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TOWARD A MODERNIZED CHARITY FRAMEWORK FOR CANADA

Submission to Special Senate Committee on the Charitable Sector

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Executive summary

Canada’s charity law is widely recognized as antiquated and ill suited for modern purposes. Charities, politicians, lawyers and a consultation commissioned by the current government have all recommended a new legislative framework. A recent court decision striking down restrictions on political activities further highlights the urgent need for a new law.

With new legislation comes the opportunity to rectify a longstanding disparity between the treatment of theistic and nontheistic worldviews within the Canadian charity regime. Specifically, we recommend creating a statutory definition of charitable purposes that includes either the removal or expansion of “the advancement of religion.”

Recommendations:


2. Within that framework, create a statutory definition for charity that treats theistic and nontheistic worldviews equally.

About the BC Humanist Association

Since 1984, the British Columbia Humanist Association (BCHA) has provided a community and a voice for Humanists, atheists, agnostics and the non-religious in BC. Humanism is a worldview that promotes human dignity without belief in a higher power. We campaign for the rights of the non-religious and an end to religious privilege. We are a registered charity.
A new legislative framework for charities in Canada

In its March 31, 2017 report, the Consultation Panel on the Political Activities of Charities made four recommendations:

1. Revise the CRA’s administrative position and policy (including its policy guidance, CPS -022 Political Activities) to enable charities to fully engage in public policy dialogue and development.

2. Implement changes to the CRA’s administration of the ITA in the following areas: compliance and appeals, audits, and communication and collaboration to enhance clarity and consistency.

3. Amend the ITA by deleting any reference to non-partisan "political activities" to explicitly allow charities to fully engage, without limitation, in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes.

4. Modernize the legislative framework governing the charitable sector (ITA) to ensure a focus on charitable purposes rather than activities, and adopt an inclusive list of acceptable charitable purposes to reflect current social and environmental issues and approaches.

Since then, the Government has not provided a response. However, on July 16, 2018, the Ontario Superior Court of Justice found sections 149.1(6.2)(a) and (b) of the Income Tax Act to be unconstitutional.¹ Further, Judge Morgan issued an order that “charitable activities” be read to include political activities. This ruling effectively enacts the Panel’s third recommendation and requires the CRA to update its policies and administration accordingly.

While the Government has announced its intentions to appeal the ruling, the Hon Diane Lebouthillier, Minister of National Revenue, and the Hon Bill Morneau, Minister of Finance, have also said that the Government intends to present legislation this fall to “implement changes consistent with recommendation no 3” of the Report.²

We are encouraged by the Ministers’ pledge but we want to see the Government go further and implement all four recommendations. We are therefore asking this Senate Committee to press the Government to ensure any new legislation creates a truly modern charitable framework.

Developing a new charitable framework is not as daunting as it sounds. Nearly every Commonwealth country has adopted a Charities Act that provides a robust framework.

¹ Canada Without Poverty v AG Canada, 2018 ONSC 41147  
As part of their recommendations for the Expert Panel, several charities have already produced possible lists of acceptable charitable purposes that could be included in such a Canadian charities act.\(^3\) Based on our discussion below, we would recommend that the advancement of religion under such legislation either be omitted entirely or explicitly expanded such that “religion” includes (i) a religion that involves belief in more than one god and (ii) a religion that does not involve belief in a god.\(^4\)

**Equality between theistic and nontheistic charities**

The *Income Tax Act* does not provide a clear definition of “charity” or what activities are considered charitable. Instead, the Canada Revenue Agency (CRA) relies on case law dating back to 1601\(^5\), with the current purposes defined by the *Pemsel* case in England in 1891\(^6\). This decision defined four categories of charitable purposes: relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community. Other Commonwealth countries, including the England and Wales, Australia and New Zealand, have all defined charity in legislation, leaving Canada as an outdated exception.

While the fourth *Pemsel* category has slowly been broadened by jurisprudence, as a principle, we do not believe it should not be up to individuals and organizations who seek to better their communities to spend their finite time and resources to argue their case in court. Parliament has utterly failed to modernize this definition in over one hundred and fifty years. Because of this failure, our definition of charities predates the protections afforded by the *Charter of Rights and Freedoms* and discriminates against non-religious worldviews and philosophies, such as Humanism.

This discrimination is most clear in the definition of religion adopted by the CRA. For a religious purpose to qualify as charitable there must be “an element of theistic worship, which means the worship of a deity or deities in the spiritual sense.”\(^7\) There is no corresponding charitable purpose for non-theistic Canadians to promote their worldviews. Charities that represent and advocate for the non-religious, like ours, are limited to promoting education about humanism or promoting human rights more generally. Whereas groups that want to promote a specific religious and theistic worldview are automatically deemed to be providing a tangible social benefit.

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We see this privilege given to theistic worldviews as violating the Charter rights of atheist, Humanist and non-religious Canadians. As Supreme Court of Canada Chief Justice McLachlin wrote in *Mouvement laïque québécois v. Saguenay* 2015:

The state’s duty of religious neutrality results from an evolving interpretation of freedom of conscience and religion. The evolution of Canadian society has given rise to a concept of this neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard, which means that it must neither favour nor hinder any particular belief, and the same holds true for non-belief. The pursuit of the ideal of a free and democratic society requires the state to encourage everyone to participate freely in public life regardless of their beliefs. A neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person’s freedom and dignity, and it helps preserve and promote the multicultural nature of Canadian society. **The state’s duty to protect every person’s freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others.** If the state adheres to a form of religious expression under the guise of cultural or historical reality or heritage, it breaches its duty of neutrality. [emphasis added]

By maintaining the “advancement of religion” as a core charitable purpose, the CRA, and therefore the state, is providing benefits to certain believers that are denied to non-believers and those religions deemed not to be charitable.

We therefore recommend that Parliament adopt legislation codifying a definition of charitable purpose in legislation to deal with this inequity. We see two clear paths forward.

1. **Remove the advancement of religion as a charitable purpose.**

The simplest path forward is to omit “advancement of religion” in a new statutory definition. Religious organizations that contribute to the public good in other ways may be recognized under other purposes, such as relief of poverty.

“Advancement of religion” was developed based on Christian (or sometimes Judeo-Christian) understandings of religious practice. As such, the CRA has adopted a view that the advancement of religion requires “a doctrine that there is a God(s) or Supreme Being(s), a doctrine that adherents worship or revere the Supreme Being and a particular and comprehensive system of faith and worship.” However, even within this fairly clear

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8 *Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, [2015] 2 SCR 3*
9 Advancement of religion and charitable registration 2016, released under ATIP. We note with concern that this draft was not released publicly but was seemingly developed in closed-door consultations.
(albeit discriminatory) definition, the CRA has chosen to make a seemingly arbitrary exception for Buddhism. Outside of its list of recognized major world religions, the CRA says it may undertake a review of a belief system’s doctrines and activities to determine whether it may qualify as a religion. As religion is a deeply and inherently personal, this is a troubling approach whereby the legitimacy of one’s faith is being decided upon by bureaucrats.

We are also seeing in nearly every survey clear evidence that religious attendance is in decline across Canada. Religious identification measured by Statistics Canada (which includes those who say they are no longer practicing), has dropped from 83.5% in 2001 to 76.1% in 2011.10 Our own surveys, found that only 33% of British Columbians said they practice a religion or faith in 201311, which fell to 27% in 201612. We also found that 15% of British Columbians said they attended religious services on a weekly basis in 2013, which had declined to 11% in 2016. This suggests that the “advancement of religion” is increasingly less relevant to many Canadians as we become a more secular country.

By eliminating “advancement of religion” as a charitable purpose, the charitable works done by religious charities can be captured under other, more specific, charitable purposes, such as relief of poverty. This has the additional benefit of no longer requiring bureaucrats to act as arbiters of which faiths are legitimate religions, which risks discrimination against new and minority faiths, and ultimately recognizes the secular nature of Canada.

2. **Broaden the definition of religion while including a strict public benefits test.**

The other option we support is to broaden “advancement of religion” in line with an amendment adopted in England and Wales. Under such a change, advancing atheistic “religions” can be considered charitable and all charities are still required to pass a “public benefits” test.

The British Parliament last updated its Charities Act in 2011 to state that religion includes “a religion which involves belief in more than one god, and a religion which does not involve belief in a god.”13 This amendment followed lobbying by Humanists UK.14 Following this new definition, Humanists UK was able to revise its charitable purposes to promote (among other purposes) “the advancement of Humanism.”15

The English definition also requires that charities “must be for the public benefit.” This important caveat removes what may often be an automatic assumption that the

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10 [https://www150.statcan.gc.ca/n1/pub/91-003-x/2014001/section03/33-eng.htm](https://www150.statcan.gc.ca/n1/pub/91-003-x/2014001/section03/33-eng.htm)
11 [https://www.bchumanist.ca/2013_bc_religious_and_secular_attitudes_poll](https://www.bchumanist.ca/2013_bc_religious_and_secular_attitudes_poll)
12 [https://www.bchumanist.ca/religious_and_secular_attitudes_2016](https://www.bchumanist.ca/religious_and_secular_attitudes_2016)
14 Then the British Humanist Association.
promotion of religion is inherently beneficial. While the language is still vague, it properly puts the onus on charities to demonstrate their value to broader society. An insular group that fails to interact with broader society could arguably fail such a test and lose its subsidy.

The CRA already applies a public benefits test under the common law; however, its own guidance notes “the difficulties inherent in the application of the rules” and that courts and legal commentators “have noted the lack of clarity and certainty” with the common law approach.16 It is clear that Parliament should bring forward a statutory definition to provide clarity to the sector.

Applying such a requirement to religious charities would not be unprecedented nor would it unconstitutionally infringe on the freedom of religion of those religious groups (or their congregants). In 2007, the Town of Gibsons decided that organizations holding property that was tax-exempt would have to justify their exemptions under a public benefits test.17 The town sends a form to various organizations, including religious properties, and asks what their “contribution to the community” is.18 When the City of Coquitlam adopted a similar procedure, a congregation of Jehovah’s Witnesses challenged it but the BC Supreme Court ruled that the infringement on their freedom of religion was not substantial.19 Further, as the majority found in Law Society of British Columbia vs Trinity Western University, decisions that limit religious freedom can be proportionate and reasonable when there are overriding public interests.20

**Conclusion**

Given the recent ruling striking down the prohibition on the political activities of charities and the Government’s stated commitment to bring forward legislation to amend Canada’s charities regime this fall, now is the ideal time for the Senate to make clear recommendations on what the future of Canadian charity law should look like. We believe this should include a clear statutory definition of what a charity is and bring equality under the law to how the government treats religious and nonreligious worldviews.

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19 Trustees of Westwood Congregation of Jehovah’s Witnesses v City of Coquitlam, 2006 BCSC 1208