

**OPENING COMMENTS TO SENATE LIBERALS OPEN CAUCUS**  
**FEBRUARY 8, 2017**  
**BY BOB WYATT, THE MUTTART FOUNDATION**

First, let me thank you for the invitation to be with you today and for taking time to explore an issue that affects literally every community in this country.

I think you would be hard-pressed to find any community in Canada that does not have a charity or not-for-profit organization in it. And I doubt that you could find many Canadians whose lives are not touched regularly by one of these organizations – whether it be a neighbourhood improvement district, a social services charity, a hospital or university, a self-help group or a collection of people concerned about the environment. Indeed, many members of this caucus have touched and been touched by charities through your service as volunteers with them.

Yet, 50 years after the laws related to charities were introduced into the Income Tax Act, we still have not had a comprehensive study as to whether these laws still make sense.

There have been technical fixes and band-aids applied to particular issues over the years, but the overall structure still predates the days we had computers on our desks, let alone access to most of the world's information through our phones.

We have fallen behind the rest of the common-law world in the way we regulate and treat charities. Our courts, which are meant to help ensure that the common law of charity remains consonant with the times, have been far more conservative than the courts in England, Australia, New Zealand or the United States.

In short, it is not clear that the current laws and mechanisms are appropriate for 21<sup>st</sup>-century Canada. Benign neglect has not served us well. I would hazard a guess that there are few laws in the country that have stood fundamentally unchanged for 50 years; these sections of the Income Tax Act should not be allowed to stay that way any longer.

The legislation was drafted at and for a time much different than today. There were many fewer charities. Fundraising was of an entirely different magnitude. Charities were not regularly asked to deliver government programs. Revenue came primarily through donations, whereas today, charities are looking for new ways to sustain themselves and the services they provide to Canadians.

On the handout you have been given, we've listed a number – certainly not all – of the issues that we think require some serious consideration. Over the last little while, the issue of political activities of charities has been getting a lot of attention. It is, by far, not the only issue and, arguably, it is not even the biggest issue.

Our Board of Directors believes that it would be inappropriate to look at only one or two of these issues and seek to fix them – whatever that fix might be. The list of problems demonstrates, we believe, that the problem is systemic, and the solution must be systemic. We must ask ourselves whether these are the laws that we would enact if we were operating from a clean slate.

We believe that this is the type of study at which the Senate excels. The committees of this chamber have demonstrated over the years that they take the time to review a situation in depth and offer thoughtful recommendations. This is the type of study that charities – and the Canadians they support – need.

We don't fool ourselves into believing that the answers to any of these issues will be easy. Charities are not all agreed on any of these issues, and we wouldn't expect Canadians to all agree on one easy solution.

For example, the question of whether the definition of charity should be based in statute, or left to the common law, is controversial. Some say the common law is the best way of ensuring that the meaning of "charity" remains current. Yet the Canadian courts, in contrast to those in other jurisdictions, have consistently deferred to Parliament on the question of what types of organizations should receive favourable tax treatment. In other jurisdictions, including England and Australia, the legislation has maintained the common-law definition of charity but added other types of organizations to the list. That might or might not be the best solution for Canada.

We do know that we lag far behind other jurisdictions in jurisprudence related to charities. Indeed, the Supreme Court of Canada went some four decades without considering a case involving charities. This is, in part, because we have an incredibly expensive and inappropriate mechanism for appealing cases involving charities or organizations that would like to be charities. Unlike individuals and corporations, these organizations cannot appeal to the Tax Court of Canada. Instead they must start their legal battle in the Federal Court of Appeal, a process that is well beyond the means of the group that wants to prevent poverty in Vancouver, or the Nova Scotia organization that believes nuclear disarmament is essential. This makes no sense. It has been criticized by commentators and by courts. Yet it continues to be the case.

On the question of revenue generation by charities, we have some of the most restrictive rules that exist in the common-law world. Should a Canadian charity, like its Australian counterpart, be able to undertake any kind of revenue generation, so long as the proceeds go to support the charitable purposes of the organization? That is a question on which reasonable people can disagree.

These are but a few examples of the issues that need to be considered. The study we are suggesting will require analysis and insight and wisdom. But it is, we believe, the best opportunity to create the type of rules that will allow charities to do what they have been doing for the last 150 years – ensure and enhance the quality of life of all Canadians and people around the world, no matter their location, no matter their circumstance.

We appreciate your interest in this issue, and ask that you give serious thought to demonstrating that interest in ways that only the Senate can.

## **THE MUTTART FOUNDATION**

### **PROPOSAL**

That a standing or special committee of the Senate be given the responsibility for an in-depth study of federal law and policy governing charities and other “public-benefit” nonprofits organizations

### **RATIONALE**

Charities and “public-benefit” nonprofits are critical to Canadians’ quality of life. Whether providing opportunities for recreation, meeting spiritual needs, addressing social issues or advancing knowledge, these organizations touch the lives of Canadians every day. Some deliver programs financed by government; others respond to specific community issues. Some are large and sophisticated entities; the vast majority have annual revenue of less than \$250,000.

Constitutionally, the supervision of charities is the responsibility of the provinces. Only Ontario provides comprehensive supervision. But even there, as in the rest of Canada, the major legislation governing charities is the Income Tax Act. That Act sets out the provision for the registration of charities, a process which allows them exemption from income tax and allows their donors to claim tax credits or business deductions.

The current basic provisions of the Income Tax Act relating to charities were introduced in the 1960s. Within the early days of the system, there were some 35,000 registered charities. Today, there are more than 86,000.

While the legislation has been amended over the years, there has been no comprehensive review of the purpose, the structure and the overall impact of these provisions. This contrasts with other legislation that mandates regular reviews. We do not know whether the current regulatory regime recognizes the changes in the role of charities in Canadian society or supports the development of a charitable sector that meets the needs of 21<sup>st</sup>-century Canada.

Nonprofits other than charities are, for all practical purposes, not regulated. Some organizations choose not to apply for charitable registration; others would like to be registered charities but are refused registration.

The lack of attention to a comprehensive review of the role and regulation of charities and “public-benefit” nonprofits contrasts with other common-law countries. England, Australia, New Zealand and some U.S. states have all undertaken studies that have led to changes in law. These changes have ranged from a complete overhaul of charity law in England to development of a new corporate form to accommodate the emerging field of social enterprise in some U.S. states.

The study contemplated in this request is not about government funding. It is, rather, about the development of a framework that recognizes the changes in the role of charities and “public-benefit” nonprofits over the last half-century.

## **SOME POSSIBLE COMPONENTS OF THE STUDY**

### **Appeal mechanism**

An organization refused registration as a charity or which loses its charitable status may take an appeal to the Federal Court of Appeal, where the appeal is heard on the record. Of all types of Canadian entities, only registered pension plans and charities are subject to this appeal structure. It is expensive and cumbersome. The appeal mechanism has been roundly criticized by all commentators, including the Supreme Court of Canada. Most commentators suggest that an appeal should be treated like any other tax matter, going first to the Tax Court of Canada for a hearing *de novo*.

### **Definition**

Nowhere in Canadian law is the term “charity” defined. Recourse must be had to the Statute of Elizabeth 1601 and the Pemsel case in 1892. Other countries have studied the issue of whether to codify a definition of charity. Some have adopted this approach; others have chosen not to do so. Still others have chosen to incorporate, in legislation, a listing of organizations which, while not charitable in the common-law sense, are seen as providing services that should be entitled to the same treatment as charities.

### **International activities**

Canada has an enviable record in providing assistance in developing countries. Yet the regulatory burden on charities who are working overseas is significant and, arguably, inconsistent with the government’s direct support to those countries. While we need to be cautious to ensure charities are not inadvertently supporting terrorism, are the existing rules the best way of providing that assurance while encouraging international assistance?

### **Political activities**

This has been a “hot button” issue since 2012 and has led to much rhetoric. It’s not clear that the majority of charities want to engage in political activities, nor is it clear that the existing policy is unworkable. However, the issue needs to be reviewed in a non-confrontational setting. While the existing policy may be fine (and there are people on both sides of the issue), some of the interpretations by CRA are considered problematic.

## **Regulation of nonprofits**

Should “public-benefit” nonprofits be regulated in some way similar to charities? At the moment, there is almost no regulation of nonprofit organizations that are not registered charities. In the last few years, CRA has issued rulings that would create huge issues for these organizations. Are those rules wise, or does something else need to be done?

## **Regulatory structure**

What encouragement can be given to co-ordinate the regulatory authority of the provincial governments with the regulatory authority of the federal government? While some have argued there is a need for an independent regulator (similar to the Charities Commission for England and Wales or the Australia Charities and Nonprofits Commission), this is probably a non-starter.

## **Relationship between government and the sector**

In 2002, the Government of Canada and the voluntary sector signed an “accord” which was to provide high-level principles on the relationship between the sector and government. The accord was disavowed by the new government in 2006. The principles may still be sound.

## **Research into the sector**

Statistics Canada has discontinued several significant research studies into Canada’s voluntary sector. Thus, it’s possible to know how many asphalt roof shingles are produced each quarter, but we have no data on how many voluntary-sector organizations exist in the country. Although the sector is a more significant contributor to GDP than is agriculture or the motor-vehicle industry, the amount of data available is minimal.

## **Social Enterprise**

In Canada, and elsewhere in the world, there has been significant attention paid to social enterprises – business activities by charities or by others that wish to pursue a social mission. New forms of organization have been created in England and some parts of the U.S. to make this possible. There is growing interest in the charitable sector, which sees this as a potential way to increase revenues for their missions. The rules on business activities by Canadian charities are confusing and are seen by some as hampering innovation. Social enterprise may or may not be the right answer, but its relationship to charities needs to be further explored.

## **Statutory framework**

Is the Income Tax Act the best place to have provisions related to charities. While provisions related to the deductibility of donations is appropriately there, are the other rules that are within the Act appropriate for such a complex piece of legislation or is there some better answer?

## **Structure**

Registered charities are currently categorized as charitable organizations, public foundations or private foundations. Questions have been raised by commentators as to whether this remains the appropriate structure.

## **Transparency**

What steps can be taken to ensure appropriate transparency of charities while not imposing an undue regulatory burden on organizations that are devoted to public service?