CALL FOR PAPERS

The Advancement of Religion as Charitable Public Benefit

During the Trinity Western University Law School case hearing at the Supreme Court of Canada on December 1, 2017, Canadian Bar Association lawyer Susan Ursal was questioned by Justice Malcolm Rowe about the CBA’s position that the accreditation of TWU’s law school was a form of “public support” that should not be given to TWU.

“How about my theoretical Jesuit institute?” Justice Rowe inquired. “You can’t get in unless you’re a Jesuit. You can’t become a Jesuit unless you’re a Catholic priest. And you can’t become a Catholic priest unless you’re a man. Should their tax-exempt status be struck down because of that?”

“It’s not the case before us,” Ursel replied, deflecting.

“But is it not the logic of what you’re putting to us?” Justice Rowe pressed.

“It is the logic of what I am putting to you,” Ursel agreed. “There are limits to what the state should be called upon to support ... you are right, we are at that threshold, and we can’t back away from it.”

In English common law countries “the advancement of religion” is charity law’s “third head”. Under this head a myriad of religious operations is held as charitable. That includes the running of religious houses of worship, religious schools, universities, and hospitals, the operation of entities to support those enterprises, and more. Tax authorities (such as Canada Revenue Agency\(^1\)) have also given concessions, under this head, to religious groups to run ancillary businesses, such as thrift stores, where profits are used for the continued operations of the religious organization.

Canadian law presumes that the third head provides a public benefit. However, in recent years, there has been a growing call for government to re-evaluate that presumption. In the UK, for example, the Charity Commission, under new legislation that abolished the presumption,\(^2\) now requires religious charities to provide “an identifiable, positive, beneficial moral or ethical framework that is promoted by religion which demonstrates that the religion is capable of impacting on society in a beneficial way.”\(^3\) The literature that has addressed the presumption has also raised the complexity of defining "religion" for the purposes of registering a religious enterprise as charitable.

The Charities Directorate, at Canada Revenue Agency, has prepared a policy guidance on religion but has not officially published the document. Lawyer Mark Blumberg through an Access To Information Request obtained a copy and has published it on his charity law website. The failure to publish is

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\(^{2}\) Charities Act, 2006 S. 3(2), online: <https://www.legislation.gov.uk/ukpga/2006/50/contents>

intriguing given that charities under the third head represent some 38% of the Canadian charitable sector.

The Senate of Canada has recently appointed a special committee to study the charitable sector in Canada with a report due by the end of 2018. It is expected that the committee will be considering this debate over the presumption of public benefit. We thought it appropriate to take the initiative and put together a publication with writings of scholars from around English common law countries who would contribute to the debate and that would be of benefit to Canada since the issue of what is charitable about religious enterprises has become a salient public policy issue.

This call for papers is for a book that will contain up to 20 scholarly papers on this subject to be published in a very short order. (You may be interested in seeing the previous book project that my office organized – by clicking here.) Given the short time frame we are on, it may mean that those interested in contributing to this project may have already given some considerable thought and reflection on the questions we raise. Potential authors are asked to send in their 250-word abstracts by April 16, and final papers by June 15. Publication of accepted papers will occur in the fall 2018.

Of interest in this debate are the positions of Lawyer Donovan Waters and Professor Kathryn Chan.

Mr. Waters argues, at some length, the complexity of “religion” and suggests that the essence of religion, being the subject of the third head, is spirituality, which is not assessable by the courts. Therefore, there can be no presumption of public benefit. Any religious entity that is considered for charitable status should not receive such status if its religious or spiritual purpose violates the law or public policy including encouraging the hatred of others.

Professor Chan argues that the development of a constitutional duty of the state to be religiously neutral, combined with the struggle of trying to determine what is the public benefit with the advancement of religion, has made the third head vulnerable to arguments that it should no longer be considered charitable. She notes that given our sceptical age we must come up with a more convincing justification than the presumption of public benefit. She asks two very important questions: is it possible to identify a rationale for recognizing religion as a charitable purpose that would survive constitutional scrutiny? Is it possible to articulate the “conceptual public benefit” of religion in constitutionally “neutral” terms?

That then is our challenge.

Please send your abstract by April 16 to:
Barry W. Bussey, BA, LLB, MA, LLM, MPACS, PhD (Cand.)
barry.bussey@cccc.org

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4 See Senate of Canada (website) online: <https://sencanada.ca/en/committees/cssb/>.