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## SILENCED: HOW NON-RELIGIOUS CHARITIES ARE CENSORED BY THE CRA

*BC Humanist Association submission to the Canada Revenue Agency's online consultation on charities' political activities.*

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### Executive summary

The rules governing Canada's charitable sector are seriously outdated and discriminate against the non-religious. New legislation is urgently needed to modernize these rules and ensure that the charitable organizations that millions of Canadians support are free to make reasoned, evidence-based arguments without fear of government reprisal.

Simple policy changes or clarifications are insufficient to achieve this goal. We recommend that Parliament adopts new legislation that:

1. Defines what a charity is in law and that such a definition ensures equality between theistic and non-theistic worldviews;
2. Empowers charities to choose the most effective approaches to achieve their purposes, within the limits of the law;
3. Ends arbitrary restrictions on charities' political activities;
4. Narrows the requirement that charities remain non-partisan to just the direct support or opposition of a political party or politician during an election campaign; and
5. Explicitly protects the free speech of charities.

### 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.

## Recommendation 1: Create an inclusive statutory definition of ‘charity’

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<sup>1</sup>, with the current purposes defined by the *Pemsel* case in England in 1891<sup>2</sup>. This ruling 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including the United Kingdom, Australia and New Zealand, have all defined charity in legislation, leaving Canada as an outdated exception.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, by principle it should not be up to individuals and organizations who seek to better their communities to spend their little time and resources to argue their case in court. Parliament has utterly failed to modernize this definition in over one hundred years. As a result 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.”<sup>3</sup> 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.

This privilege given to theistic worldviews violates the Charter rights of countless atheist, Humanist and non-religious Canadians. As Supreme Court of Canada Chief Justice McLachlin wrote in the ruling *Mouvement laïque québécois v. Saguenay* 2015<sup>4</sup>:

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

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<sup>1</sup> *Statute of Charitable Uses 1601*, England.

<sup>2</sup> *The Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] AC 531 at 583.

<sup>3</sup> “Summary policy CSP-R06”, Canada Revenue Agency. <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-r06-eng.html> Oct 25, 2002.

<sup>4</sup> *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3

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 uncharitable.

We therefore concur with the many groups recommending that a definition of charity be codified in law<sup>5</sup>. We further argue that legislation must deal with this inequity in one of two ways.

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

The most straightforward solution is simply to omit “advancement of religion” as a purpose in a new statutory definition.

Religious attendance is continuing to decline. Our June 2016 Insights West poll<sup>6</sup> found that 69% of British Columbians do not practice a religion or faith and only 15% of British Columbians attend religious services at least monthly. These numbers changed from 64% and 19% in 2013<sup>7</sup>. As Canada becomes increasingly secular, the arguments for subsidizing religious bodies becomes increasingly tenuous.

There is no doubt that many religious charities do provide a tangible public benefit beyond simply being a religious organization. For example, many churches work to relieve poverty through soup kitchens and homeless shelters. However, those activities are themselves charitable and there is no reason that these organizations can't frame their purposes as such.

Beyond that, while the overwhelming majority of religious organizations and religious Canadians work to benefit the greater community, some oppose the human rights of marginalized groups. Many religious organizations oppose LGBTQ equality, the equality of men and women, reproductive freedoms or medical assistance in dying. While it is everyone's right under the Charter to hold and argue for these beliefs, the government

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<sup>5</sup> See for example: West Coast Environmental Law, Environmental Defense

<sup>6</sup> BC Humanist Association. (2016) *Religious and Secular Attitudes 2016* [Data Set]. Insights West [Producer]. [http://www.bchumanist.ca/religious\\_and\\_secular\\_attitudes\\_2016](http://www.bchumanist.ca/religious_and_secular_attitudes_2016)

<sup>7</sup> BC Humanist Association. (2013) *2013 BC Religious and Secular Attitudes Poll* [Data Set]. Justason Market Intelligence [Producer]. [http://www.bchumanist.ca/2013\\_bc\\_religious\\_and\\_secular\\_attitudes\\_poll](http://www.bchumanist.ca/2013_bc_religious_and_secular_attitudes_poll)

should not be in the business of legitimizing and subsidizing organizations that support discrimination.

Meanwhile, some Christians believe that churches and missionary groups should voluntarily give up charitable status as the advantages conflict with the idea of being driven purely by faith to do God.<sup>8</sup>

Ending the automatic charitable status of religious groups would also provide additional tax savings. In 2012 the Canadian Secular Alliance calculated that removing “advancement of religion” as a charitable purpose could save the government over \$1 billion per year.<sup>9</sup>

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

Alternatively, new legislation could follow the path of England and Wales, whereby atheistic “religions” are considered charitable and all charities are required to pass a “public benefits” test.

England and Wales 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.”<sup>10</sup> This amendment followed years of lobbying by the British Humanist Association. Following this new definition, the BHA was able to revise its charitable purposes to promote (among other purposes) “the advancement of Humanism.”<sup>11</sup>

The English definition also requires that charities “must be for the public benefit.” This important caveat removes the automatic assumption that the 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 would arguably fail such a test and lose its subsidy.

Such a requirement would not be unprecedented nor necessarily unconstitutional. In 2007, the Town of Gibsons decided that organizations holding property that was tax-exempt would have to justify their exemptions<sup>12</sup>. The town now sends a form to those various organizations, including religious properties, and asks what their “contribution

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<sup>8</sup> “No more charitable status: A challenge facing Canadian Christian churches, ministries and missions groups,” Anonymous. <https://nomorecharitablestatus.com/> Oct 10, 2015.

<sup>9</sup> “Submission to the Standing Committee on Finance RE: Tax incentives for charitable donations”, Canadian Secular Alliance. <http://secularalliance.ca/wp-content/uploads/2012/02/csa-submission-to-the-standing-committee-on-finance-9feb2012.pdf> Feb 9, 2012.

<sup>10</sup> *Charities Act* 2011, UK. <http://www.legislation.gov.uk/ukpga/2011/25/contents/enacted>

<sup>11</sup> “Humanism, education, equality and mutual understanding: BHA celebrates its new charitable Objects”, British Humanist Association. <https://humanism.org.uk/2011/10/13/news-908/> Oct 13, 2011.

<sup>12</sup> A taxing time for churches and social groups, *Vancouver Sun*. Apr 14, 2010.

to the community” is<sup>13</sup>. Council then reviews those submissions. While we haven’t concluded an exhaustive search of municipal tax policies, Gibsons’ policy is not unique. A congregation of Jehovah’s Witnesses challenged such a policy by the City of Coquitlam but the BC Supreme Court ruled that the infringement on their freedom of religion was not substantial<sup>14</sup>.

## **Recommendation 2: Permit charities to choose their most effective approaches**

As others have clearly pointed out<sup>15</sup>, there is an inherent tension between the *Income Tax Act’s* focus on “charitable activities” and the common law’s emphasis on “charitable purposes.”

In our own work, as with many charities, there are many activities that need to happen behind the scenes before a charitable program can be implemented. One of our purposes is to provide meaningful Humanist ceremonies, but doing this requires an infrastructure to train and support Humanist Officiants, to connect potential members of the public with those Officiants and to raise awareness about their services through a website and social media promotions. Yet under a strict reading of the *Act*, only the ceremony itself might be considered charitable. Compare this to the for-profit world where selling a widget requires having a retail store, hiring staff, paying electrical bills and numerous other overhead costs. Yet all of these are considered business-related activities as they are necessary to sell the widget.

This confusion between purposes and activities becomes stifling when it comes to achieving our purposes. Coming back to our ceremonies purpose, under BC law, our Officiants are unable to legally solemnize marriages. To fulfill our charitable purpose, we must be free to advocate for a change in the *Marriage Act* of BC, even if such activities would fail the CRA’s test for whether those activities were political. We are literally unable to achieve one of our charitable purposes without undertaking political activity.

Redefining charities solely in terms of purposes would relieve this tension and enable us to proceed without needing to jeopardize our charitable status. These charitable purposes can be connected with a public benefits test, described above. Any restrictions on the activities of charities should only be that those activities be well reasoned and based on the best available evidence.

## **Recommendation 3: Remove restrictions on political activities**

The distinction between “charitable” and “political” activities has always been blurry at best. Such a line is increasingly meaningless in an era when organizations set up to solve

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<sup>13</sup> 2.8 Permissive property tax exemption, *Policy and Procedure Manual, Town of Gibsons*. Oct 20, 2009. <http://www.gibsons.ca/include/get.php?nodeid=292>

<sup>14</sup> *Trustees of Westwood Congregation of Jehovah's Witnesses v City of Coquitlam*, 2006 BCSC 1208

<sup>15</sup> “Submission of the West Coast Environmental Law Research Foundation”, West Coast Environmental Law. <http://wcel.org/resources/environmental-law-alert/new-law-needed-protect-citizens-voices-through-charities-they-sup> Nov 16, 2016.

society's greatest problems are looking beyond short-term solutions towards systematic changes that often require new laws and policies.

In addition to the tensions described with our efforts to perform meaningful Humanist ceremonies, we also often find ourselves called upon by our members or supporters to challenge religious privilege in public policy at some level. Taking these campaigns on requires us to skirt that line between the charitable defense of secularism and human rights and sometimes specifically advocating for changes in policies. In recent months we have written to school districts regarding the distribution of Gideon Bibles in public school classrooms, presented to the BC Legislature's Health Committee on religious coercion in addictions recovery programs, written briefs for Parliament's committees on medical assistance in dying and intervened at the BC Court of Appeal to argue against an ever-expanding definition of freedom of religion. Each of these activities could be considered political but they are also core to our efforts to defend the rights of the non-religious and the principle of secularism.

While some of these activities are not considered political under the CRA's policy, our most effective campaigns require a variety of tactics. For example, a letter to a superintendent expressing concerns over religion in a public school might be considered a simple representation to a public official and therefore charitable. However, in our experience, that typically has little effect unless backed with public pressure by discussing the issue in the media, encouraging supporters to write to the district and raising the possibility of a human rights complaint. While some of these activities may be considered political, in the eyes of our supporters, this work is critical to our mission.

Even in my professional capacity and having reviewed the CRA's materials, I'm still unsure as to whether the act of submitting this consultation (or my attendance at an in-person consultation) should be recorded as a political activity. While the CRA's policy statement suggests presenting a well-reasoned position to a Parliamentary Committee is permitted, this does not match the experience reported by groups like the West Coast Environmental Law Research Foundation (WCEL) during a CRA political activities audit<sup>16</sup>. They report that despite the explicit phrasing in the policy documents that making a presentation to a public official is considered charitable regardless of whether they were invited or not, auditors from the CRA considered uninvited submissions to be political activity. WCEL goes on to point out that the CRA is not required to follow its own policies, providing even greater uncertainty that cannot be solved with new policies.

As an organization we are often called upon by atheists across BC who are concerned about the influence of religion in their schools or municipalities. We stand up for the rights of these individuals often by communicating directly with public officials, reminding them of their duties of religious neutrality under the law. We generally

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<sup>16</sup> "Submission of the West Coast Environmental Law Research Foundation", West Coast Environmental Law. <http://wcel.org/resources/environmental-law-alert/new-law-needed-protect-citizens-voices-through-charities-they-sup> Nov 16, 2016.

consider this to be part of our charitable mandate but the uncertainty is present and could hamper our ability to support human rights in the future.

Because we, like all charities, have very limited resources, we only take on those campaigns we feel we can truly affect change on. Yet, achieving that change won't happen through one consultation that may be considered charitable. We will be posting this submission on our website and sharing it with our supporters and I will be asking them to share their concerns with the CRA and have already done so. That some of these activities are likely considered political by the CRA does concern me, because I and my board have a fiduciary duty not to unjustly jeopardize our charitable status. But the chance to affect change that could enable us to achieve our purposes is worth the risk.

We therefore call for these arbitrary distinctions to be removed from the *Income Tax Act* as has been done in Australia<sup>17</sup> and New Zealand<sup>18</sup> following high court rulings.

#### **Recommendation 4: Narrow the restrictions on partisan activities**

We support maintaining a prohibition on charities from engaging in direct partisan activities; however, the existing restrictions are ill-defined and overly broad. These rules force us (and other charities) to censor our supporters and leave uncertainty about our freedom to operate, particularly during election periods, when voices advocating for the public good are most valuable. We therefore recommend a change in legislation such that the only restrictions on partisan activities should be on charities supporting or opposing any political party or candidate during an election campaign.

During the 2015 federal election, the CRA issued an “Advisory on partisan political activities.”<sup>19</sup> This document advised:

“Charities that use the Internet or social media to post information should ensure the information does not contain partisan political statements. Also, the information should not link to statements made by a third party that support or oppose a candidate or political party.

“When a charity invites comments on its website, blogs, or on social media, it should monitor them for partisan political statements and remove, edit, or moderate such statements within a reasonable time.”

While the vagueness of “a reasonable time” is problematic enough, the latter half of this statement is particularly odious. Mandating that charities censor their supporters’ (and critics’) comments on platforms like Twitter and Facebook is utterly contrary to the spirit

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<sup>17</sup> *AID/WATCH Incorporated v Commissioner of Taxation* [2010] HCA 42 (High Court of Australia, 1 December 2010).

<sup>18</sup> *Greenpeace of New Zealand Incorporated* [2014] NZSC 105 [6 August 2014]

<sup>19</sup> “Advisory on partisan political activities”, Canada Revenue Agency. <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/dvsry-eng.html> Aug 21, 2015.

of open debate that the internet has fostered. Further, it's not possible in some social media settings like Twitter to control what others do with our messages.

Further, the requirement that charities refrain from linking to materials that express partisan positions is also overly broad. Charities have a strong role to play in helping the public to critically analyze statements and information in the public sphere. Some of that material will be partisan but linking to that material does not in and of itself represent any sort of endorsement. Context matters in these situations yet the CRA's rules appear draconian and ignorant of the discussions Canadians are having on social media.

As an organization with freedom of speech as one of our core values, this policy is an affront to our very philosophy and to our members. The public are savvy enough to be able to discern the position of an organization from the individuals who choose to comment on its platforms.

The restrictions on "indirect support of, or opposition to, any political party or candidate for public office" should be repealed from the *Income Tax Act* or further refined to protect the free speech of charities and their supporters.

### **Recommendation 5: Explicitly protect the freedom of speech of charities**

Presently, many of the restrictions and freedoms on the activities (and therefore the speech) of Canadian charities is dictated at the will of the government. When there's change in government, a new Minister can simply change the policy and make what was once legal now punishable. The experience of charities that underwent (or are still undergoing) political audits has put a chill through the sector and highlights how a government can silence its critics.

The restrictions placed on Canada's charitable sector are in stark contrast to the freedoms afforded to for-profit enterprises, who are able to deduct their lobbying and public relations campaigns for tax purposes.

We therefore echo the recommendations of others that protections be enshrined in legislation to prevent Ministerial interference with the work of charities in advocating or speaking out on issues relating to their charitable purposes<sup>20</sup>.

### **Responses to consultation questions**

#### **1. Carrying out political activities**

- Are charities generally aware of what the rules are on political activities?

No. The restrictions in the *Income Tax Act* are ill-defined and the experience of those organizations that have faced audit for political activities suggests they are also subject to broad interpretation.

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<sup>20</sup> *Protect Canadians' Free Speech*. <http://protectcanadiansfreespeech.ca/> Accessed: Nov 28, 2016.



While we have done our best as a small organization with a non-professional board, as a staff member, I am often forced to remind our board members of the restrictions we do face. Despite this, our (and likely many other small charities') CRA returns have likely missed accounting for some of the political activities we undertook in a specific year.

Even when we are able to find the CRA policies, many are counter-intuitive and leave us with concerns as already discussed. While we have a number of charitable activities that ensures we are spending only a small amount of our time and resources on political activities, I suspect, from anecdotes within the sector, that many other organizations avoid political activities entirely, even when those activities would otherwise support their purposes.

Rewriting or better publicizing the existing rules will not be sufficient as the chill is already in effect. The 10% limit is effectively 0% when charities are unsure of what activities may or may not count and would rather not draw attention to themselves.

- What issues or challenges do charities encounter with the existing policies on charities' political activities?

Our biggest challenge is that at its core Canada's charitable law dates back to the Elizabethan era, a time when politicians couldn't have foreseen the existence of an organized group of non-religious peoples seeking to promote their worldview on an equal footing with the religious. So from the very start, we are faced with an entrenched discrimination that limits our ability to constitute our organization.

We are also faced with the considerable uncertainty of the CRA's ever-changing rules around political activities. Our board, similar to many other smaller charities in my experience, is unclear over what the rules around political activities are and what needs to be reported.

- Do these policies help or hinder charities in advocating for their causes or for the people they serve?

These policies greatly hinder our abilities. The rules are antithetical to defending human rights and standing up for the non-religious. As discussed above, our organization (like many other modern charities) doesn't neatly fit into 17<sup>th</sup> century boxes. Further, the possibility of an ever-changing political landscape leaves the rules too open to political interference.

Our mission frequently requires us to challenge policies and laws at all levels of government, from the local school board to the federal government. Yet the restrictions put us on tenuous ground and leave a concern that we may be crossing a line.

While our approach to date has been to take on the activities we believe will allow us to achieve our purposes, we understand that our small size has likely shielded of from the risks that could face a larger organization undertaking the same activities.

## 2. The CRA's policy guidance

- Is the CRA's policy guidance on political activities clear, useful, and complete?

No, as outlined above it.

- Which formats are the most useful and effective for offering policy guidance on the rules for political activities?

The plain language format of much of the CRA's materials is commendable and the straightforward nature of the website is welcome. Following new legislation, as elaborated on above, guidance for new policies should maintain this approach while continuing to adapt to new medias (eg YouTube, social media) and friendly email updates to charities' staff. Regular webinars could also be helpful. Finally, financial support could be made available for the many small charities that run on little to no staff to learn these materials.

## 3. Future policy development

- Should changes be made to the rules governing political activities and, if so, what should those changes be?

Yes, new legislation is urgently required, as outlined above. As it stands the rules are discriminatory and censoring. Policies and guidance are not sufficient as they are subject to the whim of government and bureaucrats.

It's long past time for Canada to adopt a modern and progressive charities regime that empowers organizations to speak up based on the best available evidence.