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## CANADA: CIVIC SOCIETY UNDER NEGLECT

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MANDEEP TIWANA AND CLARE DOUBE REMIND US IN THEIR ARTICLE “CIVIL Society Under Attack,” featured in this issue of *The Philanthropist / Le Philanthrope*, that civil society is openly repressed and under attack in many parts of the world, which should make us feel very fortunate as Canadians. Our governments may suddenly withdraw funding from civil society organizations that they wish to punish or feel we no longer need, thus forcing them into bankruptcy, as has occurred with several think tanks and other nonprofits in recent years. Canadian governments tend not to put civil society leaders in jail just for speaking out, however, and we have not shot one for some time. But Canadians should avoid being too smug about our governments’ stance toward the third sector. Absent the violence and the abuse of human rights that Tiwana and Doube report, the underlying problem they describe is not that different in Canada: the reality of public policies for the third sector falls far short of political rhetoric or potential for a constructive relationship.

Tiwana and Doube note that it is difficult to find a speech by a politician “that doesn’t ‘note the value’ of civil society or ‘appreciate their contribution.’” Not so in Canada. Prime Minister Harper has never given an official speech (at least not one that appears on the PM’s website) that acknowledges the contributions of voluntary and nonprofit organizations or sets out a vision for their place in society, the economy, and democracy. In Canada, we seem to be missing *both* the political rhetoric and the adaptive policies. This lack of interest is not unique to the Harper government as no Canadian government, Conservative or Liberal, has had an actual agenda for its relationship with the third sector. While the Chrétien Liberals had a vague notion of building a better relationship with the sector, as was embodied in the Voluntary Sector Initiative (VSI), the philosophical foundations, and their practical implications, for the relationship of government with civil society have long been poorly articulated. Indeed, the Canadian stance toward the third sector is one of active neglect.

Governments appear to simply assume that nonprofits will keep going, tightening their collective belts as needed, but continuing to deliver services, and those that do not deliver services (but conduct research, are engaged in advocacy, or support the work of other civil society organizations) are probably dispensable anyway unless citizens and corporations step up with donations to support their work. The Canadian public is supportive of and has considerable trust in civil society organizations (Muttart 2008), but is also complacent about their future. Civil society leadership dissipated following the intense two years of work on the VSI, which produced only incremental change to regu-

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lations and little lasting impact on government-voluntary sector relationships, and there has been no strong, collective leadership to press for major change since.

One reason for our general complacency is that the underlying model of Canadian civil society remains rooted in a 19th century view of charity: that the purpose of charities is to provide services to the poor and disadvantaged supported primarily by private philanthropy. The choices of which causes to support are left largely to donors, and the role of governments is to keep charities honest and ensure that they spend these donations as they say they do.<sup>1</sup> In recent years, the federal government has strengthened opportunities for charitable giving by increasing the value of the tax credit and the ceiling on how much of net income people can give, permitting the donation of securities, and eliminating capital gains on certain types of donations. These are welcome measures in support of philanthropy and equip Canada with one of the most generous tax incentive systems for charitable giving in the world. But it also affirms a charity-based understanding of civil society, and the private nature of giving enables the near invisibility of the third sector in public policy. The notions of this sector as fundamental to citizenship and democracy, as community builder and social innovator, or as a force in economic development are largely absent from public discourse.<sup>2</sup> Consequently, there is no contest of ideas at a political level about the role of the third sector in governance in Canada, as is occurring in the UK and Europe. The 2009 federal stimulus package contained no support for social innovation and volunteerism, as it did south of the border. Rather than actively embrace social enterprise, Canadian regulations promote financial dependency of civil society organizations on governments and donations, which, in spite of the increased tax incentives, are not rising significantly (Imagine Canada, 2009).

Canada is thus falling far behind other countries in modernizing our policy and regulatory frameworks and diversifying financing tools to enable civil society organizations to deal with a rapidly changing environment. This failure will soon be reflected in our international competitiveness and in a weaker civil society. Without the social innovation provided by the third sector, without the financial tools to help communities help themselves, and without the injection of new ideas into policy debates that comes from active engagement of civil society, we will be poorly equipped as a country to deal with complex issues.

#### **REGULATIONS STUCK IN “CHARITY”**

The key policy and regulatory challenges facing this sector have been discussed by many contributors to this journal over many years, but the federal government, as the primary regulator of charities, has shown little interest in addressing them. One basic issue is which organizations qualify as “registered charities.” How we determine which kinds of organizations are eligible to issue tax receipts for donations, and thus have an official stamp of approval, helps define the kind of civil society we want. It also establishes whether government views the treatment of charities as a matter of social and economic policy or merely as one of fiscal policy (Wyatt, 2009).

Canada has had a more conservative approach to extending the common law definition of charity than comparable jurisdictions because few cases ever come to the Federal Court of Appeal, the expensive court of first appeal, or ultimately to the Supreme Court.

In the two cases the Supreme Court has heard on this matter in the past forty years, it refused to make major change in the law, although it invited Parliament to do so. In one case it determined that an organization dedicated to training visible minority and immigrant women did not qualify as charitable as what it did was not education under the common law and the public it benefited was too narrow (Stevens, 2000). It is amazing that, in a country as multicultural as Canada, this did not spark a public outcry, but it did not. In the more recent case, the Supreme Court indicated that it would not rule in favour of an amateur soccer association because to do so could have adverse fiscal implications, thereby tying the common law definition of charitable to a financial test and potentially freezing its expansion (Parachin, 2009). In a 2009 article in this journal, Bob Wyatt makes a strong case for more open access to judicial review to refresh the common law. While this is necessary, I argue that we need to go even further and follow the lead of England, Scotland, and other countries in establishing a legislated base, perhaps in an amended *Income Tax Act*, for a modern definition of public benefit. This would enable us to break out of the constraints of a charity model of civil society and force us as a citizenry to engage a public debate about the kind of civil society we want – with all the complexities that entails.

This reinforces the need to make institutional changes to the regulator of charities, the Charities Directorate of the Canada Revenue Agency. This idea, too, has been around for at least a decade, taken up by the Broadbent Panel on Accountability and Governance (1999), the Working Together Joint Tables (1999), the Joint Regulatory Table of the VSI (which had the mandate to examine but not make recommendations), and a number of charity lawyers (Drache & Hunter, 2000). If we are to give serious attention to creating a more enabling environment for civil society organizations, stronger leadership and a more responsive regulator is needed—one that has a deep knowledge of and can work with the sector to provide advice, education, and guidance, as well as compliance with rules when necessary. In recent years, the Charities Directorate has worked at reinventing itself from within through a series of incremental changes, including new policy guidance (e.g., related to multicultural and umbrella organizations, business activities, and the meaning of “public benefit”), greater transparency, better communications, and training for organizations on filling out the annual reporting form. But these administrative changes will not take us far enough to real reform: this will take a strong institutional presence within government as well as a sustained relationship with the regulated sector.

The need for stronger leadership is not a reflection on the individuals who have led the Charities Directorate, as there have been some dedicated and talented people in this role. The challenge is that there is little continuity in leadership: over the past 14 years there have been eight Directors (or Acting Directors) of the Charities Directorate, which translates into an average tenure of about 20 months. Although the entire federal government is characterized by high levels of mobility given its demographic profile and the opportunities for advancement created through retirements, most regulatory bodies have greater continuity than this (Streiner, 2008). One way to address the instability of leadership is to establish a more collective model in the form of a board overseeing an independent (or semi-independent) commission.

I argue that we need to go even further to encourage greater federal-provincial cooperation and a life cycle approach to the regulation of charities. There is some indication of

an awakening provincial interest in the third sector, particularly in Ontario, which has begun to realize the potential of social enterprise and removed some of the provincial barriers to it (notably by repealing legislation that prohibited charities from owning more than 10 percent of a business or land that they did not use for three years). If even one or two provinces follow, each with different approaches, regulation and oversight will quickly become a jumble of different rules. In addition, the Canada Revenue Agency is now stepping closer to provincial jurisdiction with its 2009 guidance on charitable fundraising that explicitly sets out expectations for systems of good governance by charities. When the model of a joint federal-provincial commission was floated by the Broadbent Panel (1999), it was dismissed out of hand because it would be impossible to contemplate ever getting intergovernmental agreement. To many the idea will still be laughable, but after 40 years of debate, Canada appears to be moving forward with a national securities regulator (to replace the 13 provincial and territorial ones). So perhaps it is not too fantastic a notion after all. Given the economic, social, and democratic importance of the third sector, it is at least worth exploring again in a serious way.

#### **FAITH IN FIXING GOVERNMENT FUNDING**

Our entrenchment in a charity model of civil society is also evident in the lack of movement toward providing more and better financing instruments. For too long the Canadian debate has been focused on making government grants and contributions work more effectively through multi-year funding (with some success, for instance, in New Brunswick) and reducing the “morass of rules” created by the reaction to scandal in 2000 and reinforced with more rules after the 2005 sponsorship scandal. The federal government committed to swift implementation of the recommendations of the Blue Ribbon Panel (2006), which it established to figure out how to deal with the externalities created by its own rules. In 2009, the Clerk of the Privy Council reported that the burden on “client” organizations has been reduced by 10 percent (Lynch, 2009). While it is clearly important to fix this mess, we need to look beyond the discussion among the hedgehogs as to whether 10 percent is an accurate assessment of reduced impact or whether implementation of the Blue Ribbon Panel is fast enough.

The world is changing too quickly to remain stuck in a hedge, and the more strategic discussion we need to engage in is how to create a broader array of financing instruments for civil society organizations that would enable social enterprise and social finance, provide better access to capital, and facilitate program-related investments by foundations. In the galloping interest in social enterprise and social finance, we often look to the United States and Europe, and can learn much from them. For example, Steven Rathgeb Smith (2010) describes how the construction of a \$80-million sculpture park in downtown Seattle by a nonprofit art museum was made possible through a network of complex financing arrangements and partnerships among the museum, private donors, three levels of government, foundation grants, a large oil company, a nonprofit land trust and a public development authority (a quasi-public institution that can issue bonds and has more financing flexibility than a traditional nonprofit). Even if Canadian nonprofits were sufficiently risk-taking to contemplate such a venture, it would probably not be possible under Canadian rules and we do not have the hybrid organizations to facilitate the kind of social financing involved.

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While social enterprise is not a panacea for financing civil society and we should be careful not to treat it as such, we at least need to unfetter its use by removing regulatory barriers to earning income, providing more flexible corporate forms, and facilitating access to capital (Bourgeois, 2009; Carter & Man, 2009).<sup>3</sup> And once we have unleashed all those social entrepreneurs, we will need to better educate them in methods of social finance. The fact that Canadian universities and colleges have so few programs dedicated to graduate and professional education for civil society leaders is further evidence of the invisibility of this sector.

#### THE HOPE OF HAVING A VOICE IN PUBLIC POLICY

In a charity model, organizations deliver services; they do not spend a substantial amount of their time trying to change public policy. Canadian charities have long complained that they are limited in their ability to engage in public policy advocacy because they are constrained by the federal “10 percent” rule, that no more than 10 percent (now on a sliding scale of up to 20 percent for small charities) of their resources can be spent on advocacy. The fear of stepping over this line has created an advocacy chill by which registered charities self-regulate their engagement in policy advocacy (Scott, 2003; Pross & Webb, 2003). In running the numbers, Elson (2008) notes that the upward adjustments in the percentage limits made in 2003 give charities scope to spend an additional \$113.5 million annually on policy advocacy (for a sector-wide total of \$5.7 billion annually), and there is little evidence that they could or would ever want to spend this amount on policy advocacy. The issue for the charitable sector is as much about the premise – that advocacy has to be tightly controlled – as it is about the actual spending on it.

The reason that civil society organizations have relatively little impact on public policy in Canada is due less to the constraints of the regulation than it is to the fact that they are not very good at it. Most, especially the multitude of small and medium-sized organizations across the country, have little interest in engaging in public policy, as was evident during the discussions that surrounded the VSI. Even the big organizations are small when it comes to advocacy. To be taken seriously in policy development these days, one needs good evidence. This is particularly true in regulatory decision making, which is about a third of what governments do, as this is often where “hard” evidence meets public values. In comparison to most other developed countries, our national infrastructure organizations (the federations, umbrellas, and research bodies that could be the collective voices of the nonprofit sector) have limited capacity to produce the evidence needed to be serious players at the policy table. Environmental NGOs are a possible exception, but even they are relatively small. With a few exceptions, an alternative approach of working through strong advocacy coalitions has also weakened in recent years, in part due to lack of funding but also to the compartmentalized nature of this sector.<sup>4</sup> Indeed, far too much time is spent on debating if this is, in fact, a sector at all.

At the same time, most Canadian governments have become less permeable, especially at the federal level, with few mechanisms for ongoing dialogue with civil society other than the annual budget consultations at which organizations get one shot to present new ideas. If federal departments are doing anything innovative to engage civil society, they are deliberately flying under the political radar because there is no interest in such engagement from the centre. New opportunities are opening up for creative stakeholder

collaboration with business, but this takes credible and willing partners. The challenge of more active policy engagement will not be solved by regulatory change alone, but also requires serious capacity building and a view on the part of both governments and civil society that there is value-added in such engagement.

Strong infrastructure organizations will be important not only for more effective involvement in public policy, but also in advancing better self-regulation, which is increasingly being demanding of the third sector in many countries including Canada (Breen, 2009; Morris, 2010). The CRA's new policy on charitable fundraising operates from the expectation of self-regulation first and state regulation second, and the initiative led by Imagine Canada (ARG, 2008) for a more comprehensive certification system for good governance will move the sector, positively, in the same direction as other major industries (e.g., forestry, chemicals, and fair trade coffee). Such certification will take not only strong leadership and capacity by Imagine Canada but also by lead organizations across the many subsectors of civil society in order to generate the take-up and compliance needed to make self-regulation credible. The Canadian oddity, however, is that neither governments nor other civil society organizations are particularly supportive of these infrastructure organizations.

#### **THE FUTURE: BEYOND FAITH, HOPE, AND CHARITY**

I could be accused of being wholly unoriginal in this article. The key issues that I have outlined have been written about in this journal and have been circulating among scholars and civil society leaders for the past 15 years. And I would confess: these issues are recycled. But that is because we have made so little progress in addressing them. Yet, during the same period, other countries have brought about major change to their architecture for civil society (Phillips & Smith, 2010). Why have some jurisdictions been able to advance a reform agenda while Canada has not? In every case of substantial reform, there has been a political vision for civil society and its relationship with government, accompanied by leadership from civil society. The specifics of the visions vary; for example, promoting more active citizenship (England), fostering social innovation (USA), advancing economic development (Scotland, among others), and modernizing public services (Hungary). But the point is that reform was supported by a vision that was embraced by both government and civil society. There is no evidence of any such vision emanating from Canadian governments and little pressure for one currently being driven by civil society.

In an important sense, then, Canadian civil society is "back to the future": in the mid-1990s leaders from diverse parts of civil society came together to provide the collective policy direction that was so desperately needed for the third sector as a whole. This small band of committed individuals worked hard at providing such direction and achieved some considerable successes. But most have now moved on to other things and many are thinking about their gardening projects and travel plans for their pending retirements. Who is stepping up to provide the collective leadership that is as much needed today as it was fifteen years ago? What are governments and business doing to support such leadership, both individual and organizational, and to reform the policy frameworks for a stronger civil society? What are universities and colleges doing to provide requisite education and skills for the next generation of leaders? Sadly, I think the answers are not many and not much.

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There is no question that the repression of civil society described by Tiwana and Doube is not Canada's reality. But it is also the case that we have not equipped our third sector to be as effective as it could be – not only in service delivery but also as a major player in the economy and in the practice of citizenship and democracy. As fortunate as we are in Canada, we have a lot of work to do. Now is the time to step up.

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## NOTES

<sup>1</sup> The reality is that the services provided by charities are a central part of what we take to be “public” services across Canada, and these are generally funded by contracts with provincial (and to a lesser extent, municipal and federal) governments. Philanthropy accounts for only 9 percent of the revenues of Canadian charities (Hall et al., 2005 p. 15). My argument is that our underlying assumptions play a big part in how we treat civil society organizations, even if these assumptions do not play out in reality.

<sup>2</sup> The J. W. McConnell Family Foundation, along with a few other foundations and nonprofits have been working to advance an agenda of supporting social innovation, but such an agenda has not yet permeated deeply within governments or been picked up by the media. It is telling that one of the major think tanks that had been working on social innovation, the Canadian Policy Research Networks (CPRN), was forced to close its doors in late 2009 as it had never recovered from the sudden withdrawal of its federal funding in 2007 (see Phillips, 2009, for a discussion of the 2007 cuts).

<sup>3</sup> The December 2009 Report of the Standing Committee on Finance recommended adoption of a stretch tax credit (increasing the credit to 39 percent for incremental annual giving), establishing a corporate structure for nonprofits that would allow the issuance of share capital, and eliminating the capital gains tax on donations of real estate and land. Its rationale for supporting the third sector continues to reflect a charity model, however: “The Committee believes that the country’s not-for-profit organizations and volunteers are valuable, both for individuals who need assistance and for people who are seeking to support their communities. We know that the need for charitable assistance is particularly high during times of crisis, and believe that the federal government has a role to play in encouraging charitable giving and in supporting charitable organizations” (Standing Committee on Finance, 2009, p. 77).

<sup>4</sup> The various regional networks and “chambers” of charities that have been established in recent years are a welcome addition to the civil society landscape, but few are actively engaged in public policy.

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