

## Looking Back in Wonder: A Long Year in Review

It truly was a notable year for the law and policy of charities and non-profits. Many of the reasons have already been reported in this column. But now is the traditional time to review and speculate. There is plenty of both to do. Going back slightly beyond the 12-month mark, this past period has seen more significant Canadian cases and public policy consideration about charities and non-profits (and a focus on whatever it is that is the Voluntary Sector) than for many years before.

We begin, oddly enough, with what apparently was the last publication of the Ontario Law Reform Commission (OLRC). Its *Report on The Law of Charities* was released in the late spring of 1997. Nineteen chapters, eight appendices, and hundreds of pages detail the findings of a report that was commissioned in June 1989 to “study the law governing charitable organizations and to make recommendations respecting the appropriate laws to govern charities in modern times”. It has a wealth of detailed information. But for a time in which there is so much talk about charities and non-profits alike, the understated language the Report (characteristic of this kind of document) makes this tellingly broad observation:

*“[d]espite this position of theoretical pre-eminence, however, the charity sector in Canada has attracted comparatively little academic, political, or legislative interest. As a consequence, there is a noticeable lack of informed public debate on the role of the sector in Canadian society.*

The question of what charities can and should be permitted to comment about – what is often referred to as advocacy – is an extremely important one for them. About the same time as the OLRC released its report, the Federal Court of Appeal issued its decision in *Human Life International in Canada Inc. v. M.N.R.* In that case, Mr. Justice Strayer, for the Court, observed “I believe that the jurisprudence generally supports the proposition that activities primarily designed to sway public opinion on social issues are not charitable activities.” In May 1999, Mr. Justice Stone, for another unanimous panel of the Federal Court of Appeal, observed in *Alliance for Life v. Minister of National Revenue* that “[i]t seems to me that political activities may well be ‘ancillary and incidental’ despite the fact they involve the advocacy of a particular point of view on controversial social issues...” The key consideration initially must be whether the activities actually engaged in, though apparently controversial, remain “ancillary and incidental” to the charitable activities. Leave to appeal to the Supreme Court of Canada was denied for both cases.

Between the release of *Human Life International* and *Alliance for Life*, the Supreme Court of Canada handed down its own charity law case. On January 28, 1999 – nearly a year after it heard the case — the Supreme Court of Canada released *Vancouver Society of Immigrant & Visible Minority Women*. The judgment confirms the old adage: you can lose the battle and win the war. In a

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four to three decision, the Court confirmed Revenue Canada's refusal to register the Society as a charitable organization. But in the first decision about charities from the Court in more than 30 years, the majority opinion broadened the definition of education, confirmed that the primary consideration is purposes, not activities (a distinction that seems to bedevil any

review of what is charitable), and strongly endorsed a widely held view that the whole area is badly in need of legislative overhaul.

Hot on the heels of the Supreme Court's decision came what is popularly known as the Broadbent Report. On February 8, 1999 *Building on Strengths: on Improving Governments and Accountability in Canada's Voluntary Sector* was released by the panel established by the Voluntary Sector Roundtable, a coalition of dozens of the country's biggest charitable and volunteer organizations. The report called on Ottawa to provide definitions in the *Income Tax Act* as it applies to Canada's charities, as well as create a modern non-profit corporation bill to bring order to the operations of other non-profit groups. Perhaps the most important recommendation is the call for the creation of a Voluntary Sector Commission. This would create an independent organization modelled on the Charities Commission which exists for England and Wales. The commission would assist charities to deal with their circumstances and make recommendations for registration of groups on the basis of a revised, legislated definition of charity. The Voluntary Sector Roundtable panel picks up on the call for renewal of the rules governing the voluntary sector through improved legislation.

Then on September 27, 1999, the report of the Government of Canada/Voluntary Sector Joint Tables was published. *Working Together: Report of the Joint Tables* outlines options for how the Government of Canada and the voluntary sector might more effectively work together to improve the quality of life of Canadians. The Report represents the culmination of an innovative process launched in March 1999 by federal ministers and leaders from the voluntary sector to develop a more strategic working relationship to better serve Canadians. Discussion tables, composed of government officials and sector leaders, conducted exploratory talks in three key areas: Building a New Relationship, Strengthening Capacity, and Improving the Regulatory Framework.

Coming shortly after the release of the Broadbent Report, the Joint Tables

addressed 26 of the 41 proposals put forward in the Broadbent Report. All three tables suggested the need for some body to continue the work of nurturing the relationship, strengthening capacity, and improving the regulatory framework. A common theme was the need for something like a Charities Commission. It was recognized that identifying the right model and mechanisms would take further work and analysis and that this must involve broad and comprehensive consultations within government and the voluntary sector before any conclusions can be reached on the recommended structures.

Whether these events will prove 1999 to be *annum mirabilis* – a year notable for disasters or wonders, it has been, nonetheless, a fateful time for the development of charitable and non-profit law. This brief review of just some of more significant activities reveals there is plenty on the table for consideration. The federal cabinet will soon be asked to consider what to do about the recommendations of the Joint Tables and, indirectly, of the Broadbent Report. Provincial governments will be asked to become involved. Schemes will be debated to enhance capacity and to provide more stable funding for voluntary sector organizations. Some form of a Charities Commission or a significantly revised role for the Charities Division of the Revenue and Customs Agency (the new name for Revenue Canada) will be considered. And while the outcome of all of these deliberations cannot be known, it confidently can be said that we are heading into a period which will see the ground rules set for how the charitable and nonprofit sector will operate for many years to come. Disaster or wonder, only time will tell.

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