

A Canadian Charity Tribunal

A Proposal For Implementation

by

Arthur B.C.Drache, Q.C.

With

W. Laird Hunter

Arthur B.C.Drache, Q.C.
Drache, Burke-Robertson & Buchmayer,
Ottawa, Ontario
Canada
adrache@drache.com

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A word about the collaboration resulting in this paper is in order.

The primary writer was Arthur Drache, though Laird Hunter did a first draft of some sections. There has been an ongoing intellectual collaboration between Drache and Hunter over a period of many years and many of the ideas put forward in this paper are a result of that collaboration. In addition, Hunter has read several of the drafts of the paper and made extensive editorial contributions, not the least of which was the use of the term “Tribunal” as a substitute for the more commonly used “Commission”.

The use of the editorial “we” is reflective not only of our preferred style but also of the fact that this is the intellectual product of two people, both of whom have been immersed in third sector issues for many, many years.

However, we would stress that in the end, primary responsibility for the paper is that of Arthur Drache.

Ottawa,
December 15, 1999

Forward

This paper is our attempt to focus the ongoing debate in Canada about the federal regulation of charities. More precisely, the paper examines the desirability of having an independent federal body assume some of the key roles which Revenue Canada currently plays in the charity field, as well as offering ideas about that body's structure and operations.

The paper postulates the creation of an independent body having as its primary role the right to determine which organizations will be registered as charities *for Income Tax Act purposes only*. As a concomitant, that body would decide which organizations lose their registered status for failing to continue to meet the statutory and administrative requirements of the tax system. Both of these powers are now exercised by the Charities Division of Revenue Canada.¹

We have attempted identify the *legislative and structural* options and requirements for that kind of body. We do this to allow interested parties to move beyond the need to debate *whether* that a body should be created and, instead, focus on the *mechanics* involved in structuring it. Of course, the structuring must take into account a wide range of policy decisions. We hope that this paper will further the discussion about how this function should be structured and why.

While some will undoubtedly disagree, we believe that the question of the need for change from the *status quo* is beyond debate. In the paper entitled *Working Together: A Government of Canada/Voluntary Sector Joint Initiative*² the members of what has come to be called the "Joint Tables" put forward three options for changes in the system of federal charity oversight. The recommendations and discussion will be found in Appendix A to this paper.

¹ In this paper, we shall continue to use the term "Revenue Canada", "the department" and similar terms notwithstanding the fact that we are well aware that as of November 1, 1999, Revenue Canada will cease to exist and we will have substituted therefore the Canada Customs and Revenue Agency (CCRA). Obviously, nobody really knows what changes, if any, may occur as a result of the new status of the tax authority in Canada. But there has never been a hint of a suggestion that the Charities Division will operate any differently under the new corporate structure than it has up to now.

² The paper is dated August 1999 but was issued in mid-September. It can be found on the internet at www.pco.bcp.gc.ca/prog_e.htm or at www.web.net/vsr-trsb. The paper is a compilation of recommendations put together by three "Tables", each of which was comprised of a number of senior federal bureaucrats and representatives of the charity community. It is expected to be the focus of an extended debate on the relationship between the federal government and the voluntary sector.

In essence, there are three options suggested. The first is to retain the *status quo*: all power continues to reside with Revenue Canada, albeit with some changes to make the process a more open one, aided and abetted by “a committee of knowledgeable individuals”.

The second option would see the creation of an “Agency” to “complement” Revenue Canada’s role by offering advice and to “nurture and support charities and other voluntary organization and provide information to the public.” This option was based on recommendations in the Broadbent Report³

The third option creates a “a quasi-judicial” Commission which would “undertake most of the functions currently carried on by the Charities Division”. The concept also sees the Commission as providing authoritative advice to the voluntary sector.

The Table Report indicates that when the three options were considered, Table members representing the voluntary sector all opted for the Commission model while the government representatives were of the opinion that any of the three models would work.

As noted, the purpose of this paper is to identify the *legislative and structural* options and requirements for that kind of body; it is *not* to debate which of the models might best serve Canada. We take the position that there is no viable option to the establishment of a Commission-like body.⁴ Indeed, in our view, the “Agency” option is a complete non-starter because it is perceived as simply adding a level of additional bureaucracy to the current system without creating a body with any power. As independent decision-makers, advisory boards in Ottawa are usually notoriously ineffective, and, most often, perceived to be captured creatures, serving only as part of the government’s public relations exercise.⁵

³ *Building on Strength: Improving Governance and Accountability in Canada’s Voluntary Sector*, published in February 1999. It was produced by the Panel on Accountability and Governance in the Voluntary Sector, chaired by Ed Broadbent and initiated by the Voluntary sector Roundtable.

⁴ We have chosen the term Charity Tribunal to distance the consideration of this option of an independent decision-making body under the Income Tax Act from unnecessary comparisons – both in the positive and negative aspects – with the Charity Commission of England and Wales. The focus must be on the Canadian requirements for this function.

⁵ A report published by the Fraser Institute entitled *Preserving Independence: Does the Canadian Voluntary Sector need a Voluntary sector Commission* (April, Clemens and Francis) vociferously attack the

We also take the position that organizational changes are extremely difficult, if not impossible. We do not believe that it is prudent to try to counteract the problems inherent in having a department dedicated to maximizing tax revenues make social policy decisions, particularly where a decision to recognize an organization as charitable *de facto* implies a loss of tax revenue. The Table Report suggestions of incremental changes to meet currently perceived problems smack of slapping a new coat of paint on a house which is structurally unsound.⁶

For these reasons, we are committed to what we are calling the Charity Tribunal. And having now acknowledged the basis for our position, we provide the guidelines within which we are working.

1. In our view, neither the Broadbent Report nor the Joint Table Report, gives enough attention to the constitutional problems inherent in the fact that *prima facie*, in Canada the law of charity is a matter of provincial jurisdiction, though sparsely exercised.⁷ In fact, with the exception of Ontario and Alberta⁸ the provinces are almost completely inactive in exercising their powers of oversight in the voluntary sector. As a result and though without direct jurisdiction, through its use of the provisions of the Income Tax Act the federal government has effectively become the main player in the field, forcing

concept as set out in the Broadbent report. Strangely, it relies to a great extent on a British Parliamentary Committee Report which was critical of the recent performance of the English and Wales Charity Commission. But at least insofar as the table Report is concerned, the Broadbent suggestion stands in juxtaposition to the notion of a Commission, not as a replica.

⁶ Of course, Revenue Canada is not without its supporters. Blake Bromley in a paper delivered to the Pacific Business and Law Institute on May 20, 1999 entitled *Table Talk: Dumbing-Down The Law of Charity in Canada* comes to the defence of Revenue Canada.

⁷ Section 92 of the British-North America Act states:

“92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

....

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.”

The subject is also discussed in the *Report on the Law of Charities* (1996) by the Ontario Law Reform Commission at page 5.

⁸ Ontario through an active (some say overactive) Office of the Provincial Guardian and Trustee and Alberta in legislation relating to fundraising.

charities to meet certain legislated standards in order to maintain their ability to give tax relief for donations.

This paper proposes that an independent body be established to make a limited range of decisions about getting and losing status a charity under the Income Tax Act. The Charity Tribunal would, *ab initio*, have very limited jurisdiction. We are assuming that it should not have powers which trench on those of the provinces, whether or not those powers are exercised. And we are assuming that only after the Tribunal is well-established in its primary roles of registering and deregistering charities and having a role in the appeal process will consideration be given expanding its role to encompass, for example, the role of nurturer and advisor to the sector.

2. For this paper, we accept the group of assumptions which are adopted in the Joint Table Report. These include:

- The appeals process would be reformed. All three models contemplate the need for administrative, quasi-judicial and judicial review, the potential for greater access to appeals, and a richer accumulation of expertise by adjudicators. This would guide both the sector and those who administer this complex area of law.
- Confidentiality restrictions around the registration process would be eased.
- Any body mandated to oversee the sector should have sufficient resources and expertise to develop policy, educate and communicate.
- There would be greater effort to foster knowledge of the rules and ensure compliance with them, including institution of intermediate penalties.

We particularly want to stress the second-last point. It will (and has been) argued that many of the perceived failings of Revenue Canada's Charities Division stem from a lack of resources available which precludes it doing its job well.⁹ While we accept that it is normally easier to do well with more resources than with less resources, we believe that

⁹ In a paper entitled *Regulating Virtue: A Purposive Approach to the Administration of Charities in Canada* delivered at a conference at the University of Toronto in January, 1999, Lorne Sossin, of Osgoode Hall Law School indicated that the Charities Division had 71 fulltime employees (FTE) in 1997 but was expected to have 133 in 1998. The data was contained in a letter to Sossin from Revenue Canada. (Hereinafter, this paper is referred to as Sossin. It will be published as part of a conference report in late 1999 or early 2000.)

the current problems with Revenue Canada's administration of the charity portfolio are not solely due to a lack of funding. They are, for the most part, structural, resulting from the conflicting roles of a tax collector and what can be described as adjudicator without jurisdiction.

Having said that, we believe that there is no point in creating a Tribunal (or indeed adopting either of the other two options) if there is not going to be sufficient funding.

3. Finally, we would like to make some observations about The Charity Commission for England and Wales.

The English Commission is a body which merits close examination by anybody who wants to import the concept of an independent decision maker into Canada. It's role in England and Wales would encompass what we have in Canada as the joint roles of Revenue Canada plus the provinces if they exercised their jurisdiction plus a kind of advisory, nurturing body of the type envisaged for the Agency concept in the Joint Table Report.¹⁰

The Commission works extremely well within its context¹¹ but that context is not Canada. It is our view that we can learn much about how a Canadian version of the Commission should operate from studying the England and Wales model but at the same time we believe that it is both impossible and undesirable to try to replicate that model in Canada. We make frequent references to how the Commission operates in this paper, not because we take those examples as determinative but because we think they offer ideas and options which are useful in designing the Charity Tribunal .

¹⁰ The former Chief Commissioner, Richard Fries, gave a speech in 1999 which outlined the current workings of the Commission. The speech was given in Budapest at a conference and is reproduced in full in Volume 2, #1 of the International Journal for Not-for-Profit Law at <http://www.icnl.org/journal/vol2iss1/rfries.htm>.

¹¹ However, the Twenty-Eighth Report (1997-98) of the House of Commons Committee on Public Accounts entitled *The Charity Commission Regulation and Support of Charities* (The Stationery Office, London, 1998) is a tough-toned critique of the efficiency of the Commission. But judging by the Commission's statistical record, it remains, criticized or not, much more efficient in dealing with the public than is the Charity Division of Revenue Canada.

Introduction and Background

The road which had led us to the point where a Tribunal to replace the Charities Division has been a long one, and not as direct as some might suppose. From the early 1970's until the mid-to-late 1980's, the working relationship of the charity community with the Charities Division was excellent. The Division was efficient: applications were handled expeditiously and there seemed to be an attitude of co-operation between the Division of the practitioners. At a time when Revenue Canada was in ill-odour (1983-84)¹², many believed that the Charities Division was far and away the best run and most respected in the Department.

But during the last part of the 1980's, there appeared to be a change in attitude at the Division which resulted an increasing resort to the Courts. This quickly revealed that the law of "what is a charity" was more restricted than most people had understood it to be.¹³ And the rules as to what was "acceptable" behaviour for charities, most notable on the educational/advocacy/political continuum, developed in an extremely restrictive manner.

The cases won by charitable organizations were for the most part considered to be legal anomalies.¹⁴ In more recent years there has been an increase in cases where there

¹² During this period, the Department was subject to constant attack on everything from having "quotas" for auditors to its treatment of artists. In the 1983-84 period, virtually the entire senior bureaucracy was purged and comparative outsiders brought in. It was the flak surrounding the department's abusive behaviour which led to the issuing of the "Taxpayer's Bill of Rights".

¹³ During this time we had such cases as *Scarborough Community Legal Services*, *Polish Canadian Television Production*, *Positive Action Against Pornography*, *Toronto Volgograd Committee*, *NDG Neighbourhood Association* and *Canada Uni...* most of which, experts agree, would have been recognized as charitable in England but were not so recognized by the Canadian Federal Court of Appeal.

¹⁴ Most notable of these was *Native Communications* which could have been a seminal case but which the Courts turned into an "Indian" case with limited application.

have been deregistrations, not just a refusal to register, based, for the most part, on a narrow reading of what is meant by the term “political activities”.¹⁵

For those working with and arguing the developing Canadian case law, it became apparent that England (presumably the source of the common law for the Canadian courts and Revenue Canada) was home to a more responsive approach to both definition and activities, one that recognized that charity is a living thing. This appeared to be so because since 1960, the decisions on most of the crucial areas were made primarily by the Charity Commission of England and Wales, and not the British tax officials. And the decisions of the Commission were not much challenged, so that while the law in England was changing *de facto*, there was no reported body of court cases to which Canadian judges could look as precedents.¹⁶

It is probably fair to say that until the mid-1990’s, there was little if any Canadian understanding of, or interest in, the concept of a charity commission. But after the string of courtroom losses and a backlog of decisions on hard cases, the difference between Canadian and English law became so striking that some began to think that the “answer” to the problem of a narrow definition of the term “charity” might lay in the creation of a Tribunal.¹⁷

¹⁵ The first of these was the *Briarpatch* case. Subsequently we had decisions in *Human Life International (Canada)* and *Alliance For Life* which severely narrowed the scope of a charity’s “political” activities.

¹⁶ The most striking examples is that by an internal decision, the Charity Commission decided to recognize as charitable organizations which had as their objects the improvement of race relations. Not only has Canada not followed suit but in the Supreme Court majority decision in *Vancouver Society of Immigrant and Visible Minority Women*, Mr. Justice Frank Iacobucci said:

“As the matter is not in issue, I would decline to comment as to whether the elimination of prejudice and discrimination may be recognized as a charitable purpose”.

That comment, in the context of a Canadian multi-cultural society, was probably a key element in convincing many that steps had to be taken to revisit the system as a whole, because the courts were not going to offer any help or hope.

¹⁷ In our view, this “scope problem” is intimately linked to the time it takes to process applications, especially the hard cases. The Charities Division faces is part of the tax collection administration and has neither the mandate nor the institutional culture to enable it to allow the law charities to be responsive to changing landscape of the daily aims and operations of modern charities.

In 1995, the Department of Canadian Heritage¹⁸ commissioned Arthur Drache to do a paper examining the possibility of importing the commission concept to Canada. This paper was subsequently published¹⁹ and the idea was put into intellectual play within the voluntary sector.

The core to the concept of a Canadian charity Tribunal is that it would be in a position to interpret the common law (as does the English version) and any legislative initiatives from an independent perspective, rather than from within a framework that gives priority to the collection of taxes.

The process leading to this the current call for a tribunal was accelerated in 1999. The decision of the Supreme Court of Canada in the *Vancouver Society of Immigrant and Visible Minority Women*²⁰ offered the most meagre gruel for those who had hoped for a judicial expansion of the “definition” of charity. And to make matters worse, the Court clearly put the ball back in the court of the legislature, refusing (after some very kind comments) to impose a newly suggested approach argued for by the Canadian Centre For Philanthropy, an intervenor. So the Court as a possible source of reform had opted out.

The Broadbent Report, which had been withheld pending the decision of the Supreme Court in the *Vancouver* case was published the following month. It was a wide-

¹⁸ This Department had federal jurisdiction over “volunteerism”. In addition, many of its “client” groups found that they could not be registered as charities which in turn made fundraising difficult. This became a crucial issue at the time the paper was commissioned because of government funding cutbacks to the voluntary sector generally.

¹⁹ *The English Charity Commission Concept in the Canadian Context*, *The Philanthropist*, Volume 14, #1 @ page 8. It is ironic that the author and those who commissioned him were looking at the concept of a Canadian Charity Commission as a method to bring about a more enlightened “definition” of what is charitable and a more generous approach to what are acceptable activities. In the end result, while the concept of a Commission remains very attractive, the definition problem seems to be a secondary purpose. There is a growing feeling that at least for Income Tax Act purposes, some sort of expanded listing of “acceptable” organizations should be legislated and some of the court imposed limitations on activities should also be dealt with legislatively. This last concept has been dealt with by Drache in a paper produced under the auspices of The Kahanoff Foundation entitled *Charities, Public Benefit and the Canadian Income Tax System*. The Table Report makes more limited recommendations regarding definition (suggesting legislating an additional six categories by way of Income Tax Act amendment as well as trying to offer a “solution” to the education/advocacy/political activity issue.

²⁰ [1999] 1 S. C. R.10; [1999] 2 C. T. C. 1; 99 D. T. C. 5034

ranging paper which stimulated discussion, not the least of which revolved around its version of the English Charity Commission. In our view the paper suffers from real problems in identifying jurisdictional boundaries and in having what we believe to be a naive approach as to what could be achieved through institutional changes at the Revenue Canada.²¹ As noted in the forward to this paper, it appears that the Broadbent suggestion of an “Agency” as a buffer between the government and the sector appears ill-conceived.²²

The creation of the “Joint Table” group comprised of both senior government and sector representatives attests, we believe, to the fact that all sides realize that the *status quo* is unacceptable and that the traditional ways of working out legal issues is not working and will not work. It is our belief that the fact that the Commission concept was unanimously embraced by the voluntary sector representatives of the Tables while the civil servants remained neutral amongst the three options simply shows that the sector people have been living with the issues and problems for a much longer time than have the bureaucrats.

With this background to the genesis of the Tribunal idea, we now turn to an examination of the reasons why as a generality, the tax authorities should not be the people to make decisions about whether an organization does or does not qualify for tax concessions based on their status as a charity.

²¹ The members of the panel appeared to have a degree of trust in Revenue officials and their goodwill which is not matched by many in the sector.

²² This is what we take to be the essence of the Fraser Institute’s objection to what Broadbent calls the Voluntary Commission. In fact, the Fraser Report endorses the idea of an independent panel, armed with updated directions from Parliament, the concept advanced here. See footnote 4 at p 28 and p 33

The Tax Authority As Decision Maker

In this part of the paper, we shall look at the main issues which arise when tax authorities are given this power, most of which come into play when considering the role of Revenue Canada, both past and future.

In many countries around the world, the tax authority is the decision maker for determining the sorts of organizations which are recognized as “charitable” (or as public benefit organizations or whatever term is used in the particular country) for tax purposes. And while the scope of tax benefits may vary from country to country, the fundamental question - whether it is appropriate of tax officials to make what amounts to a fundamental social policy decision - is being questioned.

International Experience

The issue has arisen in such diverse countries as New Zealand, Scotland,²³ Singapore, South Africa²⁴ and in many European nations, both east and west. While the issue is framed in different ways, a common consideration is the desirability of a “charity commission”. While many countries look to the Charity Commission of England and Wales as a model, many others have doubts about adopting this specific approach. But what all approaches do have in common is the basic premise that the tax authorities are *not* the proper ones to decide on policy matters relating to status.

An interesting confirmation of the concept of a charity commission was its broad endorsement at a conference held in May, 1999 in Budapest...much to the surprise of many participants. It happened at a workshop held under the sponsorship of the

²³ See *The regulation of Charities in Scotland* by S. R. Moody, senior Lecturer in Law, University of Dundee, published in issue #4 of the International Journal of Not-For-Profit Law accessible at <http://www.icnl.org/journal/vol1iss4/index.html>

²⁴ See *The Ninth Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa* (more commonly called the Katz Report) which can be found at: <http://www.icnl.org/journal/vol1iss3/index.html>

International Center For Not-For-Profit Law, which brought together a smallish (60) group of lawyers and bureaucrats involved with non-profits from across Europe.

The conference was titled *European Civil Society in the 21st Century: Standards and Mechanisms for regulating “Public Benefit” Organizations.*²⁵ One of the four working groups at the conference was on the topic of “Appropriate Decision Makers”. There were intensive meetings which ran for two full days which had representatives from eleven countries, most of them east European but including one each from Italy, Germany and England.

There were four basic approaches identified which are used to determine which organizations are recognized as being “charities” or public benefit organizations. These are the courts (Hungary), the tax authorities, (several) a charity commission (England and perhaps in the near future, Poland) and other (non-tax) government departments. Initially, it was apparent that representatives from each country thought their system was the ideal

The participants then used a sort of matrix (not unlike that used in the final Report of the Tables), setting out the characteristics of an ideal system. These included such items as “fairness”, “speed”, “cost”, consistency”, “political interference”, “societal values” and “appeal options”, to name some of the key considerations. Then each of the four basic approaches was rated against these characteristics, using a discussion/voting approach. To the surprise of many, the upshot was that the concept of a charity commission came out far ahead.

Obviously, the conclusions did not take into account the “political realities” in each country but this arguably made them more valuable, given that a consensus emerged amongst experts about the “ideal”, even if that ideal might be a “non-starter in their own countries.

Some countries have taken a part of that jurisdiction away through legislating more precise definitions in various statutes...countries as diverse as Barbados and

²⁵ A full issue of the International Journal of Not-For-Profit Law has been devoted to this conference. It is in Volume 2, # 1 and can be found at <http://www.icnl.org/journal/vol2iss1/>

Hungary. The moves are designed to at least partially limit decision-making by tax authorities. This approach was recommended by the final Table Report ²⁶ though it is presented in a fashion which does not specifically state that the need for such legislation stems directly from the failings of Revenue Canada and the Courts as social policy decision makers

Why The Tax Authority is Not Appropriate

We now turn to a general discussion of why the tax authority is not generally the appropriate decision-maker, as a matter of social policy, to determine what types of organizations should receive tax benefits.

1. The officials who work in tax authorities are trained to raise taxes. The culture in which they work has an innate bias which leads employees to try to maximize tax revenue. Giving them the authority to accept or reject to an application that may produce significant tax revenue loss puts it in a conflict situation. The 1999 decision of the Supreme Court of British Columbia, *Blair Longley v. M. N. R.*, demonstrates exactly the problem. ²⁷ One of the contributing factors in the Longley decision was the secrecy surrounding the work done within Revenue Canada.²⁸

²⁶ Page 52.

²⁷ 1999 Carswell BC 1657. Blair Longley came up with a scheme under which people could make payments to a registered political party and then have the funds flowed back for their personal benefit. He asked the tax authorities for an opinion on the scheme and was told that it was not legal. The case reports that there was an internal legal that the scheme *was legal*, albeit exploiting a loophole in the drafting of the tax legislation.

In due course, Longley alleged that he had been misled by officials and brought action. In the end result, he was awarded damages for the “public misfeasance” by the Revenue officials which included \$50,000 as “punitive damages”. In our view this case represents, in part, the problem of institutional bias against tax expenditures.

²⁸ One of the problems faced by charities which appeal Revenue Canada decisions is that they do not have the right to use the discovery process to depose Revenue officials or call them as witnesses under oath so that matter of personal bias or worse can almost never be brought out in a court proceeding. In non-charity cases, Revenue officials are routinely examined both through discovery and as witnesses in open court.

2. A second element relates to the role of tax authorities in enforcing compliance. While tax authorities put out huge amounts of information to the public and spend millions of dollars on communication, the thrust of their efforts is to promote compliance with the law. You don't go to the tax authorities for advice about how to reduce tax liabilities or for their approval of tax reduction ideas.

This is equally the case of the Charities Division. It is extremely helpful in advising charities and non-profits about compliance, clearly one of the Division's functions. But this should not be confused with any sort of "nurturing" role. Both the Broadbent report and the Table report, to a lesser extent, sees a new body which "helps" or "advises" charities, presumably to meet their charitable goals and to assist them to operate in an efficient manner. This is *not* a function which can or should be given to a division of a department, the role of which is to efficiently collect tax and to promote compliance.

3. Most officials in tax authorities have no formal training or background geared to the decision making necessary to determine the legal nature of a charity.²⁹ Individuals may be lawyers, accountants or have related professional or educational qualifications. But there is no requirement that they have any specific educational or occupational background when they join the Charities Section. Individuals are not social policy makers nor are they trained to make social policy. The corporate culture in which they operate makes it easier for them to say "no" rather than to say "yes".³⁰ In a milieu where success is measured in part by increasing the efficiency of tax collection and maximizing that function, it is to be expected that exemptions from tax will be granted reluctantly.³¹

²⁹ Sossin, supra note 9, describes the "on the job training" at page 17 of his paper.

³⁰ In a conversation with an official from Inland Revenue in England who deals with the issue of charities and the tax system, the following point was made. In Scotland, which is not subject to the jurisdiction of the Charity Commission of England and Wales, Inland Revenue maintains an "index" of charities for tax purposes, making decisions based on the common law as to which organizations qualify. The official told us that the Inland Revenue officials in Scotland were unhappy with having this jurisdiction because they are not trained for it, and expressed hope that the review of the overall situation which is now under way in Scotland would result in Inland revenue being stripped of what it views as a onerous obligation.

³¹ In a 1999 Press Release designed to counter some false information which appeared in the media, Revenue provided this data:

<u>Year</u>	<u>Applications Received</u>	<u>Applications Approved</u>
1992-93	3,900	3,300
1993-94	4,400	3,500

4. In most countries, the tax authorities are administrators and do not write the tax codes. In Canada, Finance writes the law and Revenue Canada administers it. This raises a number of problems because the policy makers are not the administrators. There have been instances in the recent past where substantial tax changes relating to charities have been put in place by Finance without informing Revenue. Conversely, there is evidence that Revenue has often requested tax changes which Finance refuses to co-operate in.³²

Simplifying administration is important to tax authorities, and the fewer exceptions there are to the general tax regime, the better it is.³³

In the hierarchy of government, Finance is the dominant department and Revenue is subservient insofar as policy making is concerned. Charity issues are a minute aspect of the inter-relationship. Many believe that the giving responsibility of charity administration to a new body which will be pre-eminent at the federal level and which would have direct access to Parliament would result in better and more expeditious tax legislation than is currently the case.

1994-95	3,900	3,300
1995-96	5,000	4,500
1996-97	4,300	2,800
1997-98	4,800	3,000

These figures show that in 1992-93, 84.6% of applications were successful. In 1993-94, the rate of success dropped to 79.5%. 1994-95, saw the rate back to 84.6%, with the actual number of applications and registrations being identical to the 1992-93 figure, notwithstanding the fact that the department often talks about the increasing volume of applications. In 1995-96, we hit a high water mark for applications, 5,000 of which 90% are accepted. Then we see the big change. In 1996-97, only 65% of applications are accepted and in 1997-98 the percentage drops to 62.5%.

These figures probably do not include applications which were abandoned without formality on the basis of initial negative reactions.

³² This was alluded to in the *Longley* case where Finance refused to take steps to eliminate the “loophole” which caused Revenue’s administrative *angst*.

³³ This issue became very clear in the debates about exemptions which might be given when the Goods and Services Tax proposals were being debated.

5. Tax departments are large bureaucracies, with people moving from division to division with regularity. As an atypical part of a large department Charities Division can offer few opportunities for career advancement. As a result, few remain long enough to develop expertise which significantly affects the quality of decision making.

6. Most tax administrations, quite properly, operate on a system of extreme confidentiality about tax information. This imbues departmental employees with a secretive approach to their work. In our view, this is inappropriate in the context of dealing with many issues relating to charities.³⁴ Unfortunately, this approach often carries over to such matters as guidelines to registration as non-profits, administrative issues and an unwillingness to publicly discuss issues which are of concern to the department and to the community.

This issue was recognized by the government two years ago when there was some loosening of the confidentiality rules to allow some very limited public access to information.³⁵ The Table Report also recommends a series of possible steps to try to make the working of the Charity Section more open. This is one of the changes the Tables contemplate when they talk about an “Enhanced Revenue Canada Charities Division”.³⁶

³⁴ For example, when there are public complaints about a charity, Revenue Canada is precluded from commenting on the particular charity and has to fall back on banal generalities. The English Charities Commission can and does speak out publicly about specific charities and often puts out press releases about them. It, of course is not bound by the same rules of confidentiality as are tax authorities.

³⁵ The first such step was taken more than 20 years ago, which allowed the public access to the public information returns of charities pursuant to subsection 149.1(15). The most recent changes are contained in subsection 241(3.2) which states:

“An official may provide to any person the following taxpayer information relating to a charity that at any time was a registered charity:

- (a) a copy of the charity's governing documents, including its statement of purpose;
- (b) any information provided in prescribed form to the Minister by the charity on applying for registration under this Act;
- (c) the names of the persons who at any time were the charity's directors and the periods during which they were its directors;
- (d) a copy of the notification of the charity's registration, including any conditions and warnings; and
- (e) if the registration of the charity has been revoked, a copy of any letter sent by or on behalf of the Minister to the charity relating to the grounds for the revocation.”

³⁶ See page 49 of the Table Report.

The question which has to be posed is whether it is feasible to try to create an “open culture” for one very small section of Revenue Canada, while at the same time maintaining the necessary requirements of secrecy and confidentiality for all other parts of the Department. The simpler, and more efficient approach, is to put the decision making in a new body which is not bound by Income Tax Act notions of confidentiality but which has a specific statutory mandate to be open in its operations.³⁷

7. Lastly, there is the issue of appeals. When tax cases go to court, in almost every jurisdiction (including Canada) the onus is on the taxpayer to show that the tax authorities are wrong in their assessment. The courts start with an institutional bias against the appellant. While not a question of guilt, the onus often operates with that tenor and the applicant is presumed to be guilty until proved innocent.³⁸

The problems of appeals is exacerbated by the facts that the process is an appeal³⁹ to the Federal Court of Appeal. Not only is the onus on the charity or organization in question, but the basic rules applicable in the Tax Court of Canada such as the right to have examinations for discovery, call witness and cross examine the government’s decision makers, do not apply.

In the Table Report⁴⁰, the problem of “appeals” is noted as an issue to be put forward for consultation. In fact, of all the problems inherent in having the tax authority making decisions about charitable status, this problem could be most easily solved. We could return to a situation as we had before 1972 where the appeals go to a lower court, which

³⁷ Realistically, no matter what sort of ultimate solution to the problem of jurisdiction is arrived at, there will remain some issues of confidentiality on specific files. The thrust of the policy for a new organization however, should be that the public has a right to know unless there is an over-riding public policy to the contrary. This of course is in sharp contradistinction to the *status quo*.

³⁸ This applies to tax cases relating to charitable status as the Federal Court of Appeal recently confirmed in its decision in the *Human Life (International) of Canada* case. Ironically, in common law jurisdictions at least, in non-tax cases relating to charitable status, there is a presumption in favour of recognizing charitable status and intent.

³⁹ In England, if a body wishes to challenge the decision of the Charity Commission, one has a *trial de novo*, not an appeal from the decision. This approach results in different procedural issues coming into play, including one of “onus”.

⁴⁰ See page 63.

would not only make the process more accessible but would also make it more fair, but a statutory amendment could be put in place to resolve the “onus” issue.

But the appeal issue can also be looked at in a completely new context if in fact a Tribunal replaces Revenue Canada as the arbiter of charitable status at the federal level.

A General Point About The Delay In Processing Applications

To this point, we have been looking at the general issues involved in a tax authority making social policy decisions. Before leaving this subject, however, we want to discuss a significant problem which is not necessarily related to decision-making authority.⁴¹

A problem faced by all those who make applications for charitable registered status with the Charities Division is the length of time it takes to have an application processed. We are not referring to the occasional contentious application which may take literally years to settle, one way or another, but the normal time it takes to handle the typical application, well as other routine matters.

Sossin ⁴² states that: “[t]he process typically takes between 7 and 15 months”, an observation which would probably be concurred in by most practitioners in Canada who have regular dealings with this sort of application.⁴³ The problem is not just one of the obvious difficulties created for organizations which for the most part, are operational during the application process. Under the Income Tax Act ⁴⁴, an application is deemed to have been refused if the Minister has not given the applicant notification of its disposition 180 days after the

⁴¹ Part of the problem invariably does have to do with the jurisdictional incapacity on the part of the Charities Division. Some number of applications will raise novel or contentious matters for determination. That number cannot properly be considered by the Division. There is either no clear law to apply or matters of mixed fact and law which need to be determinatively resolved. Without a way to get a decision to administer, the Division has no recourse but to thoroughly consider the matter to try to make it fit or to deny the application. The result is long periods of waiting by applicants and an intolerable position for administrators.

⁴² Supra note 9 at page 16.

⁴³ In a conversation with Arthur Drache, Sossin said he got the information from a senior official in the Charities Division.

⁴⁴ Subsection 174(4)

application was filed. In fact, if it were not for applicant's patience, Revenue Canada's administrative policies and the prohibitive cost of appealing a deemed refusal to register, the system as legislated would collapse into chaos.

By way of comparison, in the 1998 Annual report of The Charity Commission of England and Wales, issued in mid-1999, we find the following statement:

"During 1998 we responded to 93% of registration applications within 15 working days, and 94% of other correspondence within 20 working days."

Other countries may have worse records than Canada⁴⁵ but it is crucial that those who are not regular users of the system be aware of just how slow it is, and to also be aware that the problem has been getting worse, not better. A decade or fifteen years ago, the normal wait would be measured in weeks, not months. No matter what the ultimate decision may be on the question of which body makes the registration decision, it is absolutely crucial that the process be made reasonably expeditious.⁴⁶

⁴⁵ We have been told that in India the process takes years, unless it is hurried along with bribes. One Canadian lawyer remarked that if bribes were a feasible option to speed up the Canadian process, he'd gladly pay them!

⁴⁶ It should be observed that all this is taking place in an era where citizens as consumers expect (and for many things) receive instant service. Some provinces provide for corporate registrations over the internet, measured in minutes. Even without that method, the time taken is a short number of days. Taxpayers can e-file and get refunds in days. Everywhere just-in-time service standards lead people to expect prompt, uncomplicated results. People motivated by altruistic notions of service are galled and distressed at their government to find that an "approval to do good" can take months and possibly be denied. This frustration factor cannot justify inappropriate measures but it needs to be clearly borne in mind when assessing the problem and examining remedies.

The Role of The Tribunal

Before we consider how the proposed Tribunal should be structured, it is important to determine what its role should be. As any architect will attest, “form follows function”, and unless we have a clear idea of what the Tribunal should do, we cannot comfortably discuss how it should be organized.

There have been two models put forward in 1999. The first, contained in the Broadbent Report⁴⁷ was summarized as follows:

- Provide support, information, and advice about best practices to voluntary organizations related to improving accountability and governance;
- Collect and provide information to the public;
- Evaluate and make recommendations on registration for new applicants; and
- Assist organizations to maintain compliance with Revenue Canada and other regulatory requirements, and investigate public complaints.

The most striking aspect of this suggested role is that it give no real power to the Commission, and acts only in a advisory role to the Charity Division which keeps all the legal powers involved in registration and deregistration. While some have suggested that the recommendations of this body would carry significant weight with Revenue Canada, in practice, this is unlikely to be true because the Charities Division will always take the position that it must follow “the common law” and “the courts” and cannot allow the Agency’s recommendations to take priority.⁴⁸

⁴⁷ Page 58, with a summary at page 89.

⁴⁸ This view is bolstered by the experience associated with the National Arts Service Organization initiative where the decisions as to qualifications are made by the “Minister of Communications (now the Minister of Canadian Heritage) pursuant to subsection 149.1(6.4) of the Income Tax Act. Registration is to be by Revenue Canada. Very few such organizations have been registered since the inception of the concept in 1994, retroactive to 1990. Those involved in the field believe that Revenue Canada has applied its own standards to thwart the full implementation of the concept and that officials at Canadian heritage now “self-censor” applications because of problems they know Revenue will create for applications.

Equally of concern to many organizations is that the Broadbent proposal would create another layer of bureaucracy and cost without appreciably improving the system.

The Report of the Tables, in discussing a Commission as one of three options, sees its role as:

“A quasi-judicial commission would undertake most of the functions currently carried out by the Charities Division. It would provide authoritative advice to the voluntary sector, and expert adjudication of appeals on decisions by its Registrar. At the same time, such a commission would have a support function not unlike model **B**'s agency.⁴⁹”

After considerable reflection, we have come to the conclusion that *in the first instance*, the role of the Tribunal should be even more narrow than as set out in the Table Report. We take the position that it should, *at the start* simply take over the current Revenue Canada role of registration and deregistration.⁵⁰ We consider that as desirable as many of the other roles may be, the effort involved in the shift of responsibilities and the development of new policies will be so demanding that no additional roles should be contemplated in the near term.

The question is not whether there should be a tribunal but among the number of things that need to be done after it is established, what should be priority. The Table Report has a number of recommendations. At this stage, it is not clear which (if any) will be accepted and in what form.

For example, if the proposal to legislatively expand the list of organizations which are given “quasi-charitable status”⁵¹ is accepted, one of the first jobs of the Tribunal will be to develop criteria for identifying qualifying organizations. Similarly, if the Table Report

⁴⁹ The term “model B” refers to the Agency approach put forward in the Broadbent Report.

⁵⁰ See footnote 11.

⁵¹ Page 52 of the Table Report

suggestions about the introduction of “intermediate sanctions” is accepted,⁵² substantial work will have to be done to develop guidelines, not to mention work on an appeal process.

If the Table Report’s view that new approaches are needed to deal with issues such as “advocacy” and “related business” is accepted, the Tribunal will have to develop rules and guidelines, whether or not there is a new legislative framework.

And of course, if one of the overall purposes of the creation of a Tribunal is to look at the whole issue of registration with fresh eyes, it will be incumbent on that body to review all of the Charity Division’s current interpretations and where necessary, make changes.

Given that one of the purposes of a shift from the Charities Division is to have a more open approach, a high priority will have to be given to the rewriting of the public documents currently used by Revenue Canada, the developing of new ones and the development of more open procedures and the taking of steps to increase accessibility to the system.

There will also have to be significant attention paid to the issue of an appeal system, not just in the context of the “intermediate sanction” proposals but also vis a vis refusals to register and deregistrations. There is a consensus that the current appeal system which starts at the Federal Court of Appeal cannot continue.⁵³ But there is considerable work which must be done to develop an alternative. This work has to be done within the context of a shift from Revenue Canada control of the system to a Tribunal.

A couple of points should be made about the continuing role of Revenue Canada. It is our view that the audit function of charities should remain with Revenue Canada which continues to have to role of administering compliance with all aspects of the tax law.⁵⁴ We think that it only

⁵² Ibid page 58

⁵³ See, for example, the comments of the Table Report at page 55, one of the “shared assumptions” for all three of the models discussed in the report.

⁵⁴ We believe that an important precedent for much of what we are discussing here is the role of the Cultural Property Export Review Board. It has binding powers which have a direct financial impact on tax revenues and its role is recognized under the Income Tax Act. But through its relationship with Revenue Canada, investigatory powers are *de facto* vested in Revenue Canada through its audit and assessment procedures. The interplay of the Board, Revenue Canada, taxpayers, the courts and the various pieces of

makes common sense that Revenue should continue to effectively supervise the whole area of the tax treatment of charitable gifts as part of its assessing practices and given the inter-relationship of gifting and organizations, it would make little sense to say that the same department cannot look at the donee side of the equation as well as the donor side.

As will be suggested later in this paper, the audit side of Revenue would report to the Tribunal as to problems which it finds, but it would be up to the Tribunal to take the appropriate steps, whether in terms of “intermediate sanctions” or deregistration. When we discuss the issue of appeals, we will look at the role and status of Revenue Canada and we will be discussing the relationship between the Tribunal and the department with regard to operational issues, later in this paper.

Conclusions about a Tribunal

The Tribunal will have considerable work on its plate in the first few years of operation, a burden which may or may not be increased by legislative initiatives as recommended by the Broadbent Report and the Table Report. We think it is unrealistic at the start to expect it to play any of the other roles which have been suggested for it. However, with the passage of time and the development of a smooth internal operation to deal with the primary matters under its jurisdiction, we would expect that its role would expand.

We would also expect that from the beginning, the Tribunal would play an informal role in transmitting sectoral concerns to government (as through annual reports) as well as governmental concerns to the sector. Similarly, we would expect that fairly early on, steps would be taken to make contact with provincial authorities to see what level of co-operation might be developed.

We stress that the final design of the Tribunal will depend to some extent on what changes if any are made to the Income Tax Act. While we think there is a need for a Tribunal whether we have the legislative *status quo* or legislative change, the nature of changes should have an impact on the design of the Tribunal and the people who are chosen to implement its policies.

legislation which apply may be a partial model for the development of the new Tribunal and its various relationships. In Appendix C, we look at how the Cultural property Export Review Board works.

Tribunal Members and Staff

One of the assumptions that both the Broadbent Report and the Table report made about a commission is that it would be “independent”. We suggest there are two distinct elements to this independence: accountability of the Tribunal within the our system of government and the manner of making appointments to the Tribunal.

One aspect is that the Tribunal should *not* be part of a government department and should not have to report to a cabinet minister. The ideal situation would be that the Tribunal make an annual Report to Parliament directly, as do, for example, The Auditor General or the Privacy Commissioner.

The relationship to Parliament and the government of the Tribunal may be developed and refined if some of the recommendations of the Table Report’s “capacity” proposals are adopted. If a minister or group of ministers is appointed to have responsibility for the voluntary sector at the federal level, if a secretariat is created and if a Parliamentary committee dealing with the voluntary sector is created ⁵⁵ then it will be necessary to determine the interplay between the Tribunal and one or more of these bodies. But it seems to us that if the Tribunal is truly to be independent, then it must not be seen to be an arm of any of these suggested bodies or responsible to them. On the other hand, if, for example, the suggestion of the creation of a standing Parliamentary Committee is adopted, it would make sense that the Tribunal’s Annual Report to Parliament would be submitted to the Committee for review and comment.

A regular feature of the committee’s calendar might be the calling of key people from the Tribunal to “discuss” issues of importance to the sector.

If there is a Minister appointed for the voluntary sector, either formal or informal procedures could be adopted so that there can be an exchange of views. The same is true if a secretariat is created to deal with voluntary sector concerns, even if there is no single minister in charge. In England, for example, the Charity Commission has a relationship with the Attorney General and through that office will let government know when troubling or contentious issues

⁵⁵ Each of these idea is an idea or option referred to in the Table R, pages 25-27.

look to be arising.⁵⁶ In so doing, the Tribunal would not to justify its actions or seek instructions but rather give the government an early indication of what it perceives to be problems that may be developing. This approach also allows the Tribunal and other government departments to co-ordinate on issues of mutual concern.⁵⁷

Appointments to the Tribunal

There is another aspect of independence which has to be considered. This has to do with how Tribunal members are appointed. If we assume that they will be appointed by the government⁵⁸, how can an individual be seen to be independent? But it is unreasonable to assume that the government would pay the full cost of the Tribunal, have it established as a state functionary and allow the key appointments to be made by others. In any event, as the Broadbent Report⁵⁹ notes, the body should equally be independent of the sector.

The most common method of making appointments to federal boards, commissions and the similar bodies has two basic criteria. The first is to assume that there must be at least geographic, linguistic, gender and “ethnic” representation. This normally results in a fairly large board. Some interest or knowledge in the subject is often a consideration, though, frequently there is no requirement for specialized knowledge. The second criterion is kinship with the party in power. This is understandable in most cases and probably there isn’t much harm done.

But in our view, given that the purpose of the Tribunal is to be a participant in a significant administrative and statutory reform of the federal law of charities, we do not believe that connections or broadly fashioned representation should be governing criteria. What is needed is a group of people who have some level of expertise (either from the legal, sectoral or

⁵⁶ The process was explained in a private conversation with Kenneth Dibble, the head lawyer of the staff of the Charity Commission.

⁵⁷ There is a different and more direct relationship with Inland Revenue which will be discussed later in this paper.

⁵⁸ Presumably, by order-in-council.

⁵⁹ At page 63.

government perspective) and who have an understanding of what the role of the Tribunal will be over both the short and long term.

If one were not limited by a need for geographic⁶⁰ and other types of representation, the members of the Tribunal could be few in number. (England and Wales operates with just five commissioners, two of whom are “part time”)⁶¹ We also anticipate that one of the problems which will be faced is that small pool from which selections of qualified people could be made is small, especially when the potential of conflicts of interest comes is considered.

As a first step, we’d suggest that the appointment process for members of the Tribunal be initiated by application. We believe that the required positions should be advertised widely (not just a formal announcement in *The Canada Gazette*), together with the criteria. The selection of a number of qualified candidates to form the basis of a list of recommended appointees should be done by a neutral group, perhaps a body such as the Public Service Commission of Canada which has extensive experience in recruitment and replacement and is widely recognized for its impartiality.

The selection board (which could include some sitting deputy ministers and senior people from the sector) would base their choices on the usual criteria of job appointment, namely the qualities the individual has to do the job. Recommendations would then go to Cabinet which would consider them and appoint through an Order-In-Council. This process should also make removal of a Commissioner difficult, so the appointment would be for a term of years or “during good behaviour” but not “at pleasure”.

We believe that this (or a substantially similar) procedure would go a long way to ensuring that those appointed are independent of government, despite the fact that the funding of the Tribunal and its members salaries would be by government.

⁶⁰ We believe that some thought should be given to having the Tribunal dispersed into several geographic areas. Having several offices may create some problems of co-ordination and consistency but it would remove the current feeling that the decision makers are both removed and remote from the applicants.

⁶¹ See Schedule 1 of *The Charity Act, 1993*. There need be only three commissioners, though others may be appointed. At least two (of the three) must be lawyers. In fact, at the present time you have a career civil servant, a lawyer, a representative from the charity sector, an accountant and a law professor. They are deemed to be civil servants and are paid by the Crown.

The appointment of the members of the Tribunal should also take into account their role. If the Tribunal is created and there were no change in the *Income Tax Act* relating to the “definition” of charities, the members of the Tribunal would have to have a high level of legal expertise, as would at least some of their support staff . If, on the other hand, there were substantive changes to the federal tax law relating to definition, one could more easily have Tribunal members whose backgrounds were less law oriented and who could bring experience from various parts of the sector.

In our view the drafting of criteria and job descriptions becomes crucial to the selection process. Therefore one way to retain independence and to ensure competence, aside and apart from the process, is to create statutory guidelines or limits on the filling of the positions.

In Appendix B, we offer two existing statutory models which are designed to focus the characteristics required of appointees to ensure competence levels. Section 3 of The Standards Council of Canada Act is designed to ensure federal, provincial and sectoral representation on the Board. Subsection 6(2) uses general language to try to ensure a level of expertise and breadth of representation on the Board.

While the Joint Tables seemed disposed to the Standard Council’s structure as a model, we are taken with the structure of the Cultural Property Review Board. As noted elsewhere here, this Board actually makes decisions about the quality of works of art and other objects and their value which is binding on Revenue Canada and which has significant tax ramifications.⁶² Like the proposed Tribunal, the Export Review Board makes hundreds of decisions every year with have direct consequences in terms of government tax revenue. That being the case, we think it is instructive to look at the statutory requirements for Board membership.

Statutory Considerations in the Appointment of Tribunal Members

Under subsection 18(2) of the Cultural Property Export and Import Act, the Board is limited to ten people, though the appointments are on the recommendation of the Minister of

⁶² For example, property certified by the Board may be donated or sold to organizations also designated as meeting certain qualitative criteria by the Board, and the gift or sale will not attract any capital gains taxes.

Canadian Heritage. But up to four of the people must have backgrounds in galleries or museums while up to another four come from amongst dealers or collectors of art and antiques.

While the existing statutory language could be improved upon, the model is one which can certainly be used in the case of a Tribunal. We could have a smaller board than, for example, the Standards Council that could have guidelines similar to those of the *Charity Act* (referred to earlier) and the *Cultural Property Act*. There could be a requirement of legal/accounting training, a history of employment in the sector and other criteria to be determined. As we have noted, these specific requirements should not be finally determined until we have a better idea of the overall role the Tribunal will play. But the point we want to emphasize is that it is possible to draft legislation which “guarantees” representation from the various “players” and also tries to ensure a threshold level of expertise and experience.

In summary, we believe that the Board of the Tribunal (for lack of better terminology) should be comparatively small (say 5 to 11) and chosen for a combination (either in any individual or as a group) of technical and sectoral experience. We believe that the process should include an application procedure, an independent non-political selection process and a set of statutory guidelines.

Tribunal Staff

Turning to the issue of staff, there is a potential quandary which those people filling the positions will discover. The obvious source of new staff might be from amongst those currently employed in the Charities Division. The rationale would be that these people have already got some training and have a level of expertise in the field.

On the other hand, the concern we have expressed earlier in the paper is that the culture of the taxing authority is inappropriate in its influence of the decisions made about charitable determination. This fact militates against a wholesale transfer of personnel from that authority. The question is simply whether the vast majority of the existing staff would maintain a “tax authority” perspective.

In a similar manner to the selection of the members of the Tribunal, we suggest an open employment process with all the positions advertised widely and publicly. Current employees of

the Charities Division would be specifically encouraged to apply if they have an interest in continuing to work in the field, but that there would be no preference given *per se* because of their job status. Obviously, however, if they can show a level of expertise in the field which stems from having been in the Charities Division, this would be an asset. We would, however, recommend against any procedure which simply transferred all the employees from the Charities Division to the new organization without any selection procedure

We would see the employees of the new organization being “civil servants”, subject to the normal rules of the Public Service Commission, presumably unionized and with the ability to move fairly easily to more normal departments within the public service.⁶³ On the other hand, all efforts should be made to recruit people who see work within the charity milieu as a career goal, and not simply as a stepping stone up the employment ladder within the civil service. Once the Tribunal is well established, there should be an effort to promote from within while at the same time attempting to attract fresh blood with new perspectives on the issues being considered.

As a brief aside, we note that this approach to the creation of the Tribunal and to its staffing requirements would contribute to the building of capacity and strengthening of relationship of the voluntary sector with government, a matter the Joint Tables addressed. The movement of personnel between public and private sector is well-known and appreciated for the perspectives that it brings to institutions in both spheres. Developing stable career opportunities in an independent working environment within the overall government apparatus would over time, we believe, significantly contribute to the same exchange of personnel with the voluntary sector.

While we believe that a body like the Public Service Commission should be in charge of staffing (after taking into account the perceived needs as set out by the Board of the Tribunal) those Board members should have an active role in selecting senior staff. If the Board members are of the quality and experience which we believe the processes we have outlined will produce, then they will be uniquely qualified to assess the applicants for senior positions.

⁶³ It might be useful to look at how the transition was done from a government department to an “agency” when Revenue Canada became the Canada Customs and Revenue Agency. While it is true that all employees of Revenue Canada on October 31 woke up and found themselves as employees of the CCRA on November 1, 1999, one of the rationales for creating the new organizations was to give more “flexibility” in personnel and compensation issues than exists in the bulk of the public service. By the time the government is able to move on the creation of a Tribunal, we may have some better guidance relating to possible human resource options.

We would make one further observation, one as to timing. If, as we believe, it is not desirable to simply transfer existing Charity Division staff to the new organization, we believe that there will have to be a period of overlapping existence of both the Charity Division and the Tribunal. We believe that the Tribunal will need some time to establish itself, both in terms of the mechanical issues ranging from getting physical space, equipment and staff to the more fundamental matters of developing policy. It seems to us that for a period of six months to a year, there be an overlap in existence. During this time, while the Tribunal is getting itself established, the Charities Division will continue to function.

Communications and Confidentiality

We made much, earlier in this paper, about the problems created by the restrictions under the Income Tax Act ⁶⁴ designed (quite properly in our view) to limit access to taxpayer information. Though the provisions are riddled with exceptions to the rule, including special rules relating to charities ⁶⁵ the fact that the system is not geared to be “information friendly”.

Reflecting the different nature of Revenue Canada as administrator, in contrast to a Tribunal in a quasi-judicial judicial role, Revenue Canada, for example, never explains why it registers a particular organization (or even admits that it does so), though of course it does publish generalized information. The English Commission actually has published five “volumes” (slender ones, to be sure) explaining what it has done in certain types of cases, and why. It is currently involved in a very public process which goes under the name of “examining The

⁶⁴ See section 241 of the ITA.

⁶⁵ Subsection 241(3.2) states:

(3.2) Registered charities — An official may provide to any person the following taxpayer information relating to a charity that at any time was a registered charity:

- (a) a copy of the charity's governing documents, including its statement of purpose;
- (b) any information provided in prescribed form to the Minister by the charity on applying for registration under this Act;
- (c) the names of the persons who at any time were the charity's directors and the periods during which they were its directors;
- (d) a copy of the notification of the charity's registration, including any conditions and warnings; and
- (e) if the registration of the charity has been revoked, a copy of any letter sent by or on behalf of the Minister to the charity relating to the grounds for the revocation.”

Register” but which is nothing less than a public consultation on a re-writing (albeit administratively) of the English and Wales definition of charities.

As we have suggested, one of the major advantages inherent in transferring federal administration and determination about charities from Revenue Canada to a new body, lies in the opportunity for the public to be made better aware of the process of registration and deregistration, the rules which are followed, the guidelines used as well as a provision of establishing public precedents in cases where similar organizations have been recognized as charitable.

In effect, the new organization would be in a position to create its own rules on access and confidentiality without statutory constraints. It is worth noting that while this is the case in England, there are unwritten internal guidelines, usually based on common sense. A series of questions we posed in interviews ⁶⁶ about what would or would not be disclosed to members of the public in answers to queries elicited responses which amounted to “it depends”, and to a great extent the issue was whether in the view of the Commission the questioner had a legitimate interest in getting an answer. While this might not appeal to the new Canadian organization, the fact of the matter is that there are few legal constraints ⁶⁷ in England on this issue and common sense seems to be the guiding principle.

But there is, we suggest, a big difference between issues of confidentiality about specific files which are still being considered (either for registration or deregistration) and secretiveness about what has already been decided, either in terms of a particular file or in terms of policy. It seems illogical that the Canadian public can get the public information return of any particular charity, the name of which it knows, but will get no help in trying to identify charities within a group.

We also do not understand why the names of organizations which are already registered cannot be divulged and their applications used as precedents. If one looks at the new found ability for Revenue Canada to divulge information under the provisions of subsection 241(3.2), the

⁶⁶ Separate interviews with Michael Carpenter, the “legal “ Commissioner and with Kenneth Dibble, the most senior law officer.

⁶⁷ Which do apply, in England as in Canada, where questions are posed to Inland Revenue.

problem is clear. If one *knows* the name of a particular registered charity which is working in a specific field, then information may be available.⁶⁸ But if you ask Revenue first about the name a charity in the field of interest, it can't be given under current legislative constraints.

At the very least, we would expect that the new organization would consider the following:

- Expand the internet search engine to allow searches of registered organizations by key words linked to filed purposes and activities.
- Make all documents in a file available to public search, excluding only such documents which relate to ongoing issues which the Tribunal is considering.
- An annual report on the Tribunal's activities.
- A regular report of decisions of the Tribunal with an emphasis on "why" such decisions were take, both in cases of registration and refusals to register.⁶⁹
- The issuing of press releases when issues relating to a charity surface in the media providing that the issue in question relates to the Tribunal's jurisdiction.
- Inviting public discussion on issues of concern to the Tribunal including the appropriateness of certain registrations.⁷⁰
- The publication of precedents.
- The issuing of user friendly guidelines on registration, what types of organizations are eligible and the legal obligations of registered organization.

At this juncture it is impossible to determine the exact level of public disclosure which might be appropriate except to say that it is necessary that the level (and speed) of disclosure be better than at the present time. It will be for the members of the Tribunal to decide, as a high priority but presumably unencumbered by statute (except of course, perhaps for an mandatory annual report) what level of disclosure is appropriate and how it will be done.

The most important point is that the bias must be in favour of greater disclosure about the workings of the Tribunal and its processes of decision-making, as well as about organizations

⁶⁸ The actual workings of the provisions are something else. Our experience in the first year of operations is that it was exceedingly difficult to actually get information and time was certainly not of the essence. At other times, we were told that while Revenue must provide information in "prescribed form" under paragraph (b), the organization's statement of activities, a crucial document in any application, was not on prescribed form and thus not available. This interpretation is typical of the mind-set of many of the bureaucrats at Revenue, an attitude of unhelpfulness which must be changed.

⁶⁹ In december, 1999, the English Charity Commission made the decision not to recognize the Church of Scientology as a charity in England and wales. Both a summary of the reasons and the full text, 49 pages long, was posted on the Commission's internet site. This, we believe, is an example of the openness which the Tribunal should strive for.

⁷⁰ Right now, the Charity Division receives many such submissions about registration or deregistration files but in most cases will not even acknowledge that the files exist. The extent to which the submissions

which have been registered. Here we echo and endorse the theme of the Joint Tables that the institution involved in the determination and oversight of charities of the federal level needs to be independent and transparent in its operations. Difficulties will arise in the case of refusals to register and deregister charities. There will be a need to balance the public interest in knowing what is happening with the right of the organization to some level of confidentiality. An independent organization with known procedures and standards will contribute greatly to the acceptance of those decisions as having been fairly made.

Intra-Governmental Relations

It goes without saying that the Tribunal will have to be in regular contact with other government departments, in particular Revenue Canada and Finance, but also with some of the central agencies and perhaps other departments which have “client” interest. For the most part, the contact procedures need not be formalized in statute and presumably will be developed mutually in discussions between the Tribunal and the departments.

We would assume that there are well established procedures to deal with everything from budgeting to staffing, pensions to accommodation, which would be implemented once the Tribunal is established and is in the process of becoming operational.

If the recommendation is accepted that Revenue Canada retain the function of auditing registered charities, then it will be necessary that there be an amendment to subsection 241(4) of the Income Tax Act. which allows Revenue to provide a whole range of entities (other departments, provincial governments and so forth) with tax information without contravening the confidentiality provisions of the Act.⁷¹

We would also anticipate that there would be very regular, weekly if not more frequent, contact between the Audit Division of Revenue Canada and the Tribunal and we would expect that audits would be done both according to Revenue Canada’s own norms but also on request from the Tribunal.

have an impact is not known. Opening up or formalizing the process may or may not be desirable, but it an issue that the Tribunal should grapple with.

⁷¹ There is an equivalent and very broad provision giving similar effect in section 10 of *The Charity Act*, 1993.

But the Tribunal will also want to be able to communicate with Revenue and Finance (and perhaps other departments) about policies which are being developed and about specific applications which are being considered. In a communication to us, Kenneth Dibble, the Chief legal officer of the English Charities Commission, (later discussed in a personal interview with Mr. Dibble and with a representative of Inland Revenue, the British equivalent of Revenue Canada) outlined the approach used by the Commission

We believe the situation can be fairly summarized as follows:

- The Commission and Inland Revenue agreed on guidelines which would determine the types of specific cases and situations which would merit the Commission bringing them to the attention of Inland Revenue.⁷² In any given year, the number of cases would probably be less than 30.
- Inland Revenue gives its view on whether these organizations should be registered *using common law tests* as they or their legal counsel understand them. They do not base their support or opposition on such matters as the potential cost to the Treasury.⁷³
- Both parties agreed that the final decision was always that of the Commission. But Inland Revenue can appeal⁷⁴ a decision into the courts if it feels very strongly.⁷⁵ We are proposing that Revenue Canada will have a similar right to launch an appeal.
- When the issues relate not to files but to broader policy issue (as is happening now with the Review of the Register exercise, the main contact is with another part of Inland Revenue.⁷⁶

In our view, similar arrangements, the creation of mutually agreed guidelines and the ability to confer and consult, will have to be put in place, not only with Revenue Canada but also with Finance, at least insofar as policy issues are concerned. The Tribunal will also want to develop a process whereby it can easily consult with other government departments where those

⁷² These cases would likely go to the Financial Intermediaries and Claims Office (FICO).

⁷³ The interviewer expressed some polite scepticism but was assured by both interviews (speaking at different times and places and not in each other's company) that this was indeed the case.

⁷⁴ Dibble stressed that in truth, there is no "appeal" but a *trial de novo* to which the Commission is not a party!

⁷⁵ See *I.R.C. v. McMullen*, [1981] AC 1 for example holding that the support of sporting facilities in schools and universities is charitable under the head of "education" even though support of sports generally is not considered to be charitable.

⁷⁶ The Capital and Savings Division. The two branches of Inland Revenue also liase on subjects, be they files or policy, which they think might be of mutual interest.

departments' expertise and interests may be of use in helping the Tribunal to set policy and to make determinations about specific files.

The relationship with Finance will be most important for two reasons. First, the decisions of the Tribunal may have an impact on revenues in that each registration may mean that there will be incrementally more tax-receipted donations made. And there may be policy decisions which will have significant impact.

Second, the record suggests that Finance has been wary when it comes to amending tax legislation which deals with charities (as opposed to charitable donations). We anticipate that the Tribunal will develop considered opinions as to the changes which, *in its view*, are required. We would anticipate that as a matter of course, a procedure would be put in place to allow an exchange each year, or earlier, as required.

We would suggest that set procedures and guidelines be established to allow regular contact with Finance as with the case of Revenue. We would also suggest (though it is far outside our purview) that consideration might be given to having one or more officers at Finance designated as contacts with the Tribunal and that procedures be put in place there to ensure that the Tribunal's concerns are given serious consideration.

The Nature of the Charity Tribunal - Its Legal Basis and Role

Having made our case for a Charity Tribunal as the most appropriate method by which to determine and administer charities under the *Income Tax Act*, we now turn to a more detailed consideration of the nature of the Tribunal, its legal basis and the role we see it playing.

In this discussion we are concerned with central elements of administrative law, dealing as those do with the legal limits on the actions of government officials, and on the remedies which are provided to those who are affected by the failure to observe lawful limits. As we are concerned with identifying the best means by which the decision about what constitutes a charity is made, we are also concerned about the lawful authority for any particular act. This leads directly to the question of review or appeals.

General Considerations

We believe that the requirements for independence, specialized knowledge and the related functions of adjudication, policy formulations and, potentially, rule-making, taken together suggest the need for a specialized administrative tribunal authorized by specific legislation. We do not believe that, in the first instance, the court is the appropriate forum for the efficient, effective determination of what constitutes a charity for the purposes of the *Income Tax Act*. Given the numbers of cases involved, a court is ill-suited to the task of high-volume adjudication. The various elements of what constitutes legal charity requires that specialized expertise be brought to bear.

Moreover the traditional adversarial process inherent in our courts does not lend itself, we believe, to the consideration of broad range of factors necessary to give life to the often stated principal that the notion of charity is an ever-evolving concept. Finally court procedures are not flexible enough to respond to the adjudicative requirements of the determination of charity under the *Income Tax Act*.

We believe that the Charity Tribunal should be conceived as having two elements: an administrative function performed by a registration division headed by a Registrar and an adjudication function., carried out by the Board of the Tribunal. Many, if not most, applications for charitable registration under *The Income Tax Act* would be determined by reference to the existing body of law. The Registrar would administer that law and would make administrative decisions as to whether any particular applicant is and will operate as a charity. In a limited number of cases the Registrar will have doubt. Those applications would be rejected, with the Registrar having the ability (on notice to the applicant) to seek a determination of the Board of the Tribunal, sitting in its adjudicative capacity. As well, notice of that consideration would be given to presumably interested parties, such as Revenue Canada, other government departments or outsiders whom the Board thinks might usefully be heard.

At the hearing, the Registrar would appear, not in adversarial capacity but in the nature of an *amicus curiae*. It's function that would be to provide an information brief to the Board of the Tribunal setting out the state of the law giving rise to the Registrar's rejection. On the other hand, Revenue Canada, where it chooses to do so, or other parties could appear in a more adversarial role laying out its reasons why the current law should be applied so as to deny

status. The applicant would take its own position. All submissions could be in writing, or at the option of the Tribunal, a hearing could be convened.

A decision by the Charity Tribunal could be subject to an appeal to court by either the rejected applicant or by Revenue Canada. We suggest that in the first instance the Tax Court of Canada be used for a de novo hearing, with a further statutory appeal, having regard to the broad underlying legal principles for consideration, to the Federal Court Canada.

We believe that this formulation is consistent with what is required to advance the identified requirements of independence and the specialized knowledge required for adjudication, policy formulation, and potential rule-making. As has been noted⁷⁷, these bodies can be empowered to exercise one, some or all of the following functions:

- (a) Adjudication – the act of decision-making.
- (b) Policy making – the making of policy choices which may be reflected in adjudicative decisions, subordinate legislation, or policy statements issued to assist in the administration of a scheme
- (c) Rule making – the making of subordinate legislation to reflect policy choices necessary to the effective administration of the scheme.
- (d) Enforcement – action taken to compel compliance with adjudicative or policy decisions.
- (e) Research – the identification and study of problems and issues associated with a particular aspect of government administration.
- (f) Investigation – an inquiry into the existence of certain facts associated with the resolution of a dispute, a complaint or the satisfaction of a claim.
- (g) Prosecution – the institution of proceedings against those thought to contravene the legal rules governing the operation of a particular governmental scheme.
- (h) Advising – the giving of information and compliance advice.

We believe that the tribunal, in its initial formulation, should only address the matters contemplated by (a), (b) and (h). But in considering the nature of the organization and

⁷⁷ Administrative Law, Cases and Materials, 1999 Edition, Faculty of Law, University of Alberta, J.M. Law and F.A. Laux, Q.C. (editors) Introduction pp. 2-5

formulating its constituent elements, sub-delegated rule-making authority should be considered for eventual inclusion in its mandate, in light of the anticipated necessity for policy formulation based on specialized expertise.

As the Charity Tribunal is clearly an administrative tribunal acting as decision maker under delegated authority, its decisions will be subject to the developing body of administrative law controls. The need both to ensure that the Tribunal's administrative actions are not beyond the scope of its authority and to acknowledge and enhance the specialized nature of determining what constitutes a charity for the purposes of the *Income Tax Act*, means that the task of devising the appropriate legal controls on the Charity Tribunal is a somewhat complex challenge and needs to be carefully considered. The balance of this part provides more detail about the function of the Registrar, the composition of the Tribunal, its relationship to the Registrar and the role and nature of reviews by way of reconsideration and appeals. In canvassing these areas the related matters of third party interest and costs will be addressed. In presenting this formulation, it details as to compliance periods and related matters are suggested as examples of the administrative considerations which we suggest are necessary to specify so as to ensure that the overall objective of transparent, independent adjudication is met.

The Registrar

The Registrar performs the function of receiving applications and considering them in accordance with guidelines established by the board of the Tribunal. At this stage we also see, in keeping with our earlier observations about relations with other government departments, the need to have an obligation on the Registrar to circulate applications to other interested departments which raise contentious issues according to established protocols but which applications are likely to be approved. These protocols could be fashioned in regulation.

Once an application was complete, in a manner prescribed by Regulation, the Registrar would have 15 working days within which to accept or reject the application, in accordance with the Board of the Tribunal's administrative guidelines. Any application not considered within fifteen business days would be deemed approved.

All applications would be reviewed by panel of the Board of the Tribunal, subject to the right of the Chair or Vice-Chair of the Board to constitute a larger hearing panel. For

applications which the Registrar denies, if the Tribunal Board upholds the denial, notice would be given to the applicant inviting further representations. The applicant could request an appearance before the Board of the Tribunal or it can choose to make submissions entirely in writing.

All considerations by the Registrar would require a summary of the reasons for acceptance or rejection having regard to the administrative guidelines. The Registrar would appear at the consideration by the Board of the Tribunal, either by way of its summary of reasons or, at its option, by a representative of the Registrar's staff.

The Board of the Tribunal

Given the administrative relationship we envisage between the Registrar and what we are calling the Board of the Tribunal, we believe that the following formulation of jurisdiction constitutes the appropriate basis for the decision-making function of the Board. This statutory basis would be found in amendments to the *Income Tax Act*.

There is constituted the Charity Tribunal of Canada. The Tribunal has exclusive jurisdiction to determine all questions of fact and law relating to charity, as that term is used in the Income Tax Act, subject to consideration by the Tax Court of Canada and appeals to the Federal Court of Canada as provided in section [] .

In the administration of this sort of regulatory scheme, we have suggested that an emphasis be placed on special expertise and independent decision-making. This will require expertise in matters other than law. As an expert tribunal, insulated from political pressures, a tribunal empowered with this form of jurisdiction would, in our view, advance the requirements we have outlined. And, given that the tribunal would operate without the full arsenal of the adversarial process, it would be able to inform itself with of broad range of relevant factors, admitted into evidence as it determines, so as to advance the requirement of registering charities.

We suggest that the Board of the Tribunal should have a chair and two vice-chairs. These would be full-time appointments. The remaining members of the Board of the Tribunal would be part-time appointments. In keeping with our earlier observations that offices of the

Tribunal might exist in a number of locations in the country, we suggest that a pool of qualified part-time appointees be constituted in the various regions. Every panel of the Tribunal would have one of the chair or vice-chair and two other members sitting. This formulation would also allow the chair to address questions of conflict of interest. The chair or a vice chair would have the prerogative to constitute a larger hearing panel should that be appropriate to the matter under consideration.

Further Consideration and Appeals

One of the most important features of establishing an independent decision-making tribunal is to allow it to develop a body of rules which are known and clear. But acting as an instrument of delegated authority, the tribunal must be subject to appropriate review of its decisions and jurisdiction. In recent years the courts have developed a range of review criteria. We suggest that a review function be established, having regard to the need for superior court review weighed against costs to the parties and the time involved in affecting amounts to appellate review.

Bearing these notions in mind, we suggest that where the Board of the Tribunal denies an application at the hearing stage, notice with reasons be sent to the applicant within fifteen business days of the hearing. The notice would invite the applicant to elect either the informal procedure under the Tax Court Rules or the formal procedure. The jurisdiction of the Tax Court would be a *de novo* consideration. The parties to the hearing would be the Attorney General of Canada and the applicant. The Tribunal could be represented at a hearing, though a similar fashion to Labour Board practice in some jurisdictions, representative of the Tribunal appearing in an informational role only and not as a party.

If the Tax Court upheld the denial, the applicant would have a further appeal to the Federal Court of Canada, at its own expense. The review by the Federal Court would be an appellate one, on the record and without the opportunity to call evidence except in accordance with the rules of the Federal Court. If the Tax Court approved the application, notice would be given to Revenue Canada and to any other government department having a potential interest in the matter and to the Tribunal. If any of those interested parties chose to advance in appeal, the Attorney General acting for Canada would give notice to the applicant of its intention to appeal.

In that case, costs of the appeal would be costs borne by Canada, subject to a regulation as to schedule of fees and disbursements, in the normal way.

We also think that serious thought should be given to establishing a list of approved counsel who would be willing to act for needy litigants where counsel is unavailable and the applicant is without funds. It might be that this authority should be given to the Tribunal to appoint from the list where a needy application matter raises issues of concern calling for council familiar with charities issues. This charity law list could be established on a regional basis on application by interested lawyers with fees and cost set in a similar fashion to the schedule established for Federal Court appeals.

A word is in order about onus in the appeal process. As we noted earlier in this paper, appeals under the Income Tax Act automatically put the onus on the taxpayer/appellant in ant litigation. We have taken the position that the appropriate approach in considering charity cases under the new regime is that there should be a presumption that the activities on question are charitable unless it can be demonstrated that they are not. This being the case, we take the position that on appeal, the onus is on the Tribunal, Revenue Canada or any party opposing registration (or supporting deregistration) to meet the necessary burden of proof...in effect shifting the onus from where it stands today.

A final word about deregistration. Charities may be deregistered for many reasons. In situations where the deregistration is at the request of the charity, the deregistration should be carried on at the registration level.

Where the deregistration is for “mechanical” reasons such as the failure to file returns, the deregistration notice should be issued by the registration branch with some sort time frame allowed for the organization to launch an appeal to the Tribunal itself.

On the other hand, where the deregistration is based on an alleged breach of the Income Tax Act (other than a “mechanical” failure) or on the basis that the charity no longer carries on charitable activities, deregistration should come only after the Charity has had an opportunity to make a formal submission (similar in nature to what would occur after a refusal to register) to the Board of the Tribunal, with a subsequent appeal into the Court system if the Board upheld the deregistration.

Conclusion

We believe that the time has come in the evolution of the administrative and legal framework of charities under the Income Tax Act for an independent decision-making and supervisory body to be constituted. The existing arrangement which sees the Charities Division of Revenue Canada administer a body of rules which is modified only slowly and with extreme expense is inadequate. The Division is put in the conflicting position of being the legislated administrator but also an adjudicator without jurisdiction. To that situation has been added a method of appealing decisions which is unduly complex, protracted and expensive. All of this occurs within the context of a taxing authority.

We believe that the creation of an independent quasi-judicial administrative tribunal with clear, legislated jurisdiction, independent appointments capable of hearings throughout the country and a process to both administratively determine qualification and adjudicate the status of difficult cases will address the significant current problems associated with determining charitable status under the Income Tax Act. Specifying clear procedural deadlines, including a mechanism for deemed approvals and review, would establish the administrative framework which could properly and expeditiously deal with the cases put to it.

Moreover, establishing a first level review process to the Tax Court with the applicant's option to use the informal rules, would provide an appropriate oversight of the Tribunal's work without significant impediment in time or cost to those seeking status. When this arrangement is coupled with adequate involvement of the tax authority, the tax policy authority and other arms of government, a facility is established which could both manage the decisions about status under the Income Tax Act and develop an enhanced expertise about the policy requirements necessary to a properly regulate charities under the Income Tax Act in an on-going way.

This paper has been written to assist those contemplating whether there should be a charity commission for Canada. As we said at the outset, our view is that the question is not whether but how. Moreover, we have found that so often in this kind of policy discussion a serious impediment to an adequate consideration of the unknown results from a real concern about the interaction of administrative and technical detail. By fashioning a broad picture of what could be a Charity Tribunal of Canada and setting out an adequate measure of detail, we hope we

offer a picture of the how which will move those still concerned with whether to take the next step. We fear that without doing so the promise that charity as an evolving concept cannot be realized.

Appendix A

Institutional Change

Given the objectives of the regulatory framework for the voluntary sector and the need to make changes therein, the Regulatory Table has developed three models for the institutional or regulatory oversight arrangements:

Model A: an enhanced Revenue Canada Charities Division (RCCD).

Model B: an agency, somewhat similar to that proposed by the Broadbent Panel on Accountability and Governance in the Voluntary Sector.

Model C: a commission, similar to the Charity Commission for England and Wales.

Below is an outline, in broad terms, of the models' core mandates. The current vision is that each would be a federal body. There is potential, however, to design structures in a way that would allow opting-in or some other type of coordination with provincial authorities.

Model A: Enhanced Revenue Canada Charities Division (RCCD)

The RCCD would retain its current authority for the administration of the *Income Tax Act* with respect to charities. The Divisions mandate, however, would be expanded to include responsibility for facilitating public access to information about charities, and responsibility to assist charities with registration and compliance with the law.

The Division would be assisted by a committee, composed of individuals knowledgeable about charities and the law, that would advise on all aspects of the Division's expanded mandate. In addition, charities would be able to request an administrative review within Revenue Canada of RCCD decisions.

Model B: Agency

The agency's functions would complement those of Revenue Canada's Charities Division. While the RCCD would still make the decisions, the agency would, at greater arms length than the advisory committee of model A, make recommendations on difficult cases, issue policy advice, and help organizations to comply with the regulator.

As well, the agency would nurture and support charities and other voluntary organizations, and provide information to the public. This complements the option, outlined by the Table on Building a New Relationship, for an agency to nurture the relationship between the federal government and the voluntary sector.

Model C: Commission

A quasi-judicial commission would undertake most of the functions currently carried out by the Charities Division. It would provide authoritative advice to the voluntary sector, and expert adjudication of appeals on decisions by its Registrar. At the same time, such a commission would have a support function not unlike model B's agency.

The Models' Shared Assumptions

The Table assumes that the following conditions would apply to all models:

- The appeals process would be reformed. All three models contemplate the need for administrative, quasi-judicial and judicial review, the potential for greater access to appeals, and a richer accumulation of expertise by adjudicators. This would guide both the sector and those who administer this complex area of law.
- Confidentiality restrictions around the registration process would be eased.
- Any body mandated to oversee the sector should have sufficient resources and expertise to develop policy, educate and communicate.
- There would be greater effort to foster knowledge of the rules and ensure compliance with them, including institution of intermediate penalties.

Self-Regulation in the Models

As a partial response to the need for change, self-regulation can be seen as having great merit. This is provided that no duplication of reporting requirements would be created if self-regulation became institutionalized.

The potential and effect of increased self-regulation are similar in each model.

Assessment of the Models

Each of the three models was assessed with respect to the identified need for change, and with respect to a number of criteria:

- the ability to improve the availability of public information and knowledge about the sector;
- the potential for serving the non-charities part of the sector;
- the ability to accommodate provincial involvement;
- the compatibility of a support or nurturing function with other functions of the organization;
- the effect on regulatory burden;
- the degree of independence each would have from the government and the sector;
- the ability to enhance the confidence and trust of the sector and public; and,
- government control of costs.

The chart on page 57 contains a comparison of each model according to the preceding criteria. Some related general comments are as follows:

- Assumptions on reform of the appeal process, the easing of confidentiality restrictions and greater compliance support already implied that all models would see improved transparency around registration, more effort to ensure compliance (including institution of intermediate sanctions) and a more accessible appeal process. Hearings on controversial cases could be instituted under any model.
- Compared with the current situation, all of the models would foster, to some extent, both the enabling and accountability objectives of the regulatory framework.
- On several other criteria (improved public information and knowledge, enhanced confidence and trust by the sector), the differences between models are incremental, with

- model C perhaps best situated to ensure public confidence. All models offer varying degrees in meeting these criteria.
- The ability to accommodate provincial interests would be different under each model, but it is not immediately clear which model would work best.
 - The potential for serving the non-charitable voluntary sector is likely larger in models B and C. The agency in model B would perhaps have the greatest freedom to build partnerships and nurture the sector. The model C commission would likely have the greatest independence from both the government and the sector, and may therefore be able to integrate the compliance and nurturing functions most completely.

While the Regulatory Table did not seek a full consensus on a preferred model, there was widespread support among voluntary sector members of the Table for moving regulatory oversight out of Revenue Canada. The Table saw greater merit in having integrated oversight rather than bifurcated responsibilities. The nurturing role that an agency could play, and the opportunities it could offer to enter into partnerships with other stakeholders, was seen as attractive. On balance, voluntary sector members of the Table favoured model C, while government members tended to conclude that any model could work.

The Table did not extensively pursue the question of regulation of non-charities. The Table believes, however, that under any model, the oversight of "deemed charities" should be identical to and integrated with that of registered charities.

Several other issues concerning change to the institutional framework could be further explored. These issues include regulation of the wide spectrum of not-for-profit organizations discussed previously, and governance issues such as the appointment and composition of a new oversight or advisory body.

Assessment of the Models

Goals/criteria	A: an Enhanced RCCD	B: an agency	C: a commission
Improved public information and knowledge about the sector.	Website and other measures could make for improvement over the status quo.	Could be more vigorous program than under A.	Same as B.
Potential for serving the non-charitable voluntary sector.	Status quo.	Yes, on a voluntary basis. The agency would be a more acceptable interface than RCCD.	Yes, in that there are statutory obligations, and otherwise on a voluntary basis. The commission would be a more acceptable interface than RCCD.
Ability to accommodate provincial involvement, including, potentially, coordinated regulation.	The new Canada Customs and Revenue Agency has a Board with provincial representatives,	Broader potential for provincial involvement on a partnership basis.	Structures could be developed to accommodate provincial input more focussed on the charitable/voluntary sector.
Compatibility with a support or nurturing function.	In the final analysis, Revenue Canada will remain the "cop."	An agency would provide significant scope for this.	Regulatory and support functions can live side by side, but the nurturing function is likely to be somewhat more restrained than under B.

Regulatory burden: -compliance cost; -efficiency/duplication,	No change from the status quo (but see the suggestions on short-form reporting on page 58).	Burden could be lightened as a result of preventive regulation functions, and assistance to individual groups on applications or with returns.	Functioning of the commission would need to be carefully designed to ensure there is no increase in regulatory burden.
Degree of independence from government and the sector - including clarity of roles.	Same as now, except for profile of the advisory committee.	The agency would be a friend of the sector. It would also have extensive working relationships with Revenue Canada.	A commission would have greater independence from both government and the sector than either A or B .
Enhancing sector confidence and trust in the regulator, e.g.: - working relationship; - respect for confidentiality; - objectivity of the appeals.	Better working relationship than presently.	Better working relationship than under A — to the extent that the agency succeeds in its role as representing the interests of the sector.	May be better than both A and B (good working relationship, objective and confidential advice, independent appeal machinery).
Enhancing the public's confidence and trust.	Better than presently.	Role may be difficult for the general public to understand.	Same as A .
Government control of costs.	Government remains in control.	Government retains control, but the agency, through its recommendations on (de)registration and through its policy advice, would still be in a position to push at the edges.	Within the four corners of common law and statutory definitions, the commission may see room for both narrower and wider interpretations, possibly resulting in a net gradual expansion of eligibility.

Appendix B

Two Statutory Board Models From Federal Legislation

1. Standards Council of Canada

COUNCIL ESTABLISHED

3. A corporation is hereby established, to be known as the Standards Council of Canada, consisting of the following members:

- (a) a person employed in the public service of Canada to represent the Government of Canada;
- (b) the Chairperson and Vice-Chairperson of the Provincial-Territorial Advisory Committee established under subsection 20(1);
- (c) the Chairperson of the Standards Development Organizations Advisory Committee established under subsection 21(1); and
- (d) not more than eleven other persons to represent the private sector, including non-governmental organizations.

Appointment of members of Council

6. (1) Each member of the Council, other than the persons referred to in paragraphs 3(b) and (c), shall be appointed by the Governor in Council, on the recommendation of the Minister, to hold office during pleasure for such term not exceeding three years as will ensure, as far as possible, the expiration in anyone year of the terms of office of not more than one half of the members.

Requirements

(2) The members of the Council referred to in paragraph 3(d) must be representative of a broad spectrum of interests in the private sector and have the knowledge or experience necessary to assist the Council in the fulfilment of its mandate.

No right to vote

(3) The member of the Council referred to in paragraph 3(c) is a non-voting member of the Council. R.S., 1985, c. S-16, s. 6; R.S., 1985, c. 1 (4th Supp.), s. 33; 1996, c. 24, s.5.

Designation of Chairperson and Vice-Chairperson

7. (1) A Chairperson of the Council and a Vice-Chairperson of the Council shall each be designated by the Governor in Council from among the members of the Council to hold office during pleasure for such term as the Governor in Council considers appropriate.

2. Cultural Property Export and Import Act

Review Board established

18. (1) There is hereby established a board to be known as the Canadian Cultural Property Export Review Board, consisting of a Chairperson and not more than nine other members appointed by the Governor in Council on the recommendation of the Minister.

Members

- (2) The Chairperson and one other member shall be chosen generally from among residents of Canada, and
 - (a) up to four other members shall be chosen from among residents of Canada who are or have been officers, members or employees of art galleries, museums, archives, libraries or other similar

institutions in Canada; and

- (b) up to four other members shall be chosen from among residents of Canada who are or have been dealers in or collectors of art, antiques or other objects that form part of the national heritage.

Acting Chairperson

(3) The Review Board may authorize one of its members to act as Chairperson in the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant.

Quorum

(4) Three members, at least one of whom is a person described in paragraph(2)(a) and one of whom is a person described in paragraph (2)(b), constitute a quorum of the Review Board.

R.S., 1985, c. C-51, s. 18; 1995, c. 29, ss. 21, 22(E).

Remuneration

19. (1) Each member of the Review Board who is not an employee of, or an employee of an agent of, Her Majesty in right of Canada or a province shall be paid such salary or other amount by way of remuneration as may be fixed by the Governor in Council.

Expenses

(2) Each member of the Review Board is entitled, within such limits as may be established by the Treasury Board, to be paid reasonable travel and living expenses incurred while absent from his ordinary place of residence in connection with the work of the Review Board.

Appendix C

The Cultural Property Review Board: Potential Precedent and Model

One of the generalized concerns which we have heard voiced over the past year or so when there has been a discussion of the possible implementation of a “charity commission” in Canada has been the issue of power over tax-related matters. Simply put, the question is whether an arm’s length body should make decisions which have a cost to the federal government in terms of reduced tax revenues?

It is worth keeping in mind that such a model already exists and that over the past twenty or more years, the government has not only not restricted its powers but has actually enhanced them, incorporating those powers within the Income Tax Act.

The Cultural Property Review Board, created under the *Cultural Property Import and Export Act* has extensive powers which can affect tax revenues of the Federal and provincial governments.

The Board has the following powers:

- It can certify objects to be “cultural property” for Income Tax act (and export) purposes.
- Cultural property which is donated or sold to a “designated institution” escapes capital gains tax completely.
- Gifted cultural property can reduce tax liability of a donor for up to 100% of annual income with a five year carry forward of the excess.
- The Board can designate institutions which are eligible to receive such property.
- The Board certifies the value of such property and the assigned value is “deemed” to be fair market value under the Income Tax Act, binding upon the donor and Revenue Canada, though the donor has an appeal right. (This is a newish power given to the Board five or six years ago.) Revenue Canada can, however, challenge other aspects of the donation, such as whether it is a gift of capital property.
- The Board has funds available which it can give to an institution to allow it to purchase objects which are certified

Aside and apart from certain extremely vague statutory guides, the Board sets its own rules with regard to determining what is cultural property and which institutions will be designated.

While the Board is appointed by the government, its nine members need not be (and usually does not include) government representatives. Rather, four are drawn from the institutional community (museums and galleries) while four come from the private sector...collectors, appraisers and dealers, as is required by statute. The Board has been, for the most part, free of political appointees and is well respected by all sectors for its work.

The Board has worked closely with Revenue Canada on certain problems (such as “art flips”) and has

created some rules to help the Department, while at the same time operating essentially at arm's length.

All costs, including administrative costs, remuneration for Board members and staff (who are public servants) support services and expenses are borne by the government. The Board issues an annual Report which is a public documents describing its work and discussing some of its more significant decisions. The Board has specific powers to hire experts and appraisers, and the government underwrites the cost.

The point here is two-fold.

First, the Board in effect "costs" the federal government tens of millions of dollars a year by certifying property for Income Tax act purposes. This cost, of course, is in forgone tax revenue. It operates completely outside other government constraints including budgetary constraints based on deficit fighting. There is no limit on the number of objects the Board may certify in any given year.

Second, the Board is reflective of the two communities which are most interested in its work...the institutional community which will get gifts and make purchases of cultural property and the collectors and gallery owners who usually have title to such items. Only once in its twenty-five year history has the Chair been a civil servant by profession and in this case, he had been retired after a career which mostly was "culturally" oriented.

Thus, we have a model of an effective arm's length body, funded by the federal government, which has a substantial role in making decisions which are income tax related. In a broad sense, this would be akin to the role a charity commission might have under at least one of the options which is under consideration.