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## The Charity Law & Practice Review

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# ANSWERING THE BROADBENT QUESTION: THE CASE FOR A COMMON LAW DEFINITION OF CHARITY

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### Introduction

The Panel on Accountability and Governance in the Voluntary Sector released its final report on 8th February 1999.<sup>2</sup> Chaired by the former head of the New Democratic Party in Canada, Ed Broadbent, it is most commonly referred to as the Broadbent Report. It calls for fundamental changes to the legal definition of charity and how the sector is to be supervised and regulated. Initiated by the Voluntary Sector Roundtable, the impetus for change is coming primarily from intermediary Organisations. It is not clear whether it is the vision of these intermediary Organisations or the Panel that voluntary Organisations will become participation vehicles for learning and practicing the citizenship skills of policy dialogue and advocacy so as to illustrate and reinforce the goals of participatory democracy as set out in the Broadbent Report's Guiding Principles.<sup>3</sup>

Transforming the sector to this extent requires a new statutory definition of charity at law as it is too radical a change to be implemented by the courts. It is not enough

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<sup>2</sup> Titled 'Building on Strength"Improving Governance and Accountability in Canada's Voluntary Sector,' it can be found on the web at [www.pagvs.com](http://www.pagvs.com).

<sup>3</sup> Broadbent Report, at 90.

for the proponents of change that Parliament legislate a new modern definition of charity. True change requires that Revenue Canada Charities Division be emasculated and a new Voluntary Sector Commission be added to the bureaucracy which regulates the sector. This new Voluntary Sector Commission is not a creation of the sector as a model of self-regulation. It is to be established and funded by the federal government with the government naming the commissioners and having them report to Parliament through the proposed Minister for the Voluntary Sector.<sup>4</sup>

The courts have periodically expressed their frustration with the common law definition of charity and recommended that Parliament legislate a definition of charity. The most recent example is the Judgments of the Supreme Court of Canada in the *Vancouver Society of Immigrant and Visible Minority Women vs. Minister of National Revenue* (“*Immigrant Women*”) delivered 28th January 1999. Political impetus is found in a commitment in the pre-election “Red Book” document of the Liberal Party of Canada ‘Securing Our Future Together’ to do something about the sector. While nothing was clearly specified, there is a fair amount of political pressure to give definition and fulfilment to that campaign promise by acting on the Broadbent Report. The current Minister for Revenue Canada, Herb Dhaliwal, has been subjected to a significant amount of pressure from the voluntary sector due to the Court’s refusal to order registration. He came out in the press immediately after the release of the Broadbent Report stating that the political will is in place to push ahead quickly with plans to reform the way in which government, charities and volunteer Organisations work together.<sup>5</sup>

#### **The Only Question Posed in the Broadbent Report is:**

“More basically, why should the courts be deciding, based on law derived from English legislation almost 400 years old, what a democratic nation wants today?”<sup>6</sup>

As the Broadbent Report is designed to promote discussion, I will accept that question as having been asked in good faith and attempt to answer it. The courts have often stated that they can only carry out incremental change by analogy. The Broadbent Report and certain intermediary Organisations say this is inadequate. I will argue that there are very real protections offered to the sector precisely because the changes implemented by the courts can only be incremental rather than the

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<sup>4</sup> Broadbent Report, at 90, (1999) 169 DLR (4th) 34 SC.

<sup>5</sup> *Ottawa Citizen*, 9th February 1999 and *Vancouver Sun*, 9th February 1999.

<sup>6</sup> Broadbent Report, at 52.

sweeping changes which will flow from a radical legislative modernization. In making its decisions, the courts also are independent from government. Transferring these decisions directly to Parliament makes the revised definition necessarily political and an articulation of government policy.

### **To Be Fixed, It Must Be Shown to Be Broken**

The only way Parliament will be persuaded to devote valuable legislative time to charitable issues is if the politicians are convinced that the present situation is so dysfunctional and broken that it can only be fixed by legislation. The case must be made that incremental change through the courts is unworkable, as the flaws are so fundamental that a complete statutory overhaul is required. A simple reading of the mandate of the Broadbent Report raises the question as to why so much attention was given to changing the legal definition of charity and removing most of the government role of registering and regulating charities from Revenue Canada Charities Division. Its stated threefold mandate<sup>7</sup> was to:

- “conduct research and review current governance and accountability practices within the voluntary sector;
- bring forward a series of draft recommendations in a discussion paper and, by leading a broad consultation, get feedback from voluntary Organisations across Canada; and
- produce a final report making specific recommendations to promote effective governance and accountability in the sector.”

When a Panel on Accountability and Governance devotes so much of its efforts to expanding the legal definition and creating an alternative to Revenue Canada, one is allowed some scepticism as to whether there was a different agenda from the stated mandate. The Broadbent Report finds it quite unsatisfactory that Canada should be seeking definitional guidance from a Preamble to an Elizabethan statute<sup>8</sup>

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<sup>7</sup> Broadbent Report, at 1.

<sup>8</sup> The Preamble to the Charitable Uses Act, 1601 (Eng.), 43 Eliz 1, c.4 (Statute of Elizabeth) having the full title *An Acte to Redress the Misemplyment of Landes, Goodes and Stockes of Money heretofore Given to Charitable Uses* is frequently acknowledged as the starting point for the “modern” law of charity.

almost 400 years old and an English case, *Pemsel*,<sup>9</sup> over 100 years old. It wants the courts to be removed from their arbitration role. Instead, "Canadian governments must, through a democratic process that involves the voluntary sector, arrive at a more appropriate definition..."<sup>10</sup> When it is nationalistic fervour which demands a made-in-Canada definition, it is somewhat ironic that the primary criticism of the courts is that the definition of "charity" is more restrictive in Canada than in the USA and England.<sup>11</sup>

At the outset of this paper, I must disclose that I am one "of a few lawyers firmly rooted in the common law tradition"<sup>12</sup> referred to in the Broadbent Report as being opposed to broadening the definition of charity.<sup>13</sup> Realizing that the proponents of radical change view legal arguments as being much more part of the problem than part of the solution, I will nevertheless persist with a primarily legal analysis. I will attempt to deal with the Judgments of the Supreme Court of Canada in the *Immigrant Women* case.

### **Link to the Common Law World**

The primary reason for maintaining the present link to the jurisprudence which has emerged from common law courts over the past centuries is that the charitable sector in Canada is protected from inadvertent mistakes and errors in application of policy by judicial and bureaucratic arbiters of individual applications for charitable status by having a rich legal heritage. If Canada adopts a new definition enshrined in statute by a democratic Parliament, it cannot appeal to the courts to rely on the experience in England or Australia to remedy any errors or oversights in the legislation. It takes the hubris of a former politician to believe that Parliament in a short time will draft a simple and unambiguous definition of charity which has frustrated the best judicial minds for centuries. It demonstrates insularity and insecurity to protest that Canada has nothing to benefit from the jurisprudence of other countries.

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<sup>9</sup> *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) ("*Pemsel*").

<sup>10</sup> Broadbent Report, at 53.

<sup>11</sup> Broadbent Report, at 51.

<sup>12</sup> Broadbent Report, at 53.

<sup>13</sup> The author made a submission on the Draft Report "Canadians Helping Canadians".

Let me illustrate this point by respectfully disagreeing with a statement in Iacobucci J's majority Judgment in *Immigrant Women*. In determining what is education at law he states:

“To my mind, the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study, or otherwise. Simply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished but need not be, is not enough.”<sup>14</sup>

Reading that statement alone in the absence of any other authority could reasonably lead to the decision that a library simply making books available to the public does not qualify as the advancement of education. The House of Lords would not allow such an interpretation, as England respects centuries of tradition and precedent. Lord Cross of Chelsea addressed this issue in a case dealing with a testamentary gift to pay pensions to poor employees of a named company, stating:

“The status of some of the ‘poor relations’ trusts as valid charitable trusts was recognised more than 200 years ago and a few of those then recognised are still being administered as charities today. In *In re Compton* Lord Greene M.R. said, at p. 139, that it was ‘quite impossible’ for the Court of Appeal to overrule such old decisions and in *Oppenheim* [1951] A.C. 297 speaking of them remarked, at p. 309, on the unwisdom of casting doubt on ‘decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole’.”<sup>15</sup>

The House of Lords gives due deference to “decisions of respectable antiquity” and is much more reluctant to restrict the definition of charity than to expand it. However, committees commissioned by intermediary Organisations to modernize the definition of charity have demonstrated their willingness to abolish existing categories of charities. One of the most frequently cited and praised endeavours in this regard is the Goodman Report commissioned by the National Council of Social Sciences in England.<sup>16</sup>

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<sup>14</sup> *Immigrant Women*, at 114, para 171.

<sup>15</sup> *Dingle v Turner*, [1972] AC 601 (HL) at 622.

<sup>16</sup> ‘Charity Law and Voluntary Organisations,’ National Council for Social Sciences, (1976) (“Goodman Report”).

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<sup>16</sup> ‘Charity Law and Voluntary Organisations,’ National Council for Social Sciences, (1976) (“Goodman Report”).

### **The Facts of the *Immigrant Women* Case**

The applicant was a British Columbia society named Vancouver Society of Immigrant and Visible Minority Women (“Vancouver Society”). It sought to help visible<sup>23</sup> minority and immigrant women find employment and become fully and productively integrated into Canadian society. The application was first brought in 1992 and the legal purposes of the applicant were redrafted and changed four times. The final version was rejected by Revenue Canada in 1994. The applicant originally included relief of poverty in its proposed grounds for registration but was unwilling to apply a means test to the persons assisted and proceeded only under the advancement of education and fourth heads. The stated activities included a jobs skills directory, pre-employment counselling, assistance in having foreign degrees and certifications receive accreditation and acceptance in Canada and a support group for professionals. On the facts of the case, the provision of a job skills directory and establishing support groups for professionals were the activities which ultimately resulted in the denial of charitable registration.<sup>24</sup> The Supreme Court of Canada had seven judges hear the appeal, with the majority Judgment being written by Iacobucci J with three males concurring, while the minority Judgment was written by Gonthier J and concurred with by the only two women on the court.

### **A Preamble Solution to the Case**

As previously stated, this paper will analyze the issues dealt with by the Court primarily with the intent of answering the Broadbent question as to why we in Canada today want to retain our link to the jurisprudential heritage provided by the common law of England. It is a presumption of this paper that the Vancouver Society could have been declared charitable by the Supreme Court of Canada even though Charities Division was correct in denying registration of the application as it was made. Having set that objective, let me begin by going all the way back to the much maligned Preamble for an analysis which possibly would result in a favourable determination of charitable status.

In disparaging the Preamble, the Broadbent Report says it “also included reference to such activities as ‘the marriage of poor maids’ and ‘aid to persons decayed’ that

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23 One of the questions most often asked of me when discussing this case outside Canada is what is meant by the term “visible”. It is the Canadian euphemism for “coloured”.

24 *Immigrant Women*, at 124, para 195.

are clearly no longer relevant.”<sup>25</sup> It would seem to me that anyone with a high school education which included studying any of the works of William Shakespeare could translate “aid to persons decayed” into the language of the twentieth century. In an age in which HIV/AIDS ravages the immune system of so many people, I doubt they would have any problem in finding the term relevant to charity.

Finding relevance in the term “the marriage of poor maids” requires actually grappling with how the law of charity works and evolves. The primary mechanism for broadening the law of charity is to argue by way of analogy that previously decided cases lead to accepting the proposed new application. It is not beyond the scope of analogy in the law of charity to argue that the inclusion of “the marriage of poor maids” in the Preamble is an analogous ground for registering the Vancouver Society nearly 400 years later. One begins by establishing the Elizabethan social framework in which marriage was one of the better ways for poor maids to escape from the limited opportunities for an acceptable quality of life available to poor spinsters. Four centuries later, society would advocate education rather than marriage as a politically and socially acceptable means for women of limited economic means to better their situation. This education needs to be focused on job skills and accreditation of educational and professional qualifications previously obtained. In our society, the women who need such charitable assistance are not Elizabethan “spinsters” but immigrant and visible minority women, particularly those with English as a second language. The Broadbent Report acknowledges that the Federal Court of Appeal found a society operating a computer freenet was charitable because the information highway was analogous to highways listed in the Preamble.<sup>26</sup> If the courts have used that level of flexibility and creativity in accepting arguments of analogy to the Preamble, there is value in retaining a link to the Preamble for counsel who have the wit to employ it. However, the Preamble analogy may still fall short as it refers to “poor” maids and the Vancouver Society was unwilling to apply a means test.

#### **A *Pemsel* Solution to the Case**

The Broadbent Report is also keen to move beyond the classifications of the four heads of charity as set out in *Pemsel*. I respectfully submit that the Court need have gone only one sentence further in its quotation from Lord Macnaghten’s Judgment

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<sup>25</sup> Broadbent Report, at 51.

<sup>26</sup> *Vancouver Regional FreeNet Association v MNR* [1996] 3 FC 340 (FCA).

in *Pemsel* to find authority to register the Vancouver Society. At page 102, paragraph 144, Iacobucci J cites the four heads of charity without going on to Lord Macnaghten's next sentence which says:

“The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.”<sup>27</sup>

On the facts set out in his Judgment, it seems that Iacobucci J considered the activities which denied the applicant charity status were the provision of the jobs skills directory and professional support groups. These activities would not have been offensive if only poor persons had access to them. However, Iacobucci J was concerned that since no means test was to be applied, some wealthy immigrant women might receive services from the charity. The Judgment cites the fact that Canadian immigration policy explicitly and aggressively solicits immigrants in the “skilled worker”, “entrepreneur” and “investor” categories. These are persons who qualified to immigrate to Canada because they are highly qualified professionals or have met strenuous tests as to their personal net worth and the financial capital they have available to invest in Canada. Lord Macnaghten had clearly stated that such an Organisation which incidentally benefits the rich was charitable. Iacobucci J had listened to counsel more intent on stressing the inadequacy of *Pemsel* and the need for legislative reform and therefore ignored Lord Macnaghten and stated that “absent either specific legislation or ... special needs”<sup>28</sup> the Vancouver Society was not charitable.

The minority Judgment had this point correct, as Gonthier J states: “In any case, the suggestion that a charitable purpose must be related to the relief of poverty was rejected in *Pemsel*.”<sup>29</sup> Gonthier J went out of his way to complain that the lawyers were more interested in persuading the court to make wholesale changes in the law than in arguing that charitable registration could be granted under the current common law. He wrote:

“Regrettably, in my view, the Society expended little effort on locating authority to support its argument that its purpose qualifies as charitable under the fourth head of the *Pemsel* scheme. Instead, the Society

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<sup>27</sup> *Pemsel* [1891] AC 531 at 583.

<sup>28</sup> *Immigrant Women*, at 118, para 180.

<sup>29</sup> *Immigrant Women*, at 82, para 93.

concentrated its efforts on urging this Court to engage in a wholesale revision of the common law definition of charity. This is most unfortunate. No such revision is necessary, in my view, because the Society's purpose can be placed within the existing *Pemsel* categories. The Society was, consequently, too quick to ask this Court to make new law and insufficiently attentive to the possibility of succeeding under the existing regime. Before asking this Court to modify the common law, litigants should demonstrate that they have exhausted the possibilities of the existing law. In the law of charity, those possibilities are considerable."<sup>30</sup>

### **Taking the Case to the Supreme Court of Canada**

Presumably, if one is to succeed in getting leave to appeal a charity's case to the Supreme Court of Canada, the issues under appeal must be of greater significance than the facts of the case. Consequently, the litigation raised the issue of a broader redefinition of charity. Reading this Judgment raises the question whether the lawyers arguing it were so interested in convincing the Court that the existing law was inadequate that they forgot the immediate objective was to establish that the Vancouver Society was charitable. Legal counsel clearly convinced the majority of the judges that the primary question before the Court was whether the law needed to be reformed and the issue as to whether the Vancouver Society should be registered was incidental. In his opening paragraph Iacobucci J stated:

“... we also face the interesting questions of whether the time for modernization has come, and if so, what form that modernization might take. The answers to these questions will decide the ultimate issue before us: whether the appellant qualifies for registration as a charitable Organisation ...”<sup>31</sup>

At the outset of any revolution innocents must be sacrificed for the greater good of the “cause”. One wonders about the extent to which the Vancouver Society was such an innocent in the quest to revolutionize the existing common law definition of charity. Iacobucci J states: “In fact, it [Vancouver Society] reserved perhaps its most forceful submissions to urge this Court to consider adopting an entirely new

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<sup>30</sup> *Immigrant Women*, at 76-77, para 81.

<sup>31</sup> *Immigrant Women*, at 95, para 127.

approach to the definition of ‘charitable’.”<sup>32</sup> Iacobucci J obviously decided that the time for modernization has come. Having answered that question affirmatively, he could hardly say that the appellant qualified as a charity. Granting registration under the existing common law would undercut the argument that more than incremental modernization was necessary.

Having decided that the time for modernization has come, Iacobucci J’s second question is to determine what form that modernization might take. There are eight references in his Judgment to statutory amendments so it is no surprise that Iacobucci J determines that legislation is the appropriate form for modernization. It is somewhat surprising that Iacobucci J, who months earlier did not feel it necessary to go to the legislature to expressly “read in”<sup>33</sup> the inclusion of sexual orientation into the Alberta’s Individual’s Rights Protection Act,<sup>34</sup> feels that any substantial change in the law of charity “must be left to Parliament”.<sup>35</sup>

### **The Canadian Centre for Philanthropy’s Proposed Definition**

Counsel for the Vancouver Society were not the only advocates for a radical new definition. The Canadian Centre for Philanthropy (“CCP”) intervened as an *amicus curiae* to propose that the Supreme Court of Canada adopt a new approach which it outlined in a three step inquiry. Analyzing the CCP’s proposal demonstrates how many interpretation problems flow from a new definition. The first step of the proposed inquiry maintains the three heads of charity as articulated under *Pemsel* and so causes an applicant and adjudicator to retain all of the history and knowledge of this branch of the common law. Nothing in this step would assist in the registration of the Vancouver Society as it does not bring even incremental change to the law.

The second step is what radically opens up the definition of charity. It solves the confusion of what is meant by “other purposes beneficial to the community” in the

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<sup>32</sup> *Immigrant Women*, at 124, para 196.

<sup>33</sup> *Vriend v Alberta* [1998] 1 SCR 493.

<sup>34</sup> RSA 1980, c I -2.

<sup>35</sup> *Immigrant Women*, at 128, para 203.

fourth head of *Pemsel* by jettisoning the concept of “public benefit” as presently required by common law. Earlier in the Judgment<sup>36</sup> Iacobucci J cited Professor Donovan Waters to stipulate that “the essential attribute of a charitable activity is that it seeks the welfare of the public; it is not concerned with the conferment of private advantage.” The CCP definition adopts the term “public benefit” but applies it to “an identifiable group of people,<sup>37</sup> of whatever size, having a common interest.” Consequently, a charitable purpose need no longer be available to “an appreciably important class of the community”. Presumably, if an applicant fails the public test under the head of advancement of education, it could now apply under the new public benefit fourth head where no such test is required. Gonthier J expressly states that “the *Pemsel* categories are not mutually exclusive”.<sup>38</sup>

This proposition seems to completely ignore the Supreme Court of Canada’s decision in *Re Cox* in which Kerwin J stated:

“It has now been settled that the element of public benefit is essential for all charities no matter in which of Lord Macnaghten’s classifications in *Com’rs of Income Tax v Pemsel* [1981] A.C. 531, they fall.”<sup>39</sup>

Kerwin J goes on to say:

“I adopt, if I may, the words of Lord Simonds in *Oppenheim* [1951] AC at p. 307: ‘It must not, I think, be forgotten that charitable institutions enjoy rare and increasing privileges, and that the claim to come within that privileged class should be clearly established.’”<sup>40</sup>

The common law understanding of “public benefit” would deny charitable status to

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<sup>36</sup> *Immigrant Women*, at 104, para 147.

<sup>37</sup> The use of the word “people” would exclude animals. Animal rights charities would therefore only be able to seek charitable status as an anomaly under the existing fourth head of *Pemsel*. Under most analyses, the same would be true of Organisations seeking to preserve and protect the environment or cultural and heritage sites.

<sup>38</sup> *Immigrant Women*, at 72, para. 69.

<sup>39</sup> [1953] 1 DLR 577 at 579.

<sup>40</sup> [1953] 1 DLR 577 at 581.

hobbyists. The Federal Court of Appeal previously rejected the application of a model railway association<sup>41</sup> because it was too member-oriented to have a truly public character. The CPP definition would extend charitable tax benefits to such a small group of hobbyists with a common interest. In recommending the CCP model, Iacobucci J seems to have forgotten his earlier analysis that “the ‘for the benefit of the community’ requirement more often centers on who is the recipient”.<sup>42</sup>

An even greater problem is that the CCP definition does not preclude a pecuniary or other benefit accruing to the identifiable group of people. The definition therefore ignores both of what Gonthier J lists as the two central principles in the case law, being altruism and public welfare.<sup>43</sup>

### **Majority Rejection of the Appeal**

The Supreme Court of Canada did demonstrate how it could improve the law by making incremental changes. This was done by both Iacobucci J and Gonthier J broadening the definition of education. The Federal Court of Appeal had been bound by previous Canadian decisions which had adopted a restrictive definition of education. The Supreme Court of Canada considered those cases, expressly overruled them and thereby made incremental, but significant, change. It is interesting to note that in broadening the definition of education, Iacobucci J relies on English cases. While the Broadbent Report decries relying on English cases, the fact is that if Canadian courts had followed the English law instead of a Canadian statutory definition of education, the problem would not exist. The problem was getting rid of a “made-in-Canada” definition, not creating one.

Iacobucci J defines education in Canada to include training in important lifeskills with the specific end in mind of equipping people to find and secure employment.<sup>44</sup> The issue for the future is whether this new formulation is so significantly more broad than the English authorities that it will create a whole new set of interpretation

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41 *Seventh Division, Pacific Northwest Region, National Model Railway Association v MNR* [1989] 2 CTC 300, 89 DTC 5133 (FCA).

42 *Immigrant Women*, at 105, para 148.

43 *Immigrant Women*, at 57-58, para 37.

44 *Immigrant Women*, at 114-115, para 173.

problems.

Having solved a substantive problem standing in the way of registration, Iacobucci J must cast about for a reason to deny registration and force the modernization agenda to the fore. The “solution” is to parse words in the legal drafting of the purposes clauses in a Clintonesque quest for a technical legal position on the issues of whether the Society’s activities were *intra vires* its purposes and whether those purposes were too vague or uncertain. It is difficult to believe that the inclusion of the words “or conducive” was a hurdle too great for the Court to overcome without straying beyond the limits of incremental change. Lest my own incredulity sound disrespectful to the Court, let me quote directly from Gonthier J:

“Ultimately, the basis upon which Iacobucci J dismisses the Society’s appeal on this ground is that it has improperly included two words in a paragraph of its purpose section. My colleague contends that by inserting the words ‘or conducive’ into clause 2(e), the Society places itself outside the scope of legal charity.”<sup>45</sup>

### **Charities Division Rejection of the Application**

Charities Division has previously registered other Organisations which help immigrant women in Canada. As in all applications, the specific facts and documents being considered distinguish the specific case from others which appear from a distance to be identical. The record of the Court proceedings, more than the Judgments, indicate that Revenue Canada was concerned about the extent to which the proposed activities of the Vancouver Society differed from its stated purposes.

One of the more regrettable aspects about the current debate on the problems of the common law definition of charity in Canada today is the extent to which it is an invitation to trash Revenue Canada Charities Division. The call for a statutory definition is combined with the demand that Charities Division be emasculated. It seems that the proponents of the proposed new Voluntary Sector Commission believe it will be created only if Charities Division is completely discredited. There are several criticisms which are put forward so often that they should be examined in light of the Supreme Court of Canada decision.

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<sup>45</sup> *Immigrant Women*, at 91, para 116.

The first is that the examiners at Charities Division have almost no legal knowledge at a sophisticated technical level. While the applicants may not like the narrow definition of education which existed at the time of the refusal to register the Vancouver Society, Iacobucci J says that Revenue Canada's decision to deny registration under the education head was neither surprising nor incorrect.<sup>46</sup> The Court then proceeded to broaden the definition. However, examiners at Charities Division have no such authority or licence.

The second criticism is that examiners are unduly hung up on technical flaws in wording. I happen to share that criticism in a variety of situations. However, it is hard to criticize a humble examiner when Iacobucci J refuses the Vancouver Society appeal because of the inclusion of the words "or conducive" in Vancouver Society's incidental purposes clause. A new statutory definition is not going to solve this problem.

The third criticism is that Revenue Canada takes far too long to respond to an application. Again, I share that concern. The fact is, however, that the Supreme Court of Canada took nearly one year to come down with its Judgment in the *Immigrant Women* case. Revenue Canada usually completes its decision making process in a shorter time period. This is primarily a problem of resources and staffing.

Another criticism is that examiners are seldom helpful to an applicant in recommending changes which will facilitate registration. The facts of the Vancouver Society application as set out in the Judgment indicate that Revenue Canada considered four different articulations of the Society's purposes. It is surprising to me that the Court did not criticize Revenue Canada for allowing so many amendments. One wonders about the integrity of the process if an unlimited number of amendments to the stated purposes is considered by examiners.

Two of the purposes<sup>47</sup> deleted by the applicant from its formal documents were:

- “(c) To facilitate immigrant and visible minority women in achieving economic and social independence and their full potential in Canadian

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<sup>46</sup> *Immigrant Women*, at 110, para 162.

<sup>47</sup> *Immigrant Women*, at 95-96, para 129.

society;

- “(d) To co-operate and build a network within British Columbia, especially among immigrant and visible minority women and concerned individuals and groups, in order to provide current information and services for the purposes of mutual support;”

It seems that the Vancouver Society was quite prepared to remove these purposes from its formal constitution to improve its chances for registration, but had no intention of actually changing how it was going to carry on its activities. Much of both Judgments dwelt on the applicant's networking, jobs directory and mutual support activities. It is hard to understand how Revenue Canada can play any type of meaningful gatekeeper role when the Court is so willing to consider the activities which the applicant has explicitly deleted from its purposes as part of the application process. It would seem that if the application process is to have integrity, Charities Division is obligated to deny registration when an applicant removes a purpose because it appears unregistrable, but continues with the activities contemplated by that stated purpose.

### **Purposes versus Activities**

One of the most difficult challenges for an applicant for charitable registration, as well as for an examiner at Charities Division, is to understand the extent to which the test of being charitable is to be determined by the organisation's stated purposes or its intended activities. This problem exists everywhere in the charitable world but is particularly acute in Canada. This is because the statutory definition of a charitable organisation in the Income Tax Act<sup>48</sup> makes absolutely no reference to charitable purposes but defines a charitable organisation exclusively in terms of charitable activities. Iacobucci J, in my respectful opinion, is incorrect in attributing this problem to blurring “by judicial opinions”.<sup>49</sup> As Gonthier J much more accurately pointed out, “charitable activities” is a recent innovation contained in the Income

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<sup>48</sup> Subsection 149 1 (1).

<sup>49</sup> *Immigrant Women*, at 107, para 153.

Tax Act, “but has no history in the common law”.<sup>50</sup>

England expressly declined to include an “activities test” when it rewrote the *Charities Act 1993*. Dr Charles Mitchell<sup>51</sup> described the process as follows:

“... it is notable that in 1991 it was apparently thought necessary to give the courts and the Commissioners an express statutory power to look to an organisation’s likely future activities when determining its entitlement to charitable status, by inserting a clause to this effect in the Charities Bill 1991.<sup>52</sup> When the Bill was debated in the House of Lords, Lord Browne-Wilkinson took the view that this clause would ‘change the substantive law of charity’,<sup>53</sup> and objected to its enactment on the ground that it would commit the courts and Commissioners to an enquiry into the future intentions of an organisation’s officers, which was essentially impossible and which would increase the load of administrative and legal costs to be borne by voluntary organisations generally.<sup>54</sup> The further objections were raised to the clause in debate that it gave very wide powers to the courts and Commissioners, and that it failed to make clear what criteria they were supposed to apply when determining whether an organisation’s proposed activities were in the public interest.<sup>55</sup> In the face of these criticisms, the clause was dropped in committee.”

As Gonthier J points out, “It is these *purposes* which are essential, not the *activities* engaged in, although the activities must, of course, bear a coherent relationship to

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<sup>50</sup> *Immigrant Women*, at 64-65, para 52.

<sup>51</sup> Dr Charles Mitchell, *The Search for Public Benefit: Redefining Charity in English Law*, presented at the Foundations of Charity Conference, Kings College, London, September 1998 at p.16.

<sup>52</sup> Charities Bill 1992, clause 2.

<sup>53</sup> *Hansard House of Lords Debates*, 5th series, Vol 532, col 836, Lord Browne-Wilkinson, 19th November 1991.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid*, cols 830-831, Lord Richard.

the purposes sought to be achieved.”<sup>56</sup> The problem in Canada is that the statutory definition of a charitable organisation is flawed on an issue absolutely fundamental to defining a charity. If applicants for registration and examiners at Charities Division did not have a statutory definition of charitable organisation at odds with the common law, the registration process would be less difficult. It is very hard to be optimistic about the brave new world of a democratically determined statutory definition of charity when Parliament cannot understand the difference between purposes and activities.

The saving grace is that the Court simply ignores the wording in the Income Tax Act and proceeds to analyze the legal definition of charity as if it were governed only by the common law. This is the first time the Supreme Court of Canada has considered a charity case since the enactment of the present statutory definition of a charitable organisation. It refers back to Ritchie J’s discussion of the distinction between purposes and activities in *Guaranty Trust*<sup>57</sup> without pointing out that the statutory provision under consideration in that case required that the organisation be “constituted exclusively for charitable purposes”.<sup>58</sup>

### **Iacobucci J’s Definition**

The difficulty in reducing the complexities of charity law to one or two simple points can be seen by examining the majority Judgment’s formulation of the requirements for registration under the Income Tax Act. Iacobucci J states that they “come down to two:

- (1) the purposes of the organisation must be charitable, and must define the scope of the activities engaged in by the organisation; and
- (2) all of the organisation’s resources must be devoted to these activities unless the organisation falls within the specific exemptions of

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<sup>56</sup> *Immigrant Women*, at 64, para 52.

<sup>57</sup> *Guaranty Trust Company of Canada v MNR* [1967] SCR 133 (SCC) at 147.

<sup>58</sup> Section 7(1)(d)(I) of the Estate Tax Act 1958 (Can), c. 29.

s.149.1(6.1) or (6.2)".<sup>59</sup>

As the Court says, the primary issue should be the purpose test. Gonthier J states that he has reservations about the activities part of Iacobucci J's test and finds it an "awkward formulation."<sup>60</sup>

With respect, I would argue that the common law jurisprudence with regard to activities is an attempt to describe activities which a charity (and frequently more particularly, its trustees) must *not* engage in rather than a required definition of the authorized scope of its activities. At the time of the Preamble, most charitable trusts were testamentary. The concerns of the courts of equity were less with whether the purposes articulated by the testamentary draftsman were charitable, but whether the executors and trustees would administer them altruistically without private benefit to the trustees or related persons. Even by the time of *Pemsel*, Lord Macnaghten qualifies his comments with the phrase "if he were speaking with reference to endowed charities".<sup>61</sup> As recently as the time of the drafting of the Charities Act, 1960, in England, almost all of the attention of the Charity Commissioners and the courts were devoted to endowed charities and how to make certain that their activities were appropriate for charitable trusts.

This is different from *Immigrant Women* and every other registration decision considered by the Federal Court of Appeal, which were all cases dealing with charities seeking registration so that they can engage in fundraising. Defining the scope of activities of a charity is a very different exercise when the activities are dependant upon future fundraising rather than the expenditure of income from an endowment. My suspicion is that the "awkward formulation" in Iacobucci J's definition would benefit from a clearer understanding of the need to proscribe certain activities of trustees of endowed charities and the problems of delineating activities of an organisation which is dependant upon registration to raise the money necessary to carry out its purposes.

The relative importance of stated purposes and activities carried on in determining registration of an unendowed charity was litigated under a pure common law

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<sup>59</sup> *Immigrant Women*, at 109, para 159.

<sup>60</sup> *Immigrant Women*, at 66, para 55.

<sup>61</sup> *Pemsel* [1891] AC 531 at 583.

framework in England last year. In the High Court of Justice, Chancery Division, Carnwath J held<sup>62</sup> that the Charity Commissioners could look at extrinsic evidence, including activities, if the purposes contained an ambiguity. This case followed Scott J's Judgment in *Attorney-General v Ross* in which he addressed the modern problems presented primarily by unendowed charities when he said:

"The skill of Chancery draftsmen is well able to produce a constitution of charitable flavour intended to allow the pursuit of aims of a non-charitable or dubiously charitable flavour. In a case where the real purpose for which an organisation was formed is in doubt, it may be legitimate to take into account the nature of the activities which the organisation has since its formation carried on."<sup>63</sup>

With respect, it seems to me that this is preferable articulation of the common law. The primary test is to examine the stated purposes. It is only in cases of (1) purposes which are inappropriate for charities, (2) poorly or ambiguously drafted purposes, or (3) if there is reason to suspect that the drafting is overly clever and misleading, that the examiners should move on to examine extrinsic evidence such as activities. If the courts are the primary arbiters of what is charitable, I suspect that the purpose test will dominate. If, however, registration is determined by the applicant's worthiness to receive tax assistance because it conforms with the government's fiscal and social priorities, I suspect that proposed activities will become the dominant test.

The second requirement in Iacobucci J's formulation is that all of the organisation's resources must be devoted to these activities unless covered by the specific statutory exemptions of s.149.1(6.1) and (6.2). With respect, this formulation neglects the provision of s.149.1(6)(a) which states "a charitable Organisation shall be considered to be devoting its resources to charitable activities carried on by it to the extent that it carries on a related business." This omission could have been critical to the determination to deny charitable registration.

The activities which were offensive to the Court were the jobs skill directory and professional support groups. It is certainly arguable that these are not charitable activities. However, it is undeniable that they are related to the purposes of the Vancouver Society. If counsel had chosen to characterize these activities as a related

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<sup>62</sup> *Southwood v AG* (1998/1999) 1 ITELR.

<sup>63</sup> *Attorney-General v Ross* [1986] 1 WLR 252 at 263, Scott J.

business and the Vancouver Society had charged a few dollars for these services, they would have been deemed to be charitable activities under the Income Tax Act. It is hard to see what grounds would have remained upon which to deny registration if these arguments had been made and considered.

### **Consideration of Tax Issues**

The *Immigrant Women* case and the Broadbent Report represent a significant departure from the English common law in explicitly bringing consideration of tax benefits into the determination of what is charitable.<sup>64</sup> The primary discussion of the legal definition of charity in the Broadbent Report is contained in the section titled "Access to the Federal Tax System". Iacobucci J focuses on the same issue, but uses it as a reason to restrict broadening the definition, when he states:

"... given the tremendous tax advantages available to charitable Organisations, and the consequent loss of revenue to the public treasury, it is not unreasonable to limit the number of taxpayers who are entitled to this status. For this Court suddenly to adopt a new and more expansive definition of charity, without warning, could have a substantial and serious effect on the taxation system."<sup>65</sup>

This is quite different from the legal position in England. In the House of Lords, Lord Cross of Chelsea failed in his attempt to introduce consideration of fiscal privileges, when he said: "In answering the question whether any given trust is a charitable trust the courts — as I see it — cannot avoid having regard to the fiscal privileges accorded to charities."<sup>66</sup>

The majority of his colleagues agreed with Lord Cross on everything in his Judgment except this point. Viscount Dilhorne expressed the dissent the best when

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<sup>64</sup> Presumably, Kerwin J in the Supreme Court of Canada decision in *Re Cox* was referring to tax benefits when he commented on the "rare and increasing privileges" enjoyed by charitable institutions and said: "Those privileges, it might be added, are, of course, not confined to the receipt of benefits in perpetuity under a will." [1953] 1 DLR 577 at 581.

<sup>65</sup> *Immigrant Women*, at 126, para 200.

<sup>66</sup> *Dingle v Turner* [1972] AC 601 at 624.

he said:

“With Lord MacDermott, I too do not wish to extend my concurrence to what my noble and learned friend Lord Cross said with regard to the fiscal privileges of a legal charity. Those privileges may be altered from time to time by Parliament and I doubt whether their existence should be a determining factor in deciding whether a gift or trust is charitable.”<sup>67</sup>

It remains the law in England to this day that neither the Charity Commissioners nor the courts consider fiscal privileges in determining what is charitable. It could be argued that this is completely out of touch with the realities of the modern world in which charities operate. Nevertheless, those seeking a broader definition on the assumption that more Organisations will receive tax benefits should be concerned by Iacobucci J’s response when the issue became a fiscal question. Is “encouraging activities which are of special benefit to the community ... the ultimate policy reason for offering tax benefits to charitable Organisations”<sup>68</sup> as Iacobucci J states? Will Parliament agree with and adopt this rationale?

The Broadbent Report clearly wants Parliament, and not the courts, to determine which Organisations receive tax benefits. It states: “The determination of which Organisations get the full benefits of the federal tax system should signal to all Canadians what we most value in civil society when it comes to providing a tax based incentive for giving. This determination and the assignment of privileges and responsibilities associated with it is inherently political, involving trade-offs in values and in expenditures.”<sup>69</sup>

The Broadbent Report does not specify which values it is prepared to trade off in favour of which new expenditures. Indeed, it goes on to say that it wants “a ‘charity-plus’ model, as advocated by Arthur Drache.”<sup>70</sup> This proposal lets its proponents claim that they only want the definition of charity to broaden without the exclusion of purposes and Organisations currently considered charitable. The problem with this

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<sup>67</sup> *Dingle v Turner* [1972] AC 601 at 614.

<sup>68</sup> *Immigrant Women*, at 113, para 170.

<sup>69</sup> Broadbent Report, at 53.

<sup>70</sup> Broadbent Report, at 54.

proposal is that the Supreme Court of Canada rejected it in the *Immigrant Women* case when Iacobucci J considered the suggestion that the Court simply add another category to the categories established by *Pemsel* and said it was “a suggestion which, in my view, would do little to enhance the fairness or the flexibility of the law”.<sup>71</sup>

There can be no doubt that if Parliament steps in to write a new definition of charity it will give very significant weight to fiscal concerns and the huge tax expenditure consequent upon broadening the definition. One cannot tell Parliament that the definition of charity is hopelessly outdated and an anachronism with centuries of baggage from a foreign country and simultaneously tell it that it is impossible to abolish any of the purposes presently considered charitable. It would offend the principles of a “democratic” process in determining a new definition to limit the legislature in this way. In the present fiscal climate in which governments are seeking to reduce almost all forms of expenditure, any debate which might begin with a discussion of the lofty ideals of charities and civil society would soon degenerate into a depressing discourse on the need to restrict tax expenditures. People seem to have forgotten that it is economists from the Department of Finance, not enthusiasts from the voluntary sector, who will draft any statutory amendments to the Income Tax Act broadening the categories of Organisations entitled to tax benefits.

If the primary objective of the Broadbent Report and the intermediary Organisations which commissioned it is “to signal to all Canadians what we most value in civil society when it comes to providing a tax based incentive for giving”.<sup>72</sup> I would concede that the determination and the assignment of privileges and responsibilities associated with it is inherently political. It is then for Parliament to determine the consequent trade-offs in values and in expenditures. That objective, however, goes far beyond a “charity-plus” exercise in broadening the definition. One hopes that having embarked on such a journey, the leaders of the intermediary Organisations have given adequate thought to where it might lead.

### **Relationship Between the State and Voluntary Sector**

One of the great difficulties in articulating the law of charity is that it is only properly understood when its evolution is studied in its historical and social context. One of the great subtexts is the relationship between the state and the sector. The

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<sup>71</sup> *Immigrant Women*, at 128, para 203.

<sup>72</sup> Broadbent Report, at 53.

first modern study of the definition of charity in England was the Nathan Report.<sup>73</sup> In it Lord Nathan analyzed the *Preamble* from the perspective of the relationship to the state and said:

“It seems clear that at the date of the Statute of 1601 and for long afterwards there was no conception that a charitable endowment<sup>74</sup> was necessarily ill-spent because its effect might be to relieve the burden of public obligations.”<sup>75</sup>

Lord Nathan was one of the first to introduce the language of partnership into the description of the relationship at the time of the *Preamble*, saying:

“Thus a partnership was established, in which the state filled in gaps left by charity rather than charity filling in gaps left by the state; and this has continued down to the changed situation of our own.”<sup>76</sup>

The “changed situation of our own day” was the creation of the welfare state. The debate in England wrestled with the changes wrought in social service delivery by the welfare state. The Nathan Report ultimately resulted in the English Parliament passing the Charities Act 1960<sup>77</sup> which attempted to address the relationship between charities and statutory services. In the words of the Charity Commissioners:

“Sections 10 to 12 of the Act were the outcome of a lengthy period of discussion of the part which charities should play after post-war social legislation had resulted in the traditional benefits provided by charity being largely provided by the statutory services. The answer which emerged from this discussion was, in broad terms, that while charity should not withdraw from a field where it was performing a useful service, its peculiar function

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<sup>73</sup> ‘Report of the Committee on the Law and Practice Relating to Charitable Trusts’, Cmd. 8710 (London: HMSO, 1952) (“Nathan Report”).

<sup>74</sup> Note the reference again to “endowment”.

<sup>75</sup> Nathan Report, para 624.

<sup>76</sup> Nathan Report, para 38.

<sup>77</sup> 8 & 9 Elizabeth II, c. 58.

was to seek out the gaps in the statutory services and to pioneer new services.”<sup>78</sup>

The next major study of the definition of charity after the Nathan Report was the Goodman Report,<sup>79</sup> which proposed a new detailed classification of charitable purposes as set out in Appendix I, “Guidelines in Relation to the Meaning of Charitable Purposes”. Lord Goodman also implicitly opposed utilizing private money to accomplish the obligations of the State as evidenced by the final phrase in parentheses in purpose (w):

“(w) The provision of public works for the benefit of the community and the protection of the lives and property of the community (to the extent that these services are inadequately provided for by the State).”

England confronted another “changed situation” in the 1980s when Mrs Thatcher sought to dismantle the welfare state and download “statutory services” onto the charitable sector. The Charity Commissioners were among those most diligent in trying to protect the charitable sector from simply becoming a tool of government cutbacks. Their concern is evidenced by their leaflet<sup>80</sup> giving guidance to trustees of charities on assisting people who receive benefits from the State. Trustees are instructed to take care not to use the charity’s funds simply to replace the State assistance received by a person because the charity would in effect be relieving the State, not the beneficiary. They are told:

“In order to make the most effective use of their charity’s funds, trustees should take the trouble to learn about:

- the system of State benefits;
- how a person’s State benefits can be affected by receiving a grant from a charity;
- the gaps in the State benefit system which can be filled by payments from charities.”

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<sup>78</sup> 1970 Report of the Charity Commissioners, para 28.

<sup>79</sup> ‘Charity Law and Voluntary Organisations,’ National Council of Social Sciences (1976).

<sup>80</sup> *Charities for the Relief of the Poor* leaflet, reproduced in the 1991 Report of the Charity Commissioners, Appendix A(b), at 28-31

Mrs Thatcher could only have wished for a voluntary sector as compliant as the Canadian sector which gave rise to the Broadbent Report. In Canada the intermediary Organisations provide the impetus for change and create the political will to attain it — and then propose a Voluntary Sector Commission which is controlled by the government. Government cutbacks and downloading on to the voluntary sector should provide little political challenge when the Canadian sector does not retain its independence from government. The Broadbent Report's recommendations for "Capacity Building" include compacts with governments, a voice at the Cabinet table and core funding for intermediary Organisations.<sup>81</sup> Once everyone gets into bed together and intermediary Organisations get core funding from government, it is difficult to imagine our sector leaders taking a hard line with government such as the Charity Commissioners for England and Wales who assert:

"It is a cardinal principle of charity law that charitable funds should not be used in place of benefits to which an individual has a statutory right."<sup>82</sup>

Prior to the Broadbent Report being turned into statutory reality, someone needs to take the time to assess the extent to which the political will to enact these changes stems from a government agenda to further download social and other government services. There is no doubt that part of the pressure to broaden the definition of charity has come from government departments which are cutting back core and program funding to voluntary Organisations. When cutting off funding to voluntary Organisations which do not fall into the current definition of charity, the government can only tell them to substitute private sector funding if their donors can receive tax benefits for charitable donations. Consequently, there is some political will to broaden the definition.

There is cause for serious alarm when one considers the new "contextual" approach to "public benefit" proposed to the Supreme Court of Canada by counsel for the Vancouver Society. It makes no pretence at maintaining the independence of the voluntary sector's priorities and purposes from those of the State. According to Iacobucci J:

"There would be no fixed definition or categories of public benefit. Instead, the court would consider a series of questions in making the determination,

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<sup>81</sup> Broadbent Report, at 86.

<sup>82</sup> *Charities for the Relief of the Poor* leaflet, reproduced in the 1991 Report of the Charity Commissioners, Appendix A(b), at 28-31

including whether the activities of the Organisation are consistent with constitutional and *Charter* values, whether the activities complement the legislative goals enunciated by elected representatives, and whether they are of a type in respect of which government spending is typically allocated.”<sup>83</sup>

### **Proposed New Voluntary Sector Commission**

The Broadbent Report calls for a new Voluntary Sector Commission to determine which Organisations should qualify for tax benefits. It is not clear how this is going to be funded as this Commission is to exist in addition to Charities Division rather than simply replace it. It would have significantly more work than the Charities Division as its first stated primary function is to provide support, information, and advice about best practices to voluntary Organisations related to improving accountability and governance.<sup>84</sup> The model proposed bears a resemblance to the Charity Commissioners for England and Wales.

There will be a problem if the proposed Voluntary Sector Commission expects their budget to be nearly as large as that of the Charity Commission. The Charity Commissioners have a budget of over \$52.7 million and a staff of 600 people for 180,000 charities. Revenue Canada Charities Division has a budget of \$8.6 million and a staff of 130 for over 78,000 registered charities. While no estimate is given as to the size to which the portion of the voluntary sector which receives full tax donation privileges will swell under the expanded definition, the Broadbent Report considers all 175,000 Organisations in the voluntary sector. The press reports of Revenue Minister Herb Dhaliwal’s response to the Broadbent Report also use the number “175,000 charities and community groups”.<sup>85</sup> These numbers more than double the size of the charitable sector and increase it to the number of Organisations supervised by the Charity Commissioners.

The new Voluntary Sector Commission only makes sense if it and Charities Division adopt substantially the same definition of charity. The Broadbent Report reserves to Charities Division the ultimate authority to revoke the registration of charities.<sup>86</sup>

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<sup>83</sup> *Immigrant Women*, at 125, para. 197.

<sup>84</sup> Broadbent Report, at 58.

<sup>85</sup> *Ottawa Citizen* 9th February, 1999 and *Vancouver Sun*, 9th February 1999.

<sup>86</sup> Broadbent Report, at 58.

Consequently, if the new Commission registers Organisations which have purposes and activities broader than those accepted by Charities Division, presumably Charities Division would immediately audit and then move to deregister them.

The Broadbent Report not only wants a legislated definition but recommends that it be "subject to a statutory review at ten year intervals".<sup>87</sup> This will cause the definition to stultify in between statutory reviews. Both Charities Division and the courts will be very reluctant to expand the definition in any significant way when they know that Parliament will speak on the issue in several more years. The tendency will be to procrastinate any incremental change until the next review. It will be particularly difficult to argue analogy as the basis of expanding the definition when there are regular statutory reviews. Again, any ten-year review holds out the possibility of restricting rather than expanding the definition.

The only way for any new commission to simultaneously be supported by taxes and remain independent from government control is for it to be created as an extension of the courts. Such a commission could be designed to streamline the charitable registration process, expand the definition of charity by limited but clear categories and provide a less cumbersome and expensive appeal process. If it were an extension of the courts, its decisions could provide precedents in ways that Charities Division's registration decisions do not. However, it seems very difficult to achieve such a commission when the Broadbent Report is so adamantly opposed to the courts having an integral role in this process.

### **Advocacy**

One of the more intriguing aspects of the *Immigrant Women* case is how little either Judgment said about advocacy and political activities. The primary discussion relating to political issues in the case focuses on whether it is acceptable to articulate the statutory allowances with regard to political activities provided in the Income Tax Act in the legal purposes of the society. This does not deal with the substance of allowable and prohibited political purposes and activities in defining charity at law. One is thrown back on the Federal Court of Appeal in *Human Life International*<sup>88</sup> and the historic English authorities. The future is somewhat complicated by Iacobucci J's revised definition of education which says:

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<sup>87</sup> Broadbent Report, at 55.

<sup>88</sup> *Human Life International in Canada Inc. v MNR* [1998] 3 FC 202 (FCA).

“Thus, so long as information or training is provided in a structured manner and for a genuinely educational purpose — that is, to advance the knowledge or abilities of the recipients — and not solely to promote a particular point of view or political orientation, it may properly be viewed as falling within the advancement of education.”<sup>89</sup>

The Broadbent Report says: “The voluntary sector is a garden in which democratic skills are planted and nurtured.”<sup>90</sup> It then goes on to depict voluntary Organisations as a bastion of participatory democracy, saying, as they “express themselves as advocates of particular causes and constituencies ... they complement our democratic political institutions, notably parties and parliaments.” It is difficult to understand how Organisations which complement our political parties will be denied the right to have political purposes in the future. One wonders how fundamentally the new expanded definition of the voluntary sector will change the character of the charitable sector defined by the courts guided by the Preamble and *Pemsel*.

## Conclusion

In this paper I have criticized the proposed definitions of charity at law whether put forward by Iacobucci J or the Canadian Centre for Philanthropy. My purpose in doing so is not rooted in my desire to propose the perfect definition of my own. Rather, it is to demonstrate how difficult it is to reduce four centuries of legal heritage to a few sentences. Any formulation will almost certainly neglect or give undue influence to some particular aspects of charity. Such “errors” are inevitable and only catastrophic if the new formulation is codified and denied the tempering influence of the rich legal heritage embodied in the common law.

It is possible to quibble with the Supreme Court of Canada on phrases in its word formulation of charitable tests or throw-away lines on education as applied to libraries or sectarian schools. However, when it focused on the issue of the restricted definition of education as presently applied by Canadian courts, it acted to move the definition back in line with international jurisprudence. Far more importantly, the Court re-affirmed the application of the common law test of charity which primarily looks at purposes and only secondarily looks at activities. Without explicitly addressing the flaw in the statutory definition, it instinctively recognised the problem

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<sup>89</sup> *Immigrant Women*, at 113, para 169.

<sup>90</sup> Broadbent Report, at 9.

and corrected it.

As the judges made clear, counsel appearing before the Court were more interested in advocating a major revision in the law than in arguing that the Vancouver Society was registrable under the Preamble or *Pemsel*. The stated objective of broadening the definition is to make tax benefits available to many more new categories of Organisations. The majority Judgment of the Court appropriately balked at this when it considered the fiscal implications and said that it is for Parliament to expand the definition when the issue is the loss of revenue to the public treasury. The minority Judgment simply applied the common law, ignored the fiscal consideration, and found that the applicant could be considered charitable with a generous interpretation of the existing law.<sup>91</sup>

The *Immigrant Women* case is routinely cited as a clarion call for statutory reform of the definition of charity. The problem is that the Court explicitly rejected the “*Pemsel plus*” formula. Even worse, it shifts the discussion to a tax expenditure analysis. Notwithstanding its “*Pemsel plus*” recommendation, the Broadbent Report also contemplates a fundamental reassessment of fiscal priorities in the charity field, stating:

“The determination of which Organisations get the full benefits of the federal tax system should signal to all Canadians what we most value in civil society when it comes to providing a tax based incentive for giving”.<sup>92</sup>

Reflecting on the majority Judgment leads one to suspect that Iacobucci J accepted counsels’ argument that the case was fundamentally about reform rather than the registration of the Vancouver Society. The appeal was therefore denied not because he was unable to deal with “or conducive” in the ancillary clause of the formal objects. The appeal was denied because the majority of judges were unwilling to radically increase the burden to the public treasury which would result from a much broader definition without deferring the issue to Parliament. One can anticipate that Parliament will similarly shift the debates from the noble discussion of the worthiness of specific purposes and individual Organisations to an ignominious squabble on the tawdry fiscal question of affordability.

The fiscal incentives for charitable giving are extremely generous in Canada and there is concern that the Department of Finance will not simply radically broaden the

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<sup>91</sup> And see Broadbent Report at 55.

<sup>92</sup> Broadbent Report, at 9.

definition without some attempt to make the changes “revenue neutral”. Many of the constituents in the various religious communities in Canada saw this possibility as a threat to their present tax privileges. While the religious sector appears under-represented in those with whom the Panel on Accountability and Governance consulted, it is my understanding that their concerns were one of the key reasons the Broadbent Report placed so much emphasis on the “*Pemsel* plus” solution. The other concern frequently expressed in the consultations was that the pool of charitable donations in Canada is quite finite and therefore opening up the donation pool to new Organisations would financially hurt the existing ones. The sector has been widely advised in the consultation process that this is not the case because new people will contribute to the new categories of Organisations. Since the sector has itself refuted the arguments that the changes proposed will be “revenue neutral”, the negotiations with Finance officials will be arduous.

The courts have not attempted another classification since *Pemsel* and the legislature has never attempted a definition beyond the restatement of *Pemsel*'s classification. Part of the reason for this may be the timidity and inherent conservatism of the courts. More probably, it is a manifestation of the inherent wisdom of the courts. Notwithstanding their periodic frustrations with the problems in defining charity, they are unwilling to radically change the underpinnings of one of the most treasured sectors of our society without having a sense of the consequences of such a legal revolution.

Many voices in the sector are outraged by the Court's decision in *Immigrant Women* as being “politically incorrect”. They should remember the wisdom of Lord Macnaghten's caution after articulating his four classifications of charity in *Pemsel*.

He stated:

“It seems to me that a person of education, at any rate, if he were speaking with reference to endowed charities, would include in the category educational and religious charities, as well as charities for the relief of the poor. Roughly speaking, I think he would exclude the fourth division.”<sup>93</sup>

It may not be politically correct, but it is the reality that many people in Canada, pausing to reflect on the categories of charity as Lord Macnaghten did, would, roughly speaking, have the same problem. Many Canadians would not consider it a charitable purpose meriting charitable tax benefits to provide a jobs skills directory and establish support groups for immigrants who qualified to come to Canada under

the wealthy investor category. Many ordinary citizens would disagree that an Organisation which facilitates the networking of the mega-rich immigrants from Hong Kong or any other area should be considered a charity. This is not to say that the Vancouver Society was dedicated to that class of immigrants. The fact is, however, the Court considered that category of immigrants in its Judgments and the Vancouver Society was not prepared to preclude them. Given those facts, it is a tribute to the role of the courts in defining charity that the minority Judgment applying *Pemsel* and the common law was prepared to extend charitable status to the Vancouver Society.

It is important that those opposed to the courts defining charity pause to consider that the courts may be far more generous on these issues than the public or Parliament. There are huge risks in rolling the dice and asking Parliament for a new definition based on the argument that the existing definition is fatally flawed. Once Parliament decides to act, it will most probably be driven by political and fiscal considerations. A politician's polling may tell him that more political advantage is to be gained by excluding immigrants than by helping them. The courts are not subject to such pressures and have a long history of protecting minorities and extending assistance to them. If this statutory solution is to be pursued with no balanced guidelines as to how the sector will be redefined, it is absolutely imperative that Canadians retain the protections and collected wisdom of our 400 years of legal heritage.

The reason why the courts should decide, based on law derived from English legislation almost 400 years old, what a democratic nation wants today is that they bring a rich legal tradition complete with precedents to the decision-making process. A court focuses on the policy issues brought before it by the particular application without being overwhelmed by the fiscal exigencies of the public treasury. The courts consider the issues with an independence from government that the proposed Voluntary Sector Commission would not have. Removing the courts removes the safeguards which are inherent in the fact that incremental change can do only limited (and reversible) damage if the decisions are wrong. One only goes to Parliament for a definition unencumbered by the legal heritage of the common law if the intent is to get a radical new definition which is aimed at transforming the sector into participation vehicles for learning citizenship skills, advocacy and civil society based on *Charter* values. The democratic discussion in Parliament will focus much more on fiscal issues than the sector's values. The courts will not be able to protect the sector from any excessive changes legislated by Parliament. This will particularly true if the legislated made-in-Canada definition excludes the legal heritage developed by courts in England, Australia and other common law jurisdictions.