Governing Private Governance:
Evolving Approaches to the Regulation of Charitable
Fundraising in Canada

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Susan D. Phillips

INTRODUCTION
The regulation of charitable fundraising has become the hard edge where contemporary pressures for enhanced public accountability meet private governance. In recent years a number of countries have introduced or significantly expanded the regulation of charitable fundraising, taking different paths of state regulation or sector self-regulation, or some combination. This international trend, in part, stems from the imperatives created by a highly competitive environment in which more organizations are chasing limited funds and the need to ensure public confidence in the ‘civil society sector’—confidence that remains strong but can be easily eroded by scandal, of which there have been a few highly publicized cases in recent years (Gibelman & Gelman, 2004; Morris, 2005). It is also a reflection of heightened public expectations of ‘radical’ transparency and the growing presence of the ‘regulatory state’ (Jordana and Levi-Faur 2004; Scott 2004) in which both traditional rule-based regulation and ‘meta-regulation’ are increasingly important. A distinctive feature of the evolving regulatory state is not only greater regulation of private governance (of ensuring the governance systems of private organizations are up to state determined standards) but greater regulation by private governance (e.g. by third party certification systems). The recent interest in regulation of charitable fundraising has become, I argue, fundamentally about the regulation of good governance, and this cannot be achieved by traditional rule-based regulation. At least, this is the story in the Canadian context and, as I will also argue, context matters in this new regulatory environment.

Historically, Canadian governments have been reluctant regulators of fundraising. The provinces, which hold the constitutional authority, have been largely uninterested and the federal government, which as the central tax collector is the de facto regulator of charities, did not push its jurisdictional boundaries to directly regulate fundraising practices. This changed in 2009 when the Canada Revenue Agency (CRA) established a new Guidance on Fundraising that sets acceptable ratios of fundraising costs to revenues and that identifies the governance systems that a charity is expected to have in place in order to reduce the risk of incurring excessive fundraising costs. It remains to be seen whether this policy will be implemented as ‘soft’ guidance or ‘hard’ rules.

At the same time that the federal government has taken a greater interest in monitoring fundraising practices, the civil society sector has moved quickly from focussing on fundraising to good governance. It ‘leapfrogged’ from an initial re-launch in 2009 of a longstanding but under-subscribed voluntary code of ethical fundraising and financial accountability to development of a comprehensive certification system that encompasses governance as well as fundraising. This is a bold move for a sector that has not been particularly supportive of its infrastructure organizations and that until recently saw little need for sector-wide standards at all. If this Standards Program succeeds, it could become a world leader in self-regulation in the charitable sector, but in these early stages there remain many questions about its future – questions which this paper explores. Before assessing the distinctive Canadian experience, it is useful to question
the assumptions that underpin the regulation of charitable fundraising, briefly examine contextual factors that are leading to quite different approaches to regulation of charitable fundraising, and consider lessons learned from other sectors about self-regulation.

REGULATING FROM SOMEWHERE: WHAT’S THE PROBLEM? WHO’S THE TARGET?

In a critical assessment of environmental regulation, Krysar (2010) argues that the fundamental problem is that governments are ‘regulating from nowhere’ – measuring impacts through cost-benefit and other methods while the central reasons for acting are obscure or muddled. The same could be said of the regulation of charitable fundraising which tends to have deeply embedded but implicit assumptions about the underlying rationale, and this necessarily leads us down a particular regulatory route without questioning if that is an appropriate path.

The usual reasons in support of fundraising regulation relate to the avoidance of fraud and maintenance of public trust given that charities use public money; they have the privilege of issuing tax receipts for donations which are, in effect, tax expenditures, as well as receiving the public’s money directly as donations. By law, charities are required to direct substantially all (however ‘substantially’ may be defined) to their charitable purposes. As several countries have experienced, poor practice can quickly escalate to national scandal. For example, the use of charities as tax shelters (where charities give receipts for much more than the value of the donations) has captured the attention of the Canadian regulator and over the past two years it has aggressively audited suspected tax shelters, resulting in the revocation of charitable status of a number of organizations, including the sports association representing Canada’s official national sport (which officially is lacrosse, not hockey) and resulting in the tax agency rejecting more than $2.5 billion in tax claims for donations. As an underlying principle, the desire to eliminate outright fraud is hardly contestable, and could be readily handled by the offices of attorney general, police or tax agency without elaborate regulation (see Barber 2011).

The interest is in more than catching the few bad apples, however, but in enhancing transparency so as to maintain public trust in charities as a whole which, in spite of the publicity surrounding a few isolated cases, remains high (Leather 2010; Muttart, 2006). Indeed, the animating principle behind most regulation of charitable fundraising has been donor education and empowerment through transparency. The premise is that, equipped with information, donors will make more enlightened decisions about how to direct their support, giving to organizations that have acceptable fundraising costs and ethical practices and sanctioning those that do not; charities that rely on external donations will respond to donor expectations, both by being more transparent in disclosure of their fundraising practices and altering their behaviour to meet acceptable standards (Szper and Prakash 2010; Auld & Gulbrandsen 2010). Information thus becomes ‘doubly embedded’ in the actions of both donors and charities (Weil et al. 2006).

When information can be doubly embedded in a timely way, it has the desired effect on behaviour: seeing the one (out of five) star rating on hygiene on the restaurant door gives serious pause, as does a ‘high risk’ rating on a financial product being recommended by one’s financial advisor (Weil et al. 2006). The same is not true of disclosure of the ratings of charities, however. In studies of the impact of the ratings by third party watchdogs, Sloan (2009) found that positive ratings have a slight positive effect on contributions, but bad ratings have no effect, while Szper and Prakesh (2011) found no effects on donor decisions of either good or poor ratings. One reason is that the information that is required to be disclosed is mainly related to
financial inputs (e.g. proportion of the donation that will go to the charitable cause) while what is of primary concern to donors are program content and organizational reputation (Szper and Prakesh 2011).

In addition to donor education, two common market failures motivate fundraising regulation. The first relates to the dependence of charities on third party fundraising firms, and normally occurs when charities desperate to raise some threshold amount agree to commission based or extraordinarily high fees. The charity cannot manage the fundraising on its own, and regards some funds as better than none, so it becomes dependent on the private firm – which may or may not lead to good practice. In addition, the directors and staff of charities have no personal and direct economic self-interest in the contracting of fundraisers, and therefore do not suffer any monetary loss if they do not maximize the benefit to the charity from the contract. A second market failure is that the return on fundraising investment is highly speculative, especially in contrast to the core programs and activities that charities are familiar with running. The speculative nature of these outcomes reinforces the case for prudence in spending on fundraising. Decisions related to fundraising are thus intimately linked to underlying practices of good governance; from this perspective, the primary target of regulation is not the donor but the charity, and regulatory approaches need to focus on transparency of both outcomes (e.g. fundraising to revenue ratios) and procedures (e.g. openness of governance processes) (Auld & Gulbrandsen 2010). Fundraising thus becomes a point of entry for more effective self-regulation in the charitable sector.

In short, the regulation of charitable fundraising needs to check its assumptions. Extensive behavioural change will depend on more than donor education, but on creating incentives and building capacities of organizations for learning and self-improvement. It compels charities to consider their governance systems as they relate to fundraising practices, and makes a case for greater self-regulation because organizational learning cannot be driven by command-and-control rules (Breen 2011).

CONTEXT MATTERS: DIFFERING INTERSECTIONS IN CO-REGULATION
Charitable fundraising is currently being rethought and redesigned in a number of countries (notably UK, US, Ireland, Canada and Australia), either by governments or civil society, or both. There is both considerable convergence – in moving toward mixed or hybrid systems of state and self-regulation, but also substantial differences across jurisdictions. Context is important to understanding the different ways in which the regulation of charitable fundraising is evolving in different jurisdictions. As shown in Figure 1, several forces are at play, but in differing degrees, producing different intersections of state and sector regulation.

An important contextual factor is a movement toward great collaboration and governing through networks rather than hierarchies, a mode of governing referred to as ‘governance’ (Bevir 2010; Rhodes 2000). The current emphasis on collaboration, has gotten somewhat ahead of empirical evidence, however, (see Hill and Lynn 2005; Lynn 2010) and ignores several other features of modern government which are at least as important as collaborative tendencies.

The first of these is the preoccupation with accountability and the legacy of regulation that accompanied the markets created under New Public Management (NPM). In a ‘wikileaks’ era of radical transparency and an environment in which politicians’ tolerance for risk and the public’s
tolerance for failure are very low, accountability – particularly over public spending – remains a core concern of most governments. The accountability imperative has imposed stringent reporting requirements on contract and other forms of stated funding and has forced civil society organizations (CSOs) to be much more transparent in all aspects of their operations, including fundraising, administrative costs, salaries, and their own governance. In addition, the markets of NPM were, for the most part, highly regulated through various means, and because regulation is a very durable policy instrument, these arrangements have not been easily altered (Levi-Faur 2008). However, traditional command-and-control rulemaking can be burdensome for governments, as well as for the regulated sectors, and is subject to public criticism as part of the ‘red tape’ of bureaucracy (Doern 2007).

Consequently, governments have moved in the direction of meta-regulation – steering or inducing others to develop their own internalized self-regulatory responses to public problems, often while maintaining considerable control over the direction of the course by setting outcome targets (Coglianese and Mendelson 2010). Governments may provide incentives, although financial incentives are limited given current economic retrenchment, or more likely, wield the threat of state regulation should self-regulation not be taken seriously or should it fail. In part as a result of the spectacular failure of major private firms, from Enron to Lehman’s, meta-regulation has reached into internal operations to direct improvements in private governance: processes as well as outcomes are increasingly being regulated.

The context for changing patterns of charitable regulation cannot be understood by looking to governments alone. Rather, the increasing professionalization of the civil society sector that has accompanied growth and more sophisticated service provision has created new performance expectations and put greater pressure on CSOs to meet these expectations (Bies 2010; Gugerty 2010). They are also face challenges of innovation, of finding creative solutions to old and tackling new problems, thus feeding a need for effective leadership. And, increasingly this diverse constellation of charities, nonprofits, social enterprises and hybrids is starting to define itself as and act like a ‘sector,’ paying more attention to the value of infrastructure organizations and building capacity as a sector. As Gurgerty (2010) notes, the effect is to push this sector toward more stringent accreditation and certification systems rather than relaxed voluntary codes.
The relative strength of these different factors has contributed to differing combinations of meta-, self-, and co-regulation of charitable fundraising.

**US – Expanding Regulation**
In the US where state governments have a long history of regulating – and some would say micro-managing – charitable fundraising, the current move is toward greater (traditional) regulation at the national level.\(^7\) The Internal Revenue Service (IRS) has clearly signalled its intent to become an even more active regulator of tax exempt organizations and, in particular, to ask more questions about their governance and management systems on the annual informational return that all must file. Defending its stance, a senior IRS official observed, “Some folks would argue that we have gone beyond where we should be going. We disagree; we think that governance is a very big part of accountability” (quoted in Williams, 2007). In reinforcing that the IRS is not going to be timid about its involvement in good governance, Sarah Hall Ingram, IRS Commissioner of Tax Exempt and Government Entities, noted that some people believe the IRS should “get out of the governance business.’ Instead, she said, ‘we are in this discussion to stay’” (Ingram 2009). Because the US is well endowed with strong infrastructure organizations, as well as a myriad of third party watchdogs, state associations have also stepped in, assuming an active part in shaping fundraising practice and promoting self-regulation.

**UK – Rise of Meta-Regulation**
England exemplifies a form of meta-regulation that may evolve into a fully hybridized model of integrated state and sector regulation. The Charities Act 2006 promotes self-regulation but gives the Minister ‘back-up’ power to step in with compliance-based regulations if the Minister deems self-regulation of fundraising has failed (Morris 2011; Kean, 2007).\(^8\) The Institute of Fundraising, the professional membership association representing fundraisers in the UK, which has well established codes of ethical fundraising conduct to which its members must adhere, received approval by government to explore options for a self-regulation model. Based on its review, an independent nonprofit, the Fundraising Standards Board (FRSB), was established in 2006 (and went public in 2007) with £4 million in government seed funding to create an accreditation system for charitable fundraising. By subscribing to the FRSB, charities agree to adhere to the Institute of Fundraising codes of conduct and can display a hallmark of adherence. The FRSB is also mandated to receive complaints from the public about fundraising practices. With a formal government performance review due later this year and government intervention possible if it does not measure up, the FRSB needs to be attuned to measures of success (see Third Sector 2008; Wiggins 2010). As Breen (2011) notes, membership (currently at about 1,280) is lower than expected and is not yet at a threshold level to make the FRSB self-sustaining once its seed funding expires in 2011. Support among the sector seemed to be splintering and questions of effectiveness in reporting and addressing complaints have been raised.

While the FRSB is focused on fundraising, it is only one of multiple efforts that have been launched in Britain in recent years that are aimed at sector-wide self-regulation broadly related to good governance. A voluntary Code of Governance is led by NCVO; a code covering charities funded as part of public services is under an Independent Commission on Good Governance in Public Services (Morris 2011); and the Charities Commission has set out its own understanding of the practices of sound governance, which it indicates are intended to work in a complementary way with the sector’s own codes. The message of the Charity Commission is clear, however: it expects and endorses self-regulation first and, as a regulator with a long history of a support function, is actively working with charities to facilitate training to underpin effective self-regulation. The related and equally clear signal is that it is not prepared to be
passive in this regard, and has provided explicit guidance – although not formal regulations – as to the governance systems and practices it expects to see implemented. In this regard, it is both regulating regulation and moving toward a learning-based system of management improvement.

Canada – Multiple Pressures, Dual Tracks
What is evident from both the USA and UK is that oversight of private governance is clearly on government’s agenda, albeit through different mechanisms. While better governance is also on the agenda in Canada, the emerging model puts an even greater emphasis on sector self-regulation for several reasons. First, Canadian governments have demonstrated far less interest in or collaboration with the civil society sector than in the US or UK, having no overarching policy or vision for the sector. Second, the sector has been under a negative spotlight for the past few years, portrayed poorly in the media and under great scrutiny by the tax agency as it assertively audits potential tax shelters, resulting in proposals in 2011 for more detailed rules to prevent abuse. When a Member of Parliament introduced a private member’s bill in 2010 that would require disclosure and cap the salaries of the staff of charities it became clear that many in government do not regard this as an autonomous sector but see it as one that warrants suspicion and government control.

The unfolding challenge in Canada, then, is to develop effective institutional arrangements to implement self-regulation in a somewhat poisoned environment. When the future appears to hold both more command-and-control and greater meta-regulation by the tax agency, and when set in a context of heightened demands for greater transparency, the Canadian charitable sector faced difficult choices, albeit with more limited capacity in its infrastructure organizations than exist in the US or UK. The way out of this tough spot was to make a bold move toward greater self-regulation. But, can self-regulation be effective? The next section examines lesson learned from other sectors on the factors that facilitate successful self-regulation.

SELF-REGULATION: OF CLUBS, CARROTS AND CONSEQUENCES
Self-regulation is defined as collective action of a significant number of non-state actors to shape their own behaviour and that of others in a (sub)sector through the setting of norms, standards, and credible commitments, supported by mechanisms that induce adherence and that have a measure of legitimacy and acceptance across the sector and with governments, stakeholders and citizens. Variations on Self-Regulation
Two key characteristics differentiate a diversity of approaches to self-regulation. First is the degree of prescriptiveness involved (Auld et al., 2008). On one hand, the primary means of promoting adherence may be rules with sanctions; on the other hand, the focus may be on learning through joining in the collective action, and thus adherence is motivated primarily by the benefits of self-improvement. This dimension could loosely be described as hard, which is relatively perdurable, versus soft law, which is more dynamic and often initiates a process of learning and other changes over time (Abbott and Snidal, 2000). The second differentiating feature is the degree of involvement by third parties: Who sets the rules? Is compliance self-assessed or adjudicated by an independent third party (even if that party is another CSO)? The variations along these two dimensions are considerable, producing a continuum of approaches from relatively non-prescriptive voluntary codes to mandatory accreditation, which accedes authority to an organization, (either a member-based organization or a third party) to set
standards, verify that these standards are being attained, and apply sanctions for non-compliance. In effect, accreditation can be a license to operate. Its big advantage is that it provides the ultimate hammer in that the organization with the accrediting authority can deny the license to operate. However, full scale, mandatory accreditation is costly and is normally applied to only a very small segment of the charitable sector where common standards are widely applicable and accepted.

Somewhere along the continuum lies third party certification which is a more broadly based form of accreditation done on a voluntary basis. Certification is intended to be a hallmark of quality not a permit to operate, and the process is often initiated and run by what Sidel (2005) calls ‘associational entrepreneurs.’11 To varying degrees, the certifying body monitors and reports on compliance, and may or may not have the capability of levying sanctions for non-compliance. Often sanction is left to the market: consumers, funders or potential partners are expected to look for the trustmark, and give a pass to those organizations that do bear it. The primary goals of third party certification are both to encourage self-improvement by having organizations adopt recognized good practices and raise overall standards in a sector. It is also becoming increasingly common for governments to forgo or reduce licensing and other regulatory requirements for organizations that adhere to state ‘approved’ third party certifications.

A recent variant of certification, which is particularly popular in the movement for sustainability (for example in sustainable forestry and fair trade coffee), is known as Non-State Market Devices (NSMDs). This model incorporates a strong reliance on market incentives by drawing on customer preferences in globalized environments and it has been innovative in developing inclusive governing mechanisms. The NSMD model is characterized by: embeddedness in a global domain and the ability to reconfigure markets; authority for self-regulation that is not derived from the state but from global markets and customer preferences; governance mechanisms that are democratic, open, inclusive and promote learning and adaptation; authority that is enhanced by the supply chain so different levels of producers, suppliers, purchasers, and consumers are compelled to participate; and verification that ensures compliance with standards (Cashore, 2002; Auld, Bernstein & Cashore, 2008; Howlett, 2000).

Proponents of self-regulation argue that, because it is inherently bottom-up and consent-based, it is not only cost effective but can also build inter-organizational relationships, encourage ‘norm conversations’ that lead to even higher standards, and enable outcomes to be more readily monitored in a complex, fragmented environment, thereby empowering an entire sector (Webb, 2004). However, past attempts at voluntary codes in the nonprofit sector have lacked teeth, and were often under used and eventually abandoned (Bothwell, 2000; Sidel, 2005, 2010). What can we learn from other sectors as to how to make self-regulation of charitable fundraising effective?

Lessons from Other Sectors
A variety of other sectors have used various means of voluntary codes certification, and NSMDs for many years, and there is now a substantial body of literature that identifies key factors in making these forms of self regulation effective.

Philosophy of regulation and problem framing: How the underlying problem is framed helps to bring together diverse sets of actors who are ready for collective action and also shapes and constrains the format and structure that such action could take. Seldom will the ‘problem’ be solved if the sole focus is on transparency and educating consumers; rather, the regulated
sector needs to have the incentives and desire for self-control and improvement, and collectively the capacity for behavioural change.

**Structure of the sector:** Experience from industrial sectors indicates that the uptake for certification, at least in the initial phases, comes from several sources: organizations that are already compliant; larger firms for which the costs of participation can be readily absorbed; niche firms trying to differentiate themselves; those with a highly visible brand that they seek to protect and promote; and those that are highly trade dependent and whose operations are transnational. Getting some of these actors on board early tends to reduce resistance (Auld, et al., 2008).

**The importance of field building and political legitimacy:** While the structure of the sector is important, the key factor in institutionalizing widely accepted certification with high levels of participation, and avoiding fragmentation through competing programs, depends on the ability to establish norms and political legitimacy (Bernstein and Cashore 2007). This begins with a set of standards and process that have a reasonable degree of substantive legitimacy (Cohen, 2004), and unfolds by enmeshing collective norms into the strategic, self-interested motivations of individual actors. As Bartley notes (2007), it also entails fostering inter-organizational networks and actively enrolling others into a collective project. In particular, it involves make effective use of organizational ‘supply chains.’ For example, with certification in sustainable forestry, participation in the process expanded greatly once key players, such as Home Depot and Victoria Secret (the lingerie firm that has a heavy reliance on paper for its catalogues), came on board because then their suppliers and competitors saw a new value in joining as well. Certification thus developed both strategic value (position in the field) and was becoming the acceptable and appropriate thing to do: strategic and norm driven behaviour become difficult to disentangle (Bernstein and Cashore 2007; Cashore, 2002). This norm building is greatly facilitated when supported by learning opportunities, whether done by the certification body or other parties.

What is evident from the case of forestry is that foundations and other associations are critical to field building. The sustainable forestry certification body did not develop nor reach a level of maturity on its own, rather foundations provided significant funding (Bartley, 2007). Foundations did more than provide grants to the certification body, however. They actively undertook field building by supporting NGOs in their strategies to build corporate demand for sustainable forest projects, and they coordinated with each other in a network to collectively assess how to have maximal impact. As Bartley (2007: 248) notes, “foundations were neither the sole originators nor the complete puppet-masters of this field, but they did act collectively to build a network of mutually supportive organizations and enroll various actors into the certification project.”

**Governance institutions:** Evidence suggests that the institutions that govern self-regulation matter, although there is no one best institutional form; the goal is to achieve both accountability and legitimacy which entails balancing some competing objectives (Prakesh & Gurgerty 2010). Transparency is a key element in both accountability and legitimacy, but as Auld and Gulbransen (2010) note, it is useful to disentangle outcome transparency (the substantive ends of policy intervention) from procedural transparency (the openness of governing processes, including decision making and adjudication). The difference in emphasis significantly affects how relationships with stakeholders are managed; while transparency regarding outcomes is presumed, some certification processes use procedural transparency and stakeholder consultation in an instrumental way, informing stakeholders and drawing on their
expertise, while others treat procedural transparency as an end in itself.\footnote{Stakeholder relationships and procedural transparency are affected to a great extent by whether the governing mechanism is a membership-based organization, often described as a ‘club,’ or a separate body. The advantage of a club is that it can sanction its members while the downside is that it risks being seen as, well, a club (implying exclusivity).} A club is defined by three attributes: they require members to act in ways that go beyond existing legally required obligations to take on additional responsibilities; they impose costs on members in exchange for reputational branding (a trustmark that can be publicly trusted) and private benefits (usually in the form of organizational learning) (Prakesh & Gurgerty 2010; Potoski & Prakesh 2007; 2009). The club dilemma is to balance the imperatives of recruitment (ensuring that the costs are not too high or standards too stringent to be a barrier to membership) and the prevention of shirking (by effective monitoring and enforcement) (Prakesh & Gurgerty 2010; Knill and Lehmkuhl, 2002). The standards to which members agree to adhere must thus be themselves reasonable: soft enough to facilitate broad participation but stringent enough to be seen as legitimate so the brand has meaning.\footnote{Compliance with standards needs to be monitored and consequences imposed for non-compliance (usually loss of membership) but observations from a wide variety of industries demonstrate that effectiveness does not depend primarily on fear of negative consequences but on a recognition by the targets of regulation that it is in their own strategic self-interest to participate and comply rather than defect (Coglianese & Mendelson 2010). This is fostered by a sense of duty among organizational management (Braithwaite 2002) and opportunities for continuous learning (Koehler, 2007).} The question of legitimacy that often arises is: how many have to buy in to make self-regulation viable? While numbers of adherents matter, it is not a numbers game alone: the kind of behavioural change that self-regulation seeks to affect often occurs over a long period, and thus what matters in the early stages is who the early adopters are, the extent to which they can change norms across the sector and whether they can create a tipping point for change. This gets balanced against pressures for sustainability, however, to ensure there are enough paying members to provide adequate organizational capacity to support both the compliance and engagement functions. But, as noted, most certification bodies do not get established and do not survive on membership fees alone.

**The role of government:** As Harrow (2006) notes, self-regulation occurs in the ‘shadow of the state,’ which can be both protective and menacing. Indeed, there are a very limited set of circumstances when entirely voluntary, private regulation occurs with no oversight at all from the state (Gunningham 2004; 2009). Governments can play key roles in sector-led regulation by: 1) providing definitional guidance by setting meta policy and regulatory frames and specifying the issues they want to see dealt with through private governance means; 2) providing incentives for participation in voluntary codes or certification, for instance through their procurement policies, directing resources to certified organizations, supporting the agency responsible for self-regulation, facilitating learning, and creating fora for dialogue; and 3) enhancing enforcement capability by establishing performance indicators or other criteria against which success will be judged (Gunningham 2009:164). In a more directive form, this may involve the threat of regulation if self-regulation is not forthcoming or not successful. Where there are shared interests within a sector, however, the need for intervention or steering of the process by government can be quite minimal.

The balance of engagement with government is always a difficult one, particularly in sectors that guard their independence, as Sidel (2005) observes with the nonprofit sector. What seems clear
from experience is that, while the threat of state regulation if self-regulation fails may provide an incentive to private action or cooperative regulation, an unduly heavy hand, very high standards or overly coercive strategies for compliance break down the goodwill necessary to make self- or hybridized forms of regulation work (Parker, 2007).

CANADIAN LEAPFROG: FROM ABSENCE TO CERTIFICATION
In Canada, responsibility for charities rests, constitutionally, with the provinces although they have been uninterested in fully exercising this authority. The linkage to the tax system that enables charities to provide tax deductible/credit receipts for donations gives the federal government an important role in the regulatory system, and the benign neglect of charities by provincial government (except for the prosecution of fraud and the case of Quebec which administers its own taxation system) has made the federal government the *de facto* regulator. Only one province has attempted to regulate charitable fundraising directly with requirements of registration prior to solicitation (when the attempt is to raise more than $25,000 CDN or when using a fundraising business) and a duty to inform potential donors of the costs of fundraising relative to the amount to be raised. However, compliance and enforcement of the law is reportedly very weak.

At the federal level, jurisdiction is divided as the Department of Finance, which has responsibility for the *Income Tax Act*, has the authority to set policy and regulations while the Charities Directorate of the CRA (the tax agency) administers the Act and provides guidance on its interpretation. The Department of Finance operates at a high policy level and has few actual relationships with charities, however, which leaves the CRA as the ‘hands-on’ regulator with responsibility for registering, monitoring and auditing charities. Although it cannot make changes to the Act, the Charities Directorate can influence the regulatory framework through issuance of guidance on its interpretation of the legislation and common law and thus, in effect, helps define the rules.

The Charities Directorate has traditionally acted as a command-and-control regulator, and holds a very big hammer of sanction with its ability to revoke charitable status. Over the past four or five years, the Directorate has intentionally attempted to reposition itself as more of a ‘responsive’ regulator, one that puts the emphasis first on education and dialogue with the regulated sector to change behaviour, using compliance and sanction only as needed (Ayres and Braithwaite, 1992; Scott, 2004). It has been providing more consultation and training, and given more extensive clarification of its interpretation of the tax law. It has not gone as far as the Charities Commission of England and Wales or the IRS, however, in its advice giving and support functions (see O’Halloran, McGregor-Lowndes and Simon, 2008). In part, this is due to the fact that the Charities Directorate is still part of the tax agency whose primary responsibility is to protect the integrity of the tax system, not provide advice on good governance and it has been cautious about overstepping federal jurisdiction by getting into the internal operations of charities. It has also been consumed in recent years with increased attention to good old fashioned audit, particularly related to detecting tax shelters and fraudulent receipts. As a means of strengthening its capacity as a traditional regulator, the CRA has received additional audit resources over the past two years and is likely to get more regulatory tools.
The Move to Meta-Regulation

When in 2009 the Charities Directorate issued a new policy statement on fundraising activities in which is embedded a codification of what it would regard as sound conduct, it was a significant entrée into a new area of (potentially) regulating governance. The perspective of the Directorate is that this is not new policy at all; rather it merely clarifies and makes more explicit the difference between fundraising and other expenditures and what it has long expected charities to do in order to ensure they direct substantially all of their activities and resources toward their charitable purposes. There was an awareness within CRA that charities do not have a strong sense of what types of fundraising conduct are permissible and what are not. Thus, a key goal was to educate the sector about good and bad practice and to provide greater clarity for charities about the nature of CRA’s concerns. In addition, there was a need to provide CRA auditors with information on how to make consistent judgments in assessing the fundraising carried out by registered charities. In effect, the intent was to pull rather than push charities into compliance.

The Guidance on Fundraising – CPS 028 (which after revisions following consultations came into effect in June 2009) sets out guidance for charities on how to distinguish fundraising costs from other activities in their annual reporting and on how the CRA will assess what is acceptable fundraising. 16 The problem has been considerable, and not by overt intention to mislead. For example, a June 2009 study of fundraising expenses of Canadian charities suggests significant under-reporting of fundraising expenses as well as simple errors in calculations on the mandatory tax return (Ayer, Hall & Vodarek, 2009).

The Guidance clarifies that expenditures on fundraising can be indicated as expenses toward charitable activity, rather than fundraising, on the annual report if: substantially all (90 percent) of the purpose was other than fundraising or if a four part test can be met (if the charity can answer ‘no’ to all of these four questions): 1) was the main objective fundraising? 2) did the ask involve ongoing, repeated, emotive, gift incentives, or donor premiums? 3) was the audience selected for its ability to give? and 4) were commission-based or other payments tied to number or amount of donations? The guidance steers away from proscribing how a charity undertakes its fundraising, but is intended to foster informed decision-making by charities about their fundraising program in the context of their overarching goals.17

The aspect of the policy that generated the greatest concern on the part of charities is an evaluation grid that sets acceptable ratios of fundraising costs to revenues.18 The Guidance recognizes that there may be legitimate reasons why, in any given year, a charity exceeds the acceptable ratio (for example, investment in donor acquisition). These percentages will take on considerable significance, even more than anticipated when initially developed, because the longstanding ‘disbursement quota (DQ)’ which required that charities direct 80 percent of the previous year’s receipted donations toward their charitable purposes was eliminated – after considerable lobbying by the sector – by the 2010 federal budget. The demise of the DQ was warmly welcomed as it was widely regarded to impose an undue administrative burden and reduce the flexibility in how charities, particularly small ones, manage their resources.19

The Guidance also lays out in considerable detail the ‘best practices’ that CRA will consider “decrease the risk of unacceptable fundraising” (CPS 028, s. 10) and that it will be looking to see in place when an audit is conducted. And, this takes the regulator squarely into the area of governance and management. The expected conduct involves:

- Prudent planning processes
- Appropriate procurement processes
• Good staffing processes
• Ongoing management and supervision of fundraising practice
• Adequate evaluation processes
• Use made of volunteer time and volunteered services or resources
• Disclosure of fundraising costs, revenues and practice

The standards are based on good practices in other sectors as well as on the principles set out by Charity Commission of England and Wales, among others, and they did not draw much attention from charities in the consultation (personal communication). In themselves, the standards do not appear to be controversial. The larger question is: what kind of policy instrument do they represent? Are these new regulations, a credible threat, or exhortation in which the regulator is imploring charities to put these good practices in place, but has no real intent to require to so or to monitor compliance?

The clarification of the CRA’s implicit approach to fundraising costs was generally well received by charity lawyers, although it is fair to say that the sector itself is not yet quite sure what to make of it. The real effect will become apparent only with use and specifically whether the good governance provisions are treated as guidance and a basis for ongoing dialogue and learning or as a matter of compliance, against which charities could be held to account in an audit with potential sanctions for noncompliance.

There are two underlying issues which suggest that the Charities Directorate is likely to treat the good conduct measures as softer guidance rather than hard law. The first is the matter of jurisdiction because regulations that address the governance of charities in a broad sense take the federal government into, or at least very near, provincial territory. The law supplies an interpretation that the CRA can look at how charitable purposes are carried out, but these new guidelines could easily trigger a constitutional challenge by a provincial government. But, that might not be a major disappointment to the federal regulator because a court ruling against it might force the provinces to step up in a field from which they have largely abstained themselves (see Bourgeois, 2002). The new policy statement should also be regarded as an opportunity, and indeed a directive, for stronger self-regulation.

The other major challenge is the capacity of the federal regulator. A practical issue is personnel because, given the high levels of mobility in the federal public service and still lengthy periods to fill positions, there are many vacancies in the Charities Directorate, particularly among the lower ranks (but also at the top as there have been 8 directors over the past 14 years); the growth that has occurred in recent years has been in its audit staff. A more fundamental issue is that to effectively use the new policy statement as either hard regulation or an educational tool, the Directorate needs to move more emphatically toward a model of responsive regulation. Regulating in this manner is much more personnel intensive and involves an ongoing relationship with charity leaders, thereby compounding an existing problem. It again raises an issue that has come up regularly over the past decade in Canada, which is that this kind of regulation may work better under an independent national charities commission supported by its own legislation. There is no indication that the minority Conservative government had any interest in moving in this direction or, given the generous tax charitable tax credits in Canada, that the Department of Finance would ever support such a move.
An Experiment in Self-Regulation: The Standards Program
Parallel to and independent of the federal government’s interest in clarifying, and potentially expanding, its regulatory reach over charitable fundraising and good governance, Canada’s civil society sector has been moving toward more effective self regulation. The environment in which this is taking place is one of a large and diverse sector (according to the Johns Hopkins Comparative Nonprofit Study [Hall et al. 2005], the second largest by employed population in the world), but one that has never seen itself as a sector. In addition, the national infrastructure organizations have never been particularly strong in Canada, nor highly valued by the sector, and they have been systematically de-funded by governments in recent years. As noted, the regulatory environment is fragmented with little involvement by provincial governments and a federal tax agency that has traditionally acted as a command-and-control rather than a responsive regulator, and thus has had limited knowledge and connection with the sector. There are no third party watchdogs as in the USA, and the only foray into such oversight by the Better Business Bureau in the mid 1990s was short-lived.

Clearly, there have been longstanding inadequacies in the regulatory framework that compelled greater direct involvement by the charitable sector. The advances toward self-regulation have gone hand in hand with the process of institution building in the sector, although the progress has been more akin to a game of leap-frog, occurring in bursts with long periods of inaction, rather than steady incremental or consistent progress. An existing, strictly voluntary fundraising code, which had limited uptake or enforcement, has jumped to full-blown certification of good governance standards that encompass fundraising but are much more expansive.

Starts and Stops over a Decade
The first steps were taken more than a decade ago. Recognizing the vacuum of policy leadership, twelve coalitions and umbrella organizations, representing the diversity of the sector, came together in 1995, calling itself the Voluntary Sector Roundtable (VSR), to provide greater cross-sectoral leadership. Given the reports of scandals that had wafted north from the United States, as well as a few home grown ones, and the push by a backbench Member of Parliament for more stringent government regulation, the VSR believed that the sector had to be more proactive about accountability. In 1997 it established an independent panel of experts to review and make recommendations for enhancing accountability and good governance practices. In its 1999 report, the [Broadbent] Panel on Accountability and Governance outlined a good practice guide for effective stewardship and recommended a process of voluntary self-accreditation based on self-assessment and self-monitoring with public reporting on a set of standards for good governance (PAGVS 1999). A new independent regulatory commission, akin to the Charity Commission of England and Wales, was envisaged to assist with standard setting, reporting and ongoing learning.

In 1998, the Canadian Centre for Philanthropy (CPP, later to transform itself into Imagine Canada) introduced the Code of Ethical Fundraising and Financial Management to which charities were asked to sign on. The Broadbent report strongly endorsed the Code and recommended that, as a condition of registration, a charity must adopt and renew every two years a code of ethical fundraising (if not the CPP code, one similar in principle). This would have taken a degree of voluntariness out of self-regulation, at least in regard to fundraising practices.

For more than a decade, the Broadbent Panel recommendations on self-regulation went nowhere and the CPP code languished with little take up because the sector leadership got diverted by an opportunity to work on issues of its relationship with the federal government
which had been a longstanding concern (and also a subject of recommendations by the Broadbent Panel). In 2000, the federal government established a two year collaborative process – the Voluntary Sector Initiative (VSI) – to address issues of capacity, working relationships and regulatory reform for the sector, and this consumed the attention of the sector’s leadership with little long term benefit for it (Phillips 2011). 21

Through engagement of key staff from the federal regulatory agency, however, the VSI did lead to a series of smaller regulatory reforms that have, over the past four years significantly changed how the Charities Directorate of the CRA operates. In particular, the endogenous layering in of new administrative policies, policy directives and relationship building has moved the agency somewhat in the direction of being a more responsive regulator, although it has a long way to go. Out of this eventually emerged the Guidance on Fundraising, and by extension, much greater CRA interest in coming years in best practices for governance.

During this period, one of the key national infrastructure organizations effectively went bankrupt and CCP came very close itself; in 2005, the two organizations ‘merged’ to become Imagine Canada. Although the new organization struggled for a while, which contributed to a hiatus in the development of the fundraising code, it has now established financial viability and is exerting a national leadership role – albeit struggling with a sector that is not all that keen on being led (Wyatt 2009). 22

**Jumping Forward**

In January 2008 Imagine Canada (with the support of three insurance companies) re-launched its Code of Ethical Fundraising and Financial Accountability. The Code articulates standards covering donor policies, fundraising practices, and financial management practices. 23 Participation is open to registered charities on an application basis, with a fee geared to revenue; 24 participating charities must make a public commitment to the Code which entitles them to use a trustmark. Compliance is complaints based, with complaints first directed to the charity for resolution and, if not resolved, to an independent committee that is authorized to review complaints and issue (as yet unspecified) sanctions. The Committee may also informally review charity practices. Participating charities must submit an annual report of financial statements and indication of complaints received (they do not need to provide detailed information on compliance) and their boards must renew their commitment to the Code every two years. Only 350 charities signed on, which represents only a small fraction of the charitable sector, although it included a considerable number of large organizations, a good geographical mix and in the second year, an increased rate of involvement.

While re-launching the Code, a cadre of charity leaders had come to recognize that the environment was changing quite dramatically with much greater scrutiny and expectations of transparency: a limited voluntary code would not take the sector far enough fast enough toward credible self-regulation. In 2006 Imagine Canada (joined by Volunteer Canada and the government-sponsored HR Council) created a 20 member Accountability Reference Group to lead thinking about broader standards (see ARG 2007). Following a national sector summit in 2008, a steering committee of 27 members was formed to lead the initiative through the next stage of refining the standards and developing a governance and accreditation process, releasing its implementation report in July 2009 (Standards Steering Committee 2009). Their proposal was again tested, and the concept affirmed, with the sector in a second summit (the Standards Forum) in the spring 2010. In 2011, 50 founding members (including the Steering Committee members) contributed $2,000 each to bring the Standards Program into being, 24 of which are currently going through its first pilot. Depending on the pilot, the intent is that the
The program will be publicly launched in 2012, and is expected to reach a level of maturity and sustainability in four years.

The motivations underlying the Standards Program are to do more than increase transparency, although increased transparency is a key principle. The explicit goals are to build capacity in the sector and create a community of practice to work toward continuous improvement. A related goal is, by showing leadership, to delay further government regulation.

The Standards Program is not a voluntary code but a certification process – while voluntary (open to registered charities and public benefit nonprofits), it is more akin to accreditation in many self-regulating professions than to the existing ethical code. A guiding principle is that the initiative is ‘owned’ and operated by the members for its members. Self-managed standards are argued to be more effective than externally imposed ones, and the process is intended to be self-funded (through fees and fundraising, but without government involvement).25

Figure 2: Canada: Institutional Arrangements for Certification

The challenge of governance was how to create an independent arm’s length governing body without the encumbrane – and expense – of new infrastructure to manage it. This was approached through differentiating between governance (decision making), the peer review process of accreditation, and management. The new independent Voluntary Standards Forum is a membership-based organization, which will meet annually, led by an elected, volunteer and infrastructureless, Voluntary Standards Board. The management function is contracted to an existing infrastructure organization (Image Canada) which has full responsibility and liability for the operational aspects. The Standards Board appoints an independent accreditation committee comprised of members and experts familiar with the sector which makes recommendations to the Board on membership, interpretations, and non-compliance. The accreditation process puts a heavy emphasis on learning through self-assessment. Charities and other public benefit nonprofits that wish to go through the accreditation process, and thus earn the right to display the trustmark, join the Forum (with the expectation that they will assess their own conformity with the standards and come forward for accreditation within two years. Peer review of their adherence to the standards is conducted by a national committee comprised of trained
representatives of member organizations which makes recommendations to the Voluntary Standards Board. Accreditation lasts for five years, and compliance is monitored by staff and peer review through spot checks and by investigation of complaints.

The 89 standards cover four categories: governance (27); financial accountability (8); fundraising (20); staff management (24); and volunteer involvement (10). There is an attempt to respect that different standards will be relevant to large but not small organizations by incorporate three levels: one for organizations with less than one full-time staff, those with 1-50 FTEs and those with more than 50 FTEs. The fundraising and financial accountability standards are comparable to the existing code (including maintaining prohibitions on finder’s fees, commissions or percentage based compensation) and in 2013 the existing Code will be fully merged into the broader standards program. The comprehensiveness and content of the standards are certainly on the rigorous rather than the light touch side of regulation, and may be regarded by many as a barrier to entry to the ‘club.’ The alternative of making recruitment easy through lenient standards, however, would have risked a significant compromise of legitimacy as norms of good governance are widely identified in the literature. Indeed, the program seems to have struck about the right balance.

The transparency and learning components of the Standards Program are being supplemented by the development of an online portal, led by Imagine Canada with funding from CRA, that is intended to be a ‘one-stop shop’ for information on charities, including all the CRA information, a tool by which charities can check their information for the annual return before submitting to CRA, and an opportunity for charities to upload their own information about programs, contexts and outcomes. While the portal might look somewhat like GuideStar, charity leaders are quick to point out it is different because it is run by the sector not by a third party. The goal is not to rate charities but promote better understanding of the sector and encourage innovation by enabling charities to ‘tell their story’ and contextualize their work. In this way, it may reduce some of the enormous misunderstanding – whether through negative accounts that set a tone of charities as pickpockets or a reintroduction of Bill 470 – that has been on display in the media and Parliament in recent years.

**Achieving Success**

The launch of a comprehensive good governance certification system is a bold move for Canada’s charitable sector which a decade ago could not build enough interest for a limited voluntary code on fundraising. A few years ago, such a move would likely have raised cries that ‘standards’ cannot be imposed on such a diverse sector, among a variety of other objections. One reason effective self-regulation may actually move forward at this time is that many of its leaders realize that they cannot look to government for policy leadership and support. And, CSOs are coming to realize that they cannot be passive as the regulator is quite prepared for more rules that it deems necessary, and that they need start acting more like a sector by putting some trust into their infrastructure organizations. Indeed, for many observers, perhaps the biggest (pleasant) surprise of the Standards Initiative is the lack of push back from the sector.

As with any certification system, the Standards Program will need to gain acceptance as being legitimate, the process transparent, accountable and sustainable, and the outcomes producing behavioural change. Although the government has put in place its own system of meta-regulation, all reports are that the CRA is not keen to get into the business of actively regulating good governance and, like the Treasury Board Secretariat (which oversees grants and contributions), is interested in better risk-related regulation. Success of the Standards Program
thus could be as valuable for government as for the sector. Under the more formalized meta-regulation in the UK which includes a built-in assessment of the effectiveness of self-regulation, there is enormous pressure, as Breen (2011) notes, to use numbers as a key measure of success and for the FRSB to become sustainable by 2011 when the initial seed funding runs out. Because the CRA approach to meta-regulation is a softer touch and the Standards Program has greater financial independence, it can operate more in the manner of a club which will give it greater latitude to define the terms of its own success. While take-up will be important, who participates and their satisfaction with the learning provided through participation is likely to be as important as numbers alone. The Canadian leaders have been astute in positioning the program as capacity building and learning as this may go a long way to crafting expectations. They have also managed the appropriate balance in setting sufficiently rigorous standards that will force CSOs to stretch themselves, even if it comes at some tradeoff in initial recruitment.

Lessons from other sectors point to the value of such field building and, in particular, to making use of the supply chain as incentives for participation. Getting uptake by the small, autonomous organizations which are the bulk of this sector will not be easy. The good news, however, is that the Canadian sector is not dominated by strong associations which, if unified in resistance, could kill certification very quickly. Creative use of verticality (e.g. within federations) and supply chains (e.g. third party fundraisers as suppliers to charities), could enhance engagement with a wide range of stakeholders and provide additional incentives for membership in the Standards Forum. Another clear lesson from other sectors is that field building does not happen without external financial support, and such support is needed not just to operate the certification body, but to enable other organizations to build interest and demand. And, that does not occur through passive grant making; if funders want certification to succeed, they need to take an active and coordinated stance, working with each other and the proponents on a strategy for field building and maintenance of a certification body with adequate governance capacity. While the Canadian initiative has chosen, probably wisely, to remain financially independent of government, there is still much that governments and other funders can do to promote viability. For example, governments can provide important incentives through their contracting and procurement policies and work with the sector to provide learning opportunities for charities.

It is much too early to tell if certification will succeed in Canada’s civil society sector. Unquestionably, the challenges are significant and this is entirely new territory for the lead infrastructure organization. The initiative has gotten off on the right foot, however, by framing the problem not just a donor empowerment or transparency, but as education and creating a community of good practice. The fact that the stakes of not succeeding are high, as the regulator has already indicated with its policy on fundraising that it will be paying much more attention to good governance, means that there is no turning back at this stage.

**CONCLUSION: SELF-, META-, OR HYBRID REGULATION?**

The regulation of charitable fundraising is no longer about the regulation of fundraising. Rather, fundraising is increasingly seen as one manifestation of governance systems, and its regulation is being integrated into broader regimes for the promotion of good governance. Different countries are taking different approaches depending on a variety of contextual factors, but most involve some combination of state meta-regulation that steers government’s desired course and sector self-regulation. Canada has embarked down both paths at once, toward both stronger (but limited) government meta-regulation and a new experiment in sector self-regulation. The
government’s enthusiasm for regulation of good governance is more modulated than in the US due to jurisdictional constraints (which the US also faces but will not be impeded by them) and the lack of capacity of the regulator. Consequently, the Canadian regulator is cautious about how it approaches regulation of the internal operations of charities or intruding at any point in the fundraising lifecycle other than annual reporting of expenditures. However, the Canadian regulator has demonstrated that it will be an active traditional regulator, bringing in more stringent rules as needed and conducting more extensive audits.

Better governance cannot be achieved by rules alone, but requires extensive education, training, and dialogue on the part of the regulator: in effect, the emphasis needs to move from compliance and sanctions to education and relationships – toward more responsive regulation. While both the IRS and the Charity Commission have such capacity, the Canadian Charities Directorate – a small part of the tax agency – does not. The success of self-regulation in the UK has also been propelled by strong infrastructure organizations, a sense of being and acting like a sector, and substantial investment by government, all of which are absent in the Canadian context. For both state and self-regulation to succeed in Canada, the two processes should not operate separately as two solitudes. Rather, collaboration and support by government (for example, by using its procurement and other policies to create incentives for certification) is needed. Longer term, a hybridized model may emerge that involves integrating strong self-regulation and balanced, proportional government regulation, buttressed by opportunities for education and ongoing learning. The immediate need, however, is to build a credible, effective process of sector certification, thereby strengthening the charitable sector and its relationships with various stakeholders, with the federal government playing a supporting rather than a lead role.

However the model evolves, it is evident that governments will be “in this discussion to stay,” as the senior IRS official proclaimed. Their potential enthusiasm for regulating charitable fundraising and good governance needs to be tempered with a hard look at assumptions about the rationale for regulation and the impact of both more rules and greater meta-regulation. And, civil society sectors need to figure out how they can be serious players in new forms of self- and co-regulation because the historical practice of regarding good governance as a purely private matter has faded.
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ENDNOTES

1 In a very broad sense, charitable fundraising refers to the process of raising funds for charitable purposes (Hopkins 2010), although for purposes of regulation this normally excludes membership fees and purchase-of-service contracts. Even this somewhat narrower definition embraces a broad swath of activities including solicitation of donations and gifts, both large and small, through various means (e.g. gift planning, workplace giving, direct mail, street collections, the internet), events, lotteries, charitable gaming and the sale of goods and services – from Girl Guide cookies to specialized expertise.

2 For instance, in recent years a journalist with the Toronto Star newspaper doggedly investigated the Canadian charitable sector, headlining several cases of unusually high salaries for fundraisers, misspending for private gain, the use of charities as tax shelters, and the issuance of bogus tax receipts by several organizations (Donovan 2009). Issues of fraud do not always involve wrongdoing on the part of the charity, however; as a 2008 report notes, charities, particularly small ones, are often the victims of fraud (see Chen and Salterio, 2008).

3 Effective June 2010, the Canada Revenue Agency (the national regulator of charities) revoked the status of the Canadian Lacrosse Association for issuing more than $60.7 million in donation receipts for abusive transactions arising from its role as a participant in tax shelter arrangements (see, http://www.cra-arc.gc.ca/nwsrm/rlss/2010/m06/m100607-eng.html). This is just the most recent in a number of revocations of status made in the past two years for organizations masquerading as charities and fraudulent issuing of receipts for tax shelter purposes (see Blumberg 2010)

4 The requirement for information and reporting may occur at different points of the fundraising lifecycle (Breen 2009): at pre-solicitation (e.g. requiring pre-clearance for an event or the authorization to fundraise); the moment of solicitation (e.g. requiring disclosure to donors of the percentage of the donation that goes to the charitable cause); the ‘aftermath’ (e.g. when funds are transferred from a third party fundraising businesses to a charity); and/or the use of the proceeds for charitable purposes (e.g. placing limits on fundraising expenses, as reported to a central regulator).

5 State regulation generally places limits on ‘reasonable’ fundraising expenses (often by a cap on the proportion that can be spent on fundraising or administration) and/or requires that charities disclose the ratios of their fundraising to overall program revenues (either at the time of solicitation or at year end tax filing). The greatest challenge for such rules is that it is difficult to isolate fundraising practices from
organizational contexts and overall operations for a variety of reasons. In particular, limits on fundraising expenses run into problems of consistency in accounting, in what gets counted as a fundraising versus a program expense. Many regulators have tried to introduce more consistent accounting standards and provide explicit guidance as to what can be legitimately regarded as a charitable program expense (see Morris 2006), but it takes considerable auditing as well as education to produce such consistency. On the issues associated with reporting of fundraising ratios see Flack (2004) and Steinberg and Morris (2010).

Note that percentage based fundraising is contrary to the ethical code of the Association of Fundraising Professionals and the charitable sector’s own code.

In the US responsibility for the regulation of charitable fundraising rests with the states most of which had legislation that either imposed fundraising caps or required point-of-solicitation disclosure, and many were seen to be regulating to the point of extensive micromanagement. When a Supreme Court decision in the 1980s determined that such regulation violated the first amendment right to free speech (Brody 2003; Hopkins 2010; Freemont-Smith 2004) these hard edge rules had to change. State level regulation remains important, however, and generally requires that charities seeking public support must register with the state before soliciting funds in that state, file their financial documents, describe and report on their fundraising activities, and cover the administrative expenses of monitoring charities, although laws vary considerably from one state to the next (see Barber 2010). Congress has in recent years taken an interest in accountability of the nonprofit sector, with the House and Senate Finance Committees conducting a number of hearings on compliance and accountability. The Senate Finance Committee encouraged the Independent Sector, the large national umbrella organization, to establish an independent panel to examine accountability in the sector. The Panel’s 2005 report set out principles and a long list of specific recommendations for good governance and management practices and urged nonprofits to improve their performance, but rather than look to third party certification, it recommended stronger federal and state regulation (Panel on the Nonprofit Sector 2005). The IRS took up the recommendations with strong statements about the need for oversight of good governance as a means of preventing abuse and as part of a system of risk regulation. Beginning in the 2008 tax year, public reporting on several aspects of governance and management practices were required on the annual informational return. Although not backed directly by penalties and good governance is not treated as a compliance issue, the reporting may be used to trigger an audit.

Scotland established a regulatory regime for charities in 2005, but rather than run a separate standards board for charitable fundraising, the Office of the Scottish Regulator has an agreement with the FRSB.

A variety of new rules on charities and deemed equivalents, mainly amateur athletic associations, were introduced in the March 2011 federal budget which died when the election was called, but these measures are likely to be reintroduced in a new parliament. These include extending the transparency and accountability requirements to these qualified donees and allowing the tax agency to refuse to register a charity or equivalent if individuals with a history of fraud or abuse of charities are involved in its management or leadership.

In the charitable sector, independent third parties – charity ‘watchdogs’ – have assumed significant quasi-regulatory roles by setting themselves up as self-proclaimed independent watchdogs, akin to the Better Business Bureau for the private sector. Their strength lies in providing easy access to comprehensive and comparable information through a single portal. On websites such as Guidestar the information provided covers much more than fundraising expenses and activities, but includes descriptions of the organizations’ full range of financial information and activities, including their own assessment of results. Some go further in providing ratings of effectiveness according to a set of standards and enable organizations that meet these standards to display a hallmark of approval. They also receive and publicize complaints of misconduct by charities. In the United States, the watchdog, BBB Wise Giving Alliance, is not just akin to the Better Business Bureau but is actually a subsidiary of it (having merged with another watchdog in 2001). The problem associated with the self-proclaimed watchdogs is that their standards often are designed without input from CSOs and thus the ‘regulated’ do not have full acceptance or sense of ownership over the standards or the process. Consequently, the external watchdog may have limited influence on organizational learning and little ability to create incentives for self-improvement. Nor do they have the hammers of a state regulator when needed. As third parties, these watchdogs are not the same as sector self-regulation, and are not considered as such here.

In the nonprofit sector, accreditation entrepreneurs have perhaps been most active in the United States. One of the most well established and widely regarded as rigorous processes is the Evangelical Council for Financial Accountability (ECFA). Established in 1979 in response to scandals and a perceived threat of
government regulation, the ECFA is a specialized accrediting body that provide standards and peer regulation to Christian nonprofit organizations and investigates complaints; it does not serve as the political or representational voice for its members (see Bothwell, 2000). The Maryland Association of Nonprofits operates a similar process to a wide audience of nonprofits and has coupled its hallmarking process with extensive training (similar associations exist in other states). Foundation support has recently enabled the Maryland Association to franchise its model to other state nonprofit associations (Sidel, 2005) and to establish the Standards for Excellence® Institute to replicate the process nationwide.

Bartley (2007) identifies three factors that led to the serious and coordinated effort on the part of foundations: 1) a common (liberal) ideology that supported sustainability but also welcomed private governance to address government failure; 2) history of funding environmental NGOs; and 3) experience in working with the other foundations.

Auld and Gulbrandsen (2010) show how the Marine Stewardship Council approaches procedural transparency instrumentally while the Forest Stewardship Council, a membership organization, sees it as an end in itself.

The differences in standards for civil society are considerable, ranging from the broad and general ones of the Council of Foundations to the very detailed and stringent ones of the Netherlands (see Breen 2011).

These are in effect the same requirements that had been in place by many US states before being struck down as an infringement on free speech. Several other provinces have some involvement, but it is limited. Saskatchewan sets rules for businesses fundraising on behalf of charities; Manitoba provides an authorization process and sets rules for charities fundraising; and in Ontario, the Ontario Public Guardian and Trustee can act against fundraising abuses (see Broder and Conley 2010).

The policy also prohibits certain types of fundraising activity, notably where it: involves illegal conduct (e.g. tax shelters), misleading conduct or is contrary to public policy; is an end in itself; or provides excessive private benefit.

A primary reason for this is to adhere to the fundamental tenets of charity law - that entities be analyzed based on their purposes, rather than their individual activities. Appreciation to Peter Broder of the Muttart Foundation (who was on secondment to CRA to assist in drafting the Guidance) for pointing this out and for making other detailed comments on an earlier draft of this paper.

The evaluation grid sets the standards (costs/net proceeds) as: above 70% - rarely acceptable and will raise concerns with CRA; 35% and above – may raise concerns, and the CRA will examine the average ratio over recent years to determine if there is a trend of high fundraising costs; under 35% - unlikely to generate concerns. These categories were reduced from five to three following concerns raised during the consultation that the CRA was setting up ‘bright lines’ or standards, and they were rephrased to indicate that the CRA uses these as guidance, not standards. See http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-028-eng.html. While the CRA was well aware of media reports in recent years over excessive fundraising and the public concern this had generated, it did not attempt to establish clear standards in large part because its constitutional jurisdiction over the internal operations of registered charities remains unsettled. The courts have held that CRA guidance does not have the force of law and there is a paucity of case law dealing with permissible or impermissible conduct by charities in how they operate in regard to fundraising or other activities. My thanks to Peter Broder for clarifying these constraints.

Introduced in 1976, the DQ was intended to ensure that charities spend their revenues on charitable purposes and to help curtail fundraising costs and limit capital accumulation. However, its impact varied considerably. For example, charities that have a wide range of revenue sources could easily meet the quota because all charitable expenditures counted, but only receipted revenues counted as income. The rule was very constraining on small and rural charities, however, because they rely mainly on tax-receipted donations. Thus the 80-20 rule was seen to impose an unduly complex and costly administrative burden on charities and unnecessarily constrain their flexibility, without achieving the core purpose of limiting spending on fundraising and non-charitable activities.

In part, the emphasis on a voluntary system with standards that would be set by the sector was a reaction to the entry of the Better Business Bureau as a self-proclaimed independent watchdog that had begun reporting its own standards which were widely seen not to be particularly realistic.
Although the VSI produced some excellent research, launched a major program to support volunteerism (which has since been cancelled), and developed an Accord that sets out principles for engagement between the federal government and the voluntary sector (which had little teeth and, with a change of government, is now almost completely ignored), it did not deal with the major policy, financing and regulatory issues that the sector leadership had hoped it would. In addition, the injection of significant project funds and their subsequent withdrawal or end, destabilized several infrastructure organizations, reducing the leadership capacity to drive changes within the sector (Phillips, 2011).

With a membership of 1,200, Imagine Canada’s strength is not in numbers and, like all Canadian infrastructure organizations, it suffers from a lack of policy capacity. Whereas its counterpart in England, NCVO, has a policy staff of 45, Imagine Canada has a policy shop of one or two people. In spite of these shortcomings, there are no real contenders for national leadership. One important new development is the creation of cross-cutting regional networks, based loosely on the Chamber of Commerce model, which have formed into a national federation, but their governance approach is to keep the strength at the regional rather than the national level. In addition, the foundation sector is quite weak in Canada and, while represented by a national association (Philanthropic Foundations Canada), there are no strong regional or subject networks of funders as exist in the United States.

Donor policies include such things as provision upon request of information about the charity (annual reports, board members etc.) and treating donors with respect, among others. The section on fundraising practices requires charities or those fundraising on their behalf not to make claims that cannot be substantiated, and to provide information on gross revenues, net proceeds and fundraising costs. It also bans commission based and finders fees. Financial management practices cover broader aspects of systems for reporting and financial management including a requirement that the board regularly review the cost effectiveness of its fundraising.

The fees for a charity with annual revenues of under $100,000 is $100 CDN; for those with revenues of $1 million the fee is $750 and for those with revenues over $100 million the fee is $4,000.

The three insurance companies that had supported the Ethical Code each contributed a total of $300,000 CDN over three years, and the Initiative has a very active fundraising committee. Fees are set on a sliding scale based on the size of operating budgets; the application fee (paid once and upon renewal in five years) ranges from $400 for an organization with annual operating expenses under $250,000 to $8,000 for those with expenses over $10 million; in addition, the annual license fee ranges from $200 to $4,000. By comparison, the annual membership fee in the UK Fundraising Standards Board ranges from £30 to £5,000 for organizations with budgets over £50 million (and would be £1,200 for those with budgets of between £10 million and £15 million).

In the UK, for example, the FRSB has encouraged grantmakers to make accreditation a requirement for funding, although this is approach brings complications. Peter Broder (personal communication) notes that efforts had been made by the Centre for Philanthropy after the launch of the initial iteration of the Ethical Fundraising and Financial Management Code to encourage foundations and other funders to make code adoption a criterion in considering funding applications. Most funders rejected this approach as creating an additional barrier to charities in accessing funding. Once a code program is linked to fee-paying membership, as with the Standards Forum, such a requirement means that the funding is also imposing a cost (that of membership) on the organizations it funds. Potentially, at least for government funders, such an approach might also result in litigation if it was seen to inappropriately bias the procurement process. While complex, the issue of how funders can assist in creating incentives for certification needs to be openly debated.