.K. Boyle, *Charities, Public Benefit and the Canadian Income Tax System: A Proposal for Reform* (Toronto: Kahanoff Nonprofit Sector Research Initiative, 1998). Although produced by a private tax authority, this paper was relied on extensively by the subsequent report of the Panel on Accountability and Governance in the Voluntary Sector and, accordingly, will be reviewed in some detail.
5. *Ibid.*, pp. 69–79.
6. *Ibid.*, p. 24.
7. Liberal Party of Canada, *Securing our Future Together* (the "Red Book II").
8. Hereinafter referred to as the "Broadbent Report".
9. *Supra*, footnote 4.
10. *Supra*, footnote 8, p. 53.
11. *Ibid.*, p. 54.
12. The concept of a body with advisory powers in relation to charitable registrations is not entirely new. In 1980, the National Advisory Council on Voluntary Action prepared a report for the federal government entitled *People in Action*, in which it proposed the appointment of an independent three-person advisory board to review rejected applications for a registration and revocations of registered status. The advisory council could be asked to review decisions at the request of the affected voluntary association or the Minister and to make recommendations to the Minister as to the proper course to be taken. (See *People in Action*, at p.235.)
13. *Supra*, footnote 8, p. 71. "Bearing pubic witness on an issue affecting the very purpose of a charitable organization" would at least in some cases be ancillary and incidental to a charity's purposes and thus, under the existing law, would be permissible.
14. *Ibid.*
15. Federal/Voluntary Sector Joint Tables Backgrounder, "Federal Government and Voluntary Sector Seek New Strategic Relationship" (June 15, 1999) at http://www.ccp.ca.
16. Hereinafter "Joint Tables Report".
17. *Ibid.*, p. 51.
18. See Neil Brooks, *Charities: The Legal Framework* (February 1983) at pp.55–58.
19. See, for example, the role played by provincial securities commissions which involve both administration and enforcement of securities laws as well as adjudication in disputed cases.

20. *Supra*, footnote 18, p. 228 (quoting *People in Action, supra*, footnote 12.)
21. *Ibid.*, p. 229.
22. One recent report has suggested a joint federal-provincial agency along these lines: Ron Hirshhorn and David Stevens, "Organizational and Supervisory Law in the Nonprofit Sector", (Canadian Policy Research Networks Working Paper No. 1, 1997.) However there is little evidence to suggest provincial interest in such a joint agency and, in any event, it would clearly require extensive federal-provincial negotiations over many years before it could be established. Compare, for example, the discussions over the possibility of establishing a national securities commission which have continued for years without any successful resolution. Given the obstacles standing in the way of such a proposal, it will not be considered further.
23. See Arthur B.C. Drache with W. Laird Hunter, A Canadian Charity Tribunal: A Proposal for Implementation (December 1, 1999) at p.16. [Editor's Note: A two-part article based on this proposal can be found at p. 3 of this issue (Part I) and in 16 *Philanthrop.*, No. 1 (Part II) which will follow.]
24. *Ibid.*, p. 24,
25. R.S.C. 1985, c. 51.
26. *Supra*, footnote 23, p. 29–30 and Appendix C.
27. *Supra*, footnote 25, S.32.
28. The scheme is complicated and detailed. For example, anyone seeking to export property that is identified on a "control list" established by the government may only do so if it is determined by an expert examiner that the object is not of "outstanding significance" to Canada, or that it is not of "national importance" to Canada. Such decisions can be appealed to the Board.
29. Section 18 of the legislation sets out the qualifications for members of the Board.
30. *Supra,* footnote 8, p. 62.
31. *Supra*, footnote 23, p. 22.
32. *Taxpayer Bill of Rights* 2, Pub. L. No. 104–168, 110 Stat. 1452, enacted July 30, 1996.
33. *Vancouver Society of Immigrant and Visible Minority Women* v. *MNV*, [1999] 1 S.C.R. 10.
34. *Ibid.*, para 193.
35. The December 1992 Statement reduced the grants to advocacy groups by 10 per cent in 1993–94 and 1994–95, while the April 1993 Budget announced a further reduction of 15 per cent in 1995–96 and 20 per cent thereafter.
36. See the Hon. Paul Martin, *The Budget Plan* (Government of Canada, February 1994), p. 35.
37. *Supra,* footnote 8, p. 57.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. The nature and composition of the charitable sector have changed dramatically since the first registration system for charities was established in 1967. Whereas in 1967 approximately three-quarters of all registered charities were religious organizations, the welfare, education and health categories have all experienced significant growth in recent years. Approximately 3,000 new charities are registered each year, with about three-quarters of the applications for registration received by the Charities Division being approved.

2. There is a serious lack of transparency in the current process whereby applications are reviewed by the CCRA. Because individual fiscal matters are considered to be confidential pursuant to the *Income Tax Act*, the application of any particular charity for registration, including the correspondence between the CCRA and the applicant, traditionally has not been disclosed to the public.

3. Appeals from registration decisions of the CCRA are infrequent (less than 20 in the past 15 years), due in large part to an outmoded appeal process in which appeals go directly to the Federal Court of Appeal. The absence of an effective appeal mechanism means that the CCRA's decisions on registration are *de facto* unreviewable.

4. Recent amendments to the *ITA* have substantially increased the limits on permitted charitable donations, resulting in significantly increased costs to taxpayers. The cost of the charitable donation tax credit and deduction system in 1999 is estimated to be $1.58 billion, which is over 50 per cent higher than the level four years ago.

5. The common law definition of charitable purpose, based on the categories identified in *Pemsel* has proven itself to be flexible and adaptable to changing circumstances. This flexibility is a result in part of the open-ended nature of some of the *Pemsel* categories themselves. It also results from the common law method of reasoning by analogy, in which courts expand the category of charitable purposes by drawing an analogy between new purposes and existing charitable purposes.

6. Although the claim for registration was ultimately denied in the recent Supreme Court of Canada decision in *Vancouver Society of Immigrant and Visible Minority Women* v. *MNR*, the case significantly expanded the category of educational charitable purposes.

7. The principle underlying the so-called "political purposes" doctrine is sound. Amounts spent on political activities are personal choice expenditures and, as such, should generally not be deductible for income tax purposes, therefore an organization established to pursue political purposes should not be registered as a charity. Otherwise the result is to permit donors to such political or advocacy organizations to have their personal choice expenditures subsidized by other taxpayers. Moreover, such a subsidy is not available to individual taxpayers who spend money directly on political purposes.

8. The political purposes doctrine does not prevent charities from engaging in political activities where those activities are incidental and ancillary to the

charity's mandate. In such cases, the activities are properly characterized as charitable rather than political. The Supreme Court of Canada clarified this point recently in the *Vancouver Society* case in a manner with the potential to significantly broaden the scope of permissible advocacy activities that may be undertaken by charities in fulfilment of their charitable mandate.

9. The CCRA's draft guidelines on political activity generally reflect the common law. However, the so-called "10 per cent" rule does not accord with the Supreme Court's most recent pronouncement on the issue of political activity in *Vancouver Society* and should be substantially revised.

10. There is no need for a wholesale revision or codification of the law of charity. The common law categories have generally functioned well and any attempt at codification would introduce substantial uncertainty for governments, taxpayers, and the voluntary sector.

11. In comparing the Canadian system with that in effect elsewhere, it is significant that most common law jurisdictions have continued to operate on the basis of the *Pemsel* categories and have not attempted to codify the term "charitable purpose". The wide acceptance and durability of the *Pemsel* categories is evidence of their flexible and adaptable character.

12. Those jurisdictions which provide a tax credit for charitable donations make a distinction between organizations to which tax deductible donations can be made as opposed to those which are exempt from income tax. The former category is typically much more narrowly drawn that the latter.

13. The rule that charitable organizations cannot be established for political purposes is widely accepted and applied.

14. The generally accepted rule in most developed countries is that the governmental tax authorities should administer the system of tax deductibility, including determinations of which organizations are eligible to receive tax deductible donations.

15. The CCRA should retain responsibility for making initial determinations as to which organizations qualify as charitable under the *ITA*. Establishing an independent, quasi-judicial commission to make such determinations, as was proposed by the recent Joint Tables Report, deviates from international practice and would be unwise. Such a tribunal would have an extremely narrow function, unlike the Charity Commission in England and Wales which has plenary authority over charitable organizations. As such the tribunal would have limited opportunity to develop expertise, either in taxation or in charitable matters. It would also be exposed to intense political pressure from groups and organizations seeking registration as charities. Given the composition and mandate of such a tribunal, there is some reason to doubt that it would be able successfully to withstand such pressures. In contrast, the CCRA has a long and established record of impartial administration of the tax system. Its decisions are not final and are subject to appeal and review by independent courts. Before transferring jurisdiction from the CCRA to some other body, it would be prudent to implement obvious reforms to the regis-

tration process and to assess whether those reforms have achieved the desired objectives.

16. The government should not establish a separate advisory body such as was recommended by the Broadbent Report or considered by the Joint Tables. Such a body would have no decision-making authority and might well come to see its role as "pressuring" the CCRA to expand the definition of charity. In short, there is a danger that it would unduly politicize the registration process. There is a role for an advisory panel but such a body should be established within the CCRA, not external to it.

17. The registration process for charities needs to be reformed substantially so as to provide for greater transparency and accountability. Regular publication of significant registration decisions of the CCRA should be instituted. This should include publication of CCRA decisions denying registration, subject to the requirements of the *Privacy Act* and the *Access to Information Act*.

18. A system of intermediate sanctions should be instituted, including the power to impose monetary penalties and the suspension of tax privileges for contravention of the requirements of the *ITA*.

19. The internal appeals mechanism within the CCRA, which currently applies to taxpayers in general, should be extended to include decisions on charitable registration. The Appeals Advisory Committee within the CCRA should be expanded to include representatives of the voluntary sector. Consideration should also be given to forming a separate advisory group composed of voluntary sector representatives, either as a subcommittee of the existing Appeals Advisory Committee or as a stand-alone body within the Agency.

20. Appeals from CCRA decisions should be by way of a *de novo* hearing in the Tax Court of Canada. The Tax Court's informal procedure should be available for such appeals at the option of the charitable organization.

21. The existing "10 per cent rule" for political activities of charities should be abolished. In its place, a charity should be permitted to elect to be subject to the rule that it may engage in political activities as long as those activities are ancillary and incidental to its charitable purpose. Alternatively, the charity should be able to elect a revised quantitative limit similar to that currently applied by the Internal Revenue Service in the United States. Under this rule, charities would be permitted to spend up to 20 per cent of their eligible expenditures on political activities up to a certain threshold, with a lower percentage applicable to amounts spent above that threshold.

22. The proposal to establish a separate class of "deemed charity" is unwise and should not be pursued. Taxpayers should not be required to subsidize the activities of advocacy groups through the tax system. If there is concern over the fact that corporations can currently deduct the costs of lobbying as a business expense, the remedy is to eliminate such deductibility and not to establish a separate class of "deemed charity" under the tax system.