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Charitable according to whom ? The clash between Quebec's societal values and the law governing the registration of charities

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Article abstract

In the course of considering the public's views on the accommodation of cultural minorities in Quebec, the Bouchard-Taylor Commission has produced a valuable record of the views held by Quebec's voluntary sector organizations, and the societal values that are important to Quebec. In particular, it has underlined Quebec's strong commitment to three broad public objects — the advancement of the French language and Quebec culture, the encouragement of interculturalism, and the promotion of secularism — that are not recognized as charitable objects under the common law.

The Bouchard-Taylor Commission has therefore provided a timely and relevant backdrop against which to consider the real-life implications of using the common law of charitable trusts to give meaning to the statutory concept of charity (*bienfaisance*) in Quebec. Based on her observations of the Commission experience, the author suggests that the disjuncture between the law demarcating Quebec's charitable sector and the social context within which the sector operates has become significant enough to merit a reconsideration of this longstanding approach.

Note

*Charitable according to whom? The clash between Quebec's societal values and the law governing the registration of charities**

Kathryn CHAN**

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* I thank Blake Bromley and Nicholas Kasirer, dean of law at the Faculty of Law, McGill University, for their comments on earlier drafts of this article. Any remaining shortcomings are entirely my own.

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La consultation publique tenue par la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles au Québec (commission Bouchard-Taylor) a permis de recenser les points de vue de plusieurs organismes bénévoles œuvrant au Québec, tout en révélant les valeurs sociales les plus importantes partagées par l'ensemble des Québécois. En particulier, cette consultation a mis au jour l'importance accordée à trois grands objets d'intérêt public — la promotion de la langue française et de la culture québécoise, l'encouragement de l'interculturalisme et l'affirmation de la laïcité — qui ne sont pas reconnus comme des objets charitables selon la common law.

La commission Bouchard-Taylor intervient à point nommé et fournit les données contextuelles pertinentes à partir desquelles il est possible de réfléchir aux enjeux réels pour le droit québécois de se référer à la common law des fiducies charitables afin de donner un sens à la notion d'organisme de bienfaisance au sens de la Loi sur les impôts. *À partir de son observation des travaux de la commission Bouchard-Taylor, l'auteure suggère que la rupture est si importante entre le droit qui délimite la catégorie des organismes de bienfaisance et le contexte social au sein duquel se trouvent ces organismes qu'il conviendrait de reconsidérer l'approche actuelle, maintenant fort ancienne.*

It was, by all accounts, a stormy fall in the collective social and political life of Quebec. In September 2007, having publicly committed to a broad re-examination of "the sociocultural integration model that has prevailed

in Québec since the 1970s[1]", the Consultation Commission on Accommodation Practices Related to Cultural Differences (the Bouchard-Taylor Commission) opened a series of public meetings in the urban and rural communities of Quebec. Commissioners Gérard Bouchard and Charles Taylor, both academic giants in the fields of social-communal relationships in general, and Quebec society in particular, invited Quebecers to express their views on the accommodation of minorities and the kind of society in which they wish to live[2]. And Quebecers did express themselves, providing both written and oral responses to controversial questions such as : "[is the] French-Canadian [culture] being threatened by intercultural harmonization practices ?" and "what conditions must an immigrant satisfy to be deemed a full[y]-fledged Quebecer ?[3]".

The Bouchard-Taylor Commission, its findings and its political consequences are certain to be debated both in and outside Quebec for years to come. It is not my intention to contribute substantively to that debate, nor to comment on the broad social and legal issues the Commission has raised. I do, however, wish to draw attention to two particular features of the Bouchard-Taylor Commission, which strike me as being highly relevant to the issue of how the charitable sector in Quebec should be defined. The first is that the Commission has provided Quebecers with a valuable (if incomplete) snapshot of the organizations that make up Quebec's broader voluntary sector, and the variety of views that they hold. The second is that the Commission has put forward a public (if contentious) picture of the societal values that are important to Quebec.

The reason for my intrigue with these features of the Bouchard-Taylor Commission is this. Though it may go unnoticed, I believe that the Commission has shed considerable light on the disjuncture that exists between the societal objects that are deemed "charitable" (*de bienfaisance*) in Quebec, and thus granted special tax privileges by the federal and provincial government, and the societal objects that are, in fact, of special importance to Quebec. If it is true, as the Supreme Court of Canada has suggested,

1. Consultation Commission on Accommodation Practices Related to Cultural Differences (Québec), *Accommodation and Differences – Seeking Common Ground : Quebecers Speak Out*, Consultation Document by Gérard Bouchard and Charles Taylor, Québec, Gouvernement du Québec, 2007, p. v, [Online], [www.accommodements.qc.ca/documentation/document-consultation-en.pdf] (June 9, 2008) [hereinafter *Bouchard-Taylor Consultation Document*].
2. Ann Carroll, "Let the debate begin", *The [Montreal] Gazette*, August 15, 2007, [Online], [www.canada.com/montrealgazette/story.html ?id=ec4ec029-c021-4571-a25e-fa73850b3857&k=99148] (June 9, 2008).
3. *Bouchard-Taylor Consultation Document*, *supra*, note 1, p. 20-21.

that the function of the term "charity" (*bienfaisance*) in our income tax legislation is to identify those objects and activities "which are generally regarded as being of special benefit to society[4]", one would expect these "legal" and "factual" sets of objects roughly to match up. However, in the course of exploring the phenomenon of "reasonable accommodation", the Bouchard-Taylor Commission appears to have demonstrated just how imperfect this match is in Quebec. It has done so by underlining Quebec's strong commitment to three broad public objects — the advancement of the French language and Quebec culture, the encouragement of interculturalism, and the promotion of secularism — that are not recognized as charitable objects under the common law. From the vantage point of an admitted outsider, therefore, the Commission appears to have provided a timely and relevant backdrop against which to examine the real-life implications of applying the common law of charitable trusts in Quebec.

The paper undertakes to explore this apparent disjuncture between the formal legal rules and the social context currently shaping Quebec's voluntary sector through the following parts. Part 1 reviews the legal framework according to which organizations are accorded registered charity status in Quebec, and the recent judicial pronouncements that have, for practical purposes, set this framework in stone. Part 2 examines the prominent role that the promotion of the French language and Quebec culture, interculturalism, and secularism have played in the Commission debate to date, and contrasts that prominence with the common law rules suggesting these objects are not of special benefit to society. The paper concludes with some comments on the extent of the disjuncture and the arguments for and against change.

1 The legal framework governing the registration of charities in Quebec

The legal framework for registering charities federally is well-known, and does not differ in any material respect for organizations that are resident in Quebec**.** Organizations that wish to benefit from the substantial tax benefits that are conferred on registered charities must apply to the Charities Directorate of the Canada Revenue Agency (CRA), which "registers" qualified organizations under the authority of subsection 248 (1) of the federal *Income Tax Act*[5]. While the *Income Tax Act* sets out various statutory criteria for registration, the obtaining of registered charity status depends primarily on the Minister's determination of whether an organiza-

4. *Vancouver Society of Immigrant and Visible Minority Women* v. *M.N.R.*, [1999] 1 S.C.R. 10, par. 128 [hereinafter *Vancouver Society*].
5. *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1, s. 248 (1).

tion is constituted exclusively for "charitable purposes" (*fins de bienfaisance*) or "charitable activities" (*activités de bienfaisance*). The Act does not comprehensively define these terms, nor articulate which source of law should give meaning to them in any particular province. However, since at least 1967, both the CRA and the courts have accepted without qualification that the meaning of "charity" (*charité/bienfaisance*) under the *Income Tax Act* is synonymous with the meaning of charity that evolved under the common law of charitable trusts[6]. As such, the *Income Tax Act* concept of charity has always been developed by reference to English case law and the common law method of analogical reasoning, even when applied to organizations operating exclusively in Quebec[7].

As the only Canadian jurisdiction that collects and administers all of its own provincial income taxes, Quebec is also the only jurisdiction where the provincial income tax payable by both individuals and corporations is not based on the federal definition of taxable income[8]. Within the voluntary sector, Quebec has used this autonomy to create distinct rules for the valuation of certain types of property, and to expand the list of entities that are eligible to issue tax receipts. Since December 2002, for example, Quebec's list of "qualified donees" has included non-profit organizations whose mission is to support Quebec sovereignty or Canadian unity through educational means[9]. Since 2006, it has also included cultural and communications organizations that fit within the mandate of and are recommended for registration by the Minister of Culture, Communications and the Status of Women[10].

However, despite Quebec's authority to create its own tax base and to determine which entities are "of special benefit" to society for fiscal

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6. *Vancouver Society*, *supra*, note 4, par. 148.
7. *N.D.G. Neighbourhood Association* v. *Minister of National Revenue,* (1988) 85 N.R. 73 (F.C.A.) ; this history is discussed in more detail in : Kathryn Chan, "Taxing Charities / Imposer les organismes de bienfaisance : Harmonization and Dissonance in Canadian Charity Law", (2007) 55 *Can. Tax J.* 481, 489-498.
8. Most of the Canadian provinces have entered into tax collection agreements with the federal government, which require them to levy their tax by reference to the tax base set by the federal government. However, Quebec collects its own corporate and individual income taxes, making it the only province that can define its own tax base for both purposes : Vern Krishna, *The Fundamentals of Canadian Income Tax,* 9th ed., Toronto, Thomson/Carswell, 2006, p. 12-13.
9. *Taxation Act*, R.S.Q., c. I-3, ss. 710 (a)(iii.1), (iii.3), 752.0.10.1 ("total charitable gifts" / "total des dons de bienfaisance").
10. *Id.*, s. 710 (a)(iii.3) ; Conseil des arts et des lettres (Québec), *Procédure de demande d'une recommandation de l'obtention du statut d'organisme culturel ou de communication enregistré*, Québec, Gouvernement du Québec, 2003, [Online], [www.calq.gouv.qc.ca/organismes/enregistrement.htm] (June 9, 2008).

purposes in the province, the process for obtaining provincial charitable tax status in Quebec is currently tied to the federal, common law framework. Like the federal government, Quebec has in place a central registration system to regulate the entities entitled to issue provincial tax receipts for charitable gifts[11]. Under the Quebec *Taxation Act*, the provincial Minister of Revenue may approve for registration any charitable organization, private foundation or public foundation that applies in prescribed form. The *Taxation Act* defines these entities in terms of their "charitable purposes" (*fins de bienfaisance*) and "charitable activities" (*activités de bienfaisance*), without providing any further definition of these terms[12]. However, the application form prescribed by the *Taxation Act* requires applicants to prove that they have previously been registered as charities by the CRA[13]. As I have noted elsewhere, the upshot of this procedure is that the federal, common law concept of charity dictates the range of organizations that can be registered as charities in Quebec[14].

I have, in other contexts, challenged the uniform, common law interpretation of the federal registered charity provisions as being at odds with basic principles of statutory construction and constitutional law, as well as the federal government's commitment to bilingualism and bijuralism, as expressed through the enactment of sections 8.1 and 8.2 of the *Interpretation Act*[15]. In my view, Quebec's civil law tradition encompasses a variety of customary law sources on transfers to charitable purposes, which should form part of the default legislative dictionary that gives meaning to the term charity (*bienfaisance*) when federal or provincial tax legislation is applied within the province.

Realistically, however, there seems to be little prospect that the conventional judicial interpretation of the registered charity provisions will be modified anytime soon. In 2006, the Federal Court of Appeal dismissed

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11. *Taxation Act*, *supra*, note 9, ss. 752.0.10.3, 985.5.
12. *Id.*, s. 985.1.
13. *Id.*, s. 985.5, which provides that organizations be approved for charitable registration "on application made to the Minister in prescribed form". The prescribed form, *Application for Registration as a Charity or as a Quebec or Canadian Amateur Athletic Association, TP-985.5-V*, requires that applicants for registered charity status include the Business Number assigned to them by CRA. Revenue Quebec will even deem a charitable organization to have been registered in Quebec on the day it was registered by CRA, if it submits the TP-985.5-V within 30 days of confirmation of that registration : Revenu Québec, *Registered Charities and Certain Recognized Organizations. Guide to Filing the Information Return*, [Online], 2005, [www.revenu.gouv.qc.ca/documents/eng/formulaires/tp/tp-985.22.g-v(2005-10).pdf] (June 9, 2008).
14. K. Chan, *supra*, note 7, 498.
15. *Ibid.* ; *Interpretation Act*, R.S.C., 1985, c. I-21, s. 8.1, 8.2.

arguments that civil law concepts of charity might assist a federal applicant for charitable status, and made a series of *obiter* comments casting doubt on the applicability of the concepts in Quebec[16]. More recently, in a case involving an Ontario amateur soccer association that had been denied registered charity status, the Supreme Court of Canada dismissed the argument that an Ontario charity law decision might be relevant by virtue of section 8.1 of the *Interpretation Act*, stating that "specific statutory definitions of charity in provincial legislation and decisions dealing with that definition do not dictate the meaning of charity under the *ITA*[17]". Considered in light of the miniscule number of charitable registration decisions that actually make their way up to the courts (*Amateur Youth Soccer Association* was the Supreme Court's second ever decision on the interpretation of the federal registered charity scheme), it appears that these developments have closed the door to a multijural interpretation of the registered charity provisions, at least for the foreseeable future. The only remaining question, perhaps, is whether this state of affairs really matters to Quebec or, indeed, to anyone else. And if it does, are there any alternatives for change ?

2 The treatment of Quebec's societal objects under the common law

The fact that a dated body of largely English common law decisions dictates the range of organizations that are granted both federal and provincial charitable tax benefits in Quebec has never generated any significant debate among Quebec's legal or political community. Is there any reason for this situation to change ? Ultimately, the answer to this question will have to come from within Quebec itself. However, by underlining Quebec's strong commitment to promoting the French language and Quebec culture, interculturalism, and secularism — three objects that are not recognized as charitable under the common law — the Bouchard-Taylor Commission has at least provided Quebec with an opportunity to consider what the stakes of the answer might be.

2.1 The advancement of the French language and Quebec culture

For those to whom it was not already obvious, the Bouchard-Taylor Commission has confirmed that the advancement of the French language and Quebec culture is a central and longstanding priority of the government of Quebec. As the Commission's consultation document explains, the

16. *Travel Just* v. *Canada Revenue Agency*, 2006 FCA 343, par. 16.
17. *Interpretation Act*, *supra*, note 15, s. 8.1 ; *A.Y.S.A. Amateur Youth Soccer Association* v. *Canada (Revenue Agency)*, 2007 SCC 42, par. 39.

Quebec government has been publicly committed to promoting French as the "normal and everyday language of work, instruction, communication, commerce and business" since at least the enactment of Bill 101 in 1977[18]. Quebec has a detailed cultural policy, which was adopted unanimously by the National Assembly in 1992, and a variety of departments and organizations entrusted with promoting Quebec culture at home and abroad[19]. As far as the integration of immigrants is concerned, the French language and culture have historically been considered as the "focal point of convergence" for minority cultures[20]. However, Quebec also protects the cultural rights of its ethnic minorities, whose "right to maintain and develop their own cultural interests with the other members of their group" is recognized in the province's *Charter of Human Rights and Freedoms*[21]. In the wake of the Commission's proceedings, the political focus on language and culture in Quebec has only increased : in October 2007, the leader of the Parti Québécois proposed the adoption of legislation to promote the appreciation of Quebec culture, and amendments to the *Civil Code*[22] that would require all immigrants seeking Quebec citizenship to possess an "appropriate knowledge" of French[23].

The promotion of the French language and Quebec culture also emerged, during the Commission proceedings, as a priority for many of the province's voluntary organizations. For a few of these organizations, such as the *Société Saint-Jean-Baptiste*, the project of promoting the French language and Quebec culture appears to be integrally linked to a desire to preserve the French-Canadian culture in Quebec[24]. However, the majority of Quebec's voluntary sector, including that part of the sector that

18. *Charter of the French Language*, R.S.Q. c. C-11, Preamble ; *Bouchard-Taylor Consultation Document*, *supra*, note 1, p. 13-14.
19. Ministère de la Culture, des Communications et de la Condition féminine (Québec), *La politique culturelle du Québec : notre culture, notre avenir*, June 1992, [Online], [publications.mcc.gouv.qc.ca/applicat/ClinStat.nsf/c358890ef4d5b88585256db100526bfe/4b9e6d693e6f9e8985256b840055b974 ?OpenDocument] (June 9, 2008).
20. *Bouchard-Taylor Consultation Document*, *supra*, note 1, p. 14.
21. *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 43.
22. *Civil Code of Québec*, S.Q. 1991, c. 64.
23. See Bill 195, *Québec Identity Act*, 1st Sess., 38th Leg., Quebec, 2007, s. 10.
24. See the submission of La Société Saint-Jean-Baptiste de Québec, *Affirmation et intégration : le défi des accommodements raisonnables*, mémoire présenté dans le cadre de la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, October 4, 2007, [Online], [www.accommodements.qc.ca/documentation/memoires/Quebec/la-societe-saint-jean-baptiste-de-quebec-affirmation-et-integration--le-defi-des-accommodements-raisonnables.pdf] (June 9, 2008). All of the written submissions made to the Commission are available online at [www.accommodements.qc.ca/documentation/memoires-en.html] (June 9, 2008).

represents specific ethnic and religious groups, appears to be committed to the promotion of a Quebec culture that includes "all cultures within the borders of Quebec and not […] sole[ly] […] the French-Canadian culture[25]". Notably, many of the "minority culture" organizations that participated in the Commission proceedings also voiced broad support for the advancement of the French language in Quebec[26].

To some extent, the crucial importance that is accorded to promoting the French language and Quebec culture in Quebec has now been incorporated into the province's tax structure, through the creation of the "cultural and communications organizations" category of qualified donee. However, culture or language-focused organizations generally do not have the option of pursuing registered charity status, leaving all such organizations excluded from federal tax benefits, and those that fall outside the parameters set by the Minister of Culture, Communications and the Status of Women unable to issue tax receipts at all. The reason, simply put, is that promoting, preserving or fostering a particular culture is not considered to be a charitable purpose in Canada[27]. The jurisprudential basis for the Canadian position is a 1947 English decision called *Williams' Trustees*, in which the House of Lords decided that a trust to promote the moral, social, spiritual and educational welfare of Welsh people, while clearly beneficial to that community, did not fall within the "spirit and intendment" of the preamble to the Charitable Uses Act, a statute passed by the Parliament of Elizabeth I in 1601[28].

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25. See the submission of the Sikh Community of Montreal, *Brief Presented to the Consultation Commission on Accommodation Practices Related to Cultural Differences* by Canadian Sikh Council *et al.*, p. 7, October 2007, [Online], [www.accommodements.qc.ca/documentation/memoires/Montreal/the-sikh-community-of-montreal-singh-manjit.pdf] (June 9, 2008).
26. See, for example, the submission of Présence musulmane Montréal, *Plaidoyer pour un Nous inclusif*, mémoire présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, October 2007, p. 17, [Online], [www.accommodements.qc.ca/documentation/memoires/Montreal/presence-musulmane-montreal-plaidoyer-pour-un-nous-inclusif.pdf] (June 9, 2008) : "Des efforts doivent alors être fournis et soutenus par les membres des différentes communautés ethniques afin de vanter les mérites de la connaissance de la langue locale et d'encourager son apprentissage par les membres de leur famille."
27. Canada Revenue Agency, *Policy Statement – Applicants Assisting Ethnocultural Communities, No CPS-023* (effective date June 30, 2005), par. 24 and footnote 13, [Online], [www.cra-arc.gc.ca/tax/charities/policy/cps/cps-023-e.html] (June 9, 2008).
28. *Williams' Trustees* v. *Inland Revenue Commissioners*, [1947] A.C. 447 (H.L.). The common law courts have tied the meaning of "charity" to the *Statute of Charitable Uses Act, 1601* (U.K.), 43 Eliz. I, c. 4, since at least the early 19th century : Hubert Picarda, *The Law and Practice Relating to Charities*, 3rd ed., London, Butterworths, 1999, p. 10.

Within England itself, *Williams' Trustees* does not appear to have ever posed a great obstacle to charitable status : the register of the Charity Commission of England and Wales includes many charities constituted for such objects as helping Welsh youth "become good citizens on the basis of the cultivation of the Welsh language [and] culture[29]". England has also now added the "advancement of […] culture" to its statutory list of charitable purposes, thereby bringing itself in line with the Scottish charity definition[30]. In Canada, however, *Williams' Trustees* appears to have survived the global human rights and decolonization movements, and to continue to inform the Canadian position. While CRA will grant charitable registration to ethnocultural groups that only seek to educate the public about their culture, it emphasizes that applicants must *not* have the promotion or preserving of a culture as a purpose[31]. For this reason, the *Société Saint-Jean-Baptiste* must be considered to have something in common with many of the Sikh and Muslim associations in Quebec : none of these can foster the particular culture it represents if it wishes to achieve registered charity status. Similarly, while a charitable organization may be dedicated to supporting the creation of new dramatic works, supporting the creation of *French* dramatic works is not considered to be an "especially beneficial purpose" worthy of charitable tax benefits in Quebec.

2.2 The promotion of interculturalism

The lofty objective which the Bouchard-Taylor Commission set for itself was to discern how intercultural relations should be managed in Quebec. As such, competing concepts of pluralism — including multiculturalism, interculturalism and multi-ethnicity — were a key focus of the Commission's proceedings. While these concepts generated more debate than consensus among the various consultation participants, it seems safe to make a few, limited observations based on the Commission's documents and proceedings. The first is that the Quebec government appears to be

29. Charity Commission, *Extract from the Central Register of Charities Maintained by the Charity Commission for England and Wales – Cwmni Urdd Gobaith Cymru (Corffforedig) / The Welsh League of Youth (Incorporated)*, [Online], [www.charity-commission.gov.uk/registeredcharities/showcharity.asp ?remchar=&chyno=524481] (June 9, 2008).

30. *Charities Act 2006* (U.K.), 2006, c. 50, s. 2 (2)(f) ; *Charities and Trustees Investment (Scotland) Act 2005*, A.S.P. 2005, c. 2, s. 7 (2)(b) ; Stephen Lloyd (ed.) *et al.*, *Charities – The New Law 2006 : A Practical Guide to the Charities Acts*, Bristol, Jordans, 2007.

31. Canada Revenue Agency, *Charitable Work and Ethnocultural Groups – Information on Registering as a Charity*, section 7, [Online], January 31, 2008, [www.cra-arc.gc.ca/tax/charities/policy/ethno-e.html] (June 9, 2008).

broadly committed to the concept of pluralism, and to a vision of Quebec as a vibrant, pluralistic society[32].

However, the concept of pluralism to which Quebec is officially committed differs markedly from the concept that prevails in the rest of the country. As the Commission consultation document points out, in 1988 the Quebec government rejected Trudeau's vision of multiculturalism in favour of a policy of interculturalism, or "cultural convergence", which emphasizes the concomitant responsibility of cultural communities to learn French and participate in public life[33]. This intercultural approach, which Danic Parenteau summarizes as one of "*vivre ensemble*" rather than "*vivre dans la différence*", remains the basis of Quebec's contemporary integration policy, a tangible reflection of the province's strong social identity[34].

Based on the briefs submitted to the Commission, it also appears that Quebec's voluntary sector is broadly committed to the promotion of pluralism, although great disagreement remains about what forms and manifestations of pluralism should be encouraged or accommodated in Quebec[35]. However, if the concept of pluralism provoked great controversy, it also provoked some of the most thoughtful and forward-looking submissions on how intercultural relations in Quebec might be improved. One of the most compelling of these was made by *Diversité artistique*

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32. The pluralistic nature of Quebec society is articulated in the integration policy that has been in place since 1990 : *Bouchard-Taylor Consultation Document*, *supra*, note 1, p. 15.

33. *Id.*, p. 14.

34. See Danic Parenteau, "Le multiculturalisme, une « norme morale » ?", *Le Soleil*, December 10, 2007, [Online], [www.cyberpresse.ca/article/20071210/CPSOLEIL/71206075] (June 9, 2008) : describing the federal multiculturalism model as "le prolongement d'une conception libérale anglo-saxonne de la société, dans laquelle cette dernière est généralement perçue comme étant dépourvue d'identité propre ; l'identité de la société n'étant que la simple addition des identités des divers individus qui l'habitent". The Quebec integration model, by contrast, "est conforme à une conception de la société comme étant porteuse d'une identité".

35. For a sample of the opposing views on what pluralism should "mean", see the submissions of Canadian Council of Muslim Women (Québec), *Rapport soumis à la Commission Bouchard-Taylor* by Samaa Elibyari, October 2007, [Online], [www.accommodements.qc.ca/documentation/memoires/A-N-Montreal/conseil-canadien-des-femmes-musulmanes.pdf] (June 9, 2008) ; Les Citoyens du forum régional de Châteauguay, *Mémoire des citoyens du forum régional de Châteauguay présenté à Longueuil à la Commission sur les accommodements raisonnables*, October 2, 2007, [Online], [www.accommodements.qc.ca/documentation/memoires/longueuil/paradis-normand-memoire-des-citoyens-du-forum-regional-de-chateauguay.pdf] (June 9, 2008).

Montréal, a non-profit organization dedicated to promoting cultural diversity among the cultural and fine arts institutions of Montreal[36]. *Diversité* argued that increasingly, Quebec culture is developing in silos : productions mounted by a particular cultural community are only attended by members of that cultural community, while the artistic institutions of the "majority" are only seldom frequented by the sizeable, minority communities. Citing various international legal documents affirming the importance of cultural rights, it submitted that Quebec, which has had great success in the last decades promoting Quebec culture on the international stage, must now turn its attention to the domestic front, to ensure that all of Quebec's cultural communities have access to Quebec's cultural life.

While it would be easy to argue that an organization like *Diversité artistique Montréal* should be given special encouragement and fiscal support during this particular period in Quebec history, such an organization has little chance of benefiting from the tax privileges accorded to registered charities in Quebec unless it frames its objects in "advancement of education" terms. The reason for this is that the advancement of multiculturalism is not currently recognized as a charitable purpose in Canada, although it is sometimes recognized to be a legitimate "byproduct" of other charitable purposes such as the assistance of refugees[37]. While the blow this deals to Trudeau's version of multiculturalism might not be of great concern to Quebec, it is safe to say that the promotion of pluralism and interculturalism likewise falls outside the scope of the *Income Tax Act* concept of charity (*bienfaisance*)[38].

Within England, there has never been any strong common law support for the position that the promotion of multiculturalism is not charitable, although some might argue that it was inherent in the logic (or attitude) of the House of Lords' treatment of the Welsh in *Williams' Trustees*. In any event, the Charity Commission of England and Wales has since accepted that the promotion of religious or racial harmony, equality and diversity are all charitable purposes analogous to the charitable purpose of promoting moral improvement, and these purposes have now been codified in the

36. See the submission of Diversité artistique Montréal (DAM), *L'accès aux produits culturels, Un facteur de cohésion sociale pour le Québec de demain*, mémoire présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles by Guillaume Sirois, October 2007, [Online], [www.accommodements.qc.ca/documentation/memoires/Montreal/diversite-artistique-montreal-dam-l-acces-aux-produits-culturels-un-facteur-de-cohesion-social-pour-le-quebec-de-demain-montreal.pdf] (June 9, 2008).

37. Canada Revenue Agency, *supra*, note 27, par. 24-25.

38. *Income Tax Act*, *supra*, note 5, ss. 248 (1), 149.1.

Charities Act[39]. It seems, therefore, that an organization like *Diversité artistique Montréal*, whose basic aim is to promote cultural diversity, would now be recognized as a charity in the UK.

In Canada, on the other hand, organizations that aim to advance cultural diversity and intercultural harmony — whether under the guise of multiculturalism, interculturalism or pluralism — are generally excluded from the charitable sphere. CRA's most recent publication on the topic states that while charities "can do a variety of activities that may contribute to a more multicultural community", such as fostering positive relations between communities, their purpose in carrying out these activities cannot be to promote multiculturalism[40]. The reason for this policy, according to CRA, is simply that "[m]ulticulturalism is an expansive concept, and as a purpose, it would also not fall within any of the recognized categories of charity[41]". However, this is hardly a convincing justification, given that many expansive concepts (religion and education, for starters) are recognized as charitable purposes by the common law, and that England has found the promotion of diversity to be analogous to the common law charitable purpose of promoting moral improvement.

The other possible basis for the Canadian position on multiculturalism is the *Canada UNI* decision, in which a non-profit organization whose objects included establishing direct communications between citizens of Canada's distinct groups and "enhanc[ing] appreciation and tolerance of linguistic and cultural differences through knowledge and understanding" was denied charitable registration by the Federal Court of Appeal[42]. Taking as its starting point that the broad purpose of the Canada UNI Association was to promote Canadian unity, and relying on an old line of English authority stating that the promotion of international understanding or friendship is not charitable, the Federal Court of Appeal held that the organization was inherently political and thus could not be registered as a charity under the *Income Tax Act*.

Unfortunately, the court in *Canada UNI* said almost nothing about why it found the appellant's objects to be "virtually indistinguishable" from the promotion of international friendship, or why it should be considered "political" to enhance tolerance of cultural diversity within the Canadian

39. S. Lloyd, *supra*, note 30, p. 22 ; *Charities Act 2006* (U.K.), *supra*, note 30, s. 2 (2)(c), (h).
40. Canada Revenue Agency, *supra*, note 31, section 8.
41. Canada Revenue Agency, *supra*, note 27, par. 24-25.
42. *Canada UNI Assn.* v. *Canada (Minister of National Revenue – M.N.R.)*, [1992] F.C.J. No 1130 (C.A.), 151 N.R. 4.

state. As a result, we are left with no good reasons to accept, and several good reasons to dispute, the exclusion of multiculturalism and pluralism from the Canadian charitable regime. The refusal to recognize multiculturalism as a purpose of special benefit to Canadian society seems manifestly inconsistent with section 27 of the *Canadian Charter*, which states that our fundamental law must "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians[43]". It certainly sits uneasily with the Supreme Court of Canada's very recent pronouncement that Canada's evolutionary journey toward diversity and pluralism has included "a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected[44]". Viewed from the perspective of the Bouchard-Taylor Commission proceedings, CRA's position that neither multiculturalism, pluralism, nor interculturalism is an object that is worthy of special tax treatment appears to be yet another example of the growing rift between the governing, common law of charity and the social reality that exists in Quebec today.

2.3 The promotion of secularism

The third concept which emerged as a key priority for Quebec during the proceedings of the Bouchard-Taylor Commission is the concept of secularism (*laïcité*)[45]. In the press and on the Commission floor, controversy raged over the extent to which symbols of religious life must be eliminated from the public sphere, and the extent to which the state must accommodate manifestations of religious belief. At one end of the spectrum, religious voluntary organizations such as the *Centre justice et foi* emphasized that believers and religious communities should be entitled to live out their faith in the public as well as private dimensions of their lives[46]. At the other end, organizations such as the Quebec Secular Movement proposed the creation

43. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 27.
44. *Bruker* v. *Marcovitz*, 2007 SCC 54, par. 1.
45. *Bouchard-Taylor Consultation Document*, *supra*, note 1, p. 25-26.
46. Submission of the CENTRE JUSTICE ET FOI, *Au cœur du nouveau pluralisme religieux québécois : redéfinir les liens qui nous unissent*, mémoire présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, October 2007, p. 15, [Online], [www.accommodements.qc.ca/documentation/memoires/A-N-Montreal/centre-justice-et-foi.pdf] (June 9, 2008).

of a secular charter, and submitted that Quebec should not allow any faith-based derogations from democratically-established, public norms[47].

What is *not* controversial, judging from the experience of the Commission, is that Quebec now considers itself to be a secular society, with a government and public culture that are neutral in respect of all religious beliefs[48]. Quebec is also strongly committed to the equal treatment of believers and non-believers. As Commissioners Bouchard and Taylor wrote in their consultation document,

> [in] a society that is both egalitarian and diversified, it is impossible to recognize only one official religion […] since doing so would make members of all other religions second-class citizens. *Moreover, the duty to maintain neutrality in respect of all believers also extends to all nonbelievers. In other words, non-religion and religion, i.e. all visions of the world whether or not they are spiritual, must be recognized and treated fairly*[49].

This recognition of Quebec's secular neutrality is not new : arguably, it inheres in the Quebec *Charter*, which recognizes the fundamental nature of freedom of conscience and religion, and, unlike its Canadian counterpart, lacks any reference to the supremacy of God[50]. However, the Bouchard-Taylor Commission does appear to have generated a degree of social consensus on the importance of preserving at least those elements of secularism about which the populace agrees.

As with its commitment to pluralism, however, Quebec's commitment to treating all believers and non-believers with equal regard is not reflected in the common law rules that determine the allocation of charitable tax benefits in the province. The common law of charity, which developed in England during the rise of its established church, has long recognized the "advancement of religion" as one of the principal categories of charitable

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47. Submission of the Quebec Secular Movement : Mouvement laïque québécois, *Pour une gestion laïque de la diversité culturelle*, présenté à la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, September 2007, [Online], [www.accommodements.qc.ca/documentation/memoires/longueuil/mouvement-laique-quebecois-pour-une-gestion-laique-de-la-diversite-culturelle.pdf] (June 9, 2008).
48. See, for example, the submission of the United Church of Canada in Québec, *United in our Diversity*, Presentation to the Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, November 2007, p. ii, par. 4, [Online], [www.accommodements.qc.ca/documentation/memoires/A-N-Montreal/eglise-unie-du-canada-en.pdf] (June 9, 2008) : "We are unequivocally in favor of a Quebec civil society and public culture that remain neutral in the area of religion."
49. *Bouchard-Taylor Consultation Document*, *supra*, note 1, p. 25.
50. *Charter of Human Rights and Freedoms*, *supra*, note 21 ; *Canadian Charter of Rights and Freedoms*, *supra*, note 43, Preamble.

objects, and presumed this object to be of benefit to the public[51]. It also purports to stand neutral between religions, showing "no preference […] to any church and other religious body[52]". As I have explained elsewhere, however, this claim of neutrality is self-referential and essentially meaningless, as it "depend[s] on charity law's own definition of religion to set the parameters of equal treatment[53]". Historically, this definition was framed in terms of what common law judges deemed to be religion's two "essential attributes" : faith in a god and worship of that god[54]. England, whose case law formed the primary basis of that conservative definition, recently modernized its position, clarifying in the *Charities Act 2006* that the advancement of religion encompasses "religion[s that do] not involve belief in a god[55]". However, the definition relied on by the Canadian Charities Directorate is not so broad : according to the CRA website, a "religion" must involve an element of theistic worship, which means the worship of a deity or deities in the spiritual sense[56].

The common law has also never stood neutral between believers and non-believers, instead assuming "that any religion is at least likely to be better than none[57]". This principle has been questioned by the American courts, which have accepted that a "sincere and meaningful belief[,] [which] occup[ies] in the life of its possessor a place parallel to that filled by […] God" may qualify as a religion[58]. In England, however, the promotion of secularism, humanism, and atheism have not historically been regarded as charitable objects, while the dissemination of ethical principles is only charitable if it qualifies as educational or is found to contribute to the mental or moral improvement of man[59]. What this means is that in Quebec, non-profit organizations such as the Quebec Secular Movement and *Mouvement Humanisation* are generally unable to access the signifi-

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51. Despite some debate, CRA continues to affirm this presumption of public benefit : see Terrance S. Carter, "Advancing Religion as a Head of Charity : What are the Boundaries ?", (2007) 20 *Philanthropist* 257, 282.
52. *Gilmour* v. *Coats and others*, [1949] 1 All E.R. 848, 861 (H.L.).
53. Kathryn Bromley (now Chan), "The Definition of Religion in Charity Law in the Age of Fundamental Human Rights", (2000) 3 *International Journal of Not-for-Profit Law*, [Online], [www.icnl.org/knowledge/ijnl/vol3iss1/ar_KBromley.pdf] (June 9, 2008).
54. *Re South Place Ethical Society*, [1980] 1 W.L.R. 1565, 1572.
55. *UK Charities Act 2006*, *supra*, note 30, s. 2 (3)(a)(ii).
56. Canada Revenue Agency, *Summary Policy* (*Religion – Charitable Purposes,* No *CPS-R06)*, October 25, 2002, [Online], [www.cra-arc.gc.ca/tax/charities/policy/csp/csp-r06-e.html] (June 9, 2008).
57. *Neville Estates Ltd* v. *Madden and others*, [1962] 1 Ch. 832, 853.
58. *United States* v. *Seeger*, 380 U.S. 163 (1965).
59. See *Bowman and others* v. *Secular Society Ltd.*, [1917] A.C. 406 ; *Re South Place Ethical Society*, *supra*, note 54.

cant fiscal benefits that are available to the province's Catholic, Muslim and Jewish communities. A community of Tzu Chi Buddhists would similarly be precluded from achieving registered charity status unless it framed its objects in terms of health or poverty relief.

Conclusion

The "enlightening experience in Québec-style democracy[60]" that was the Bouchard-Taylor Commission consultations may well have granted all of the organizations in Quebec's voluntary sector an equal voice in Quebec's great socio-cultural debate. The fact remains, however, that these organizations are not "equals" under the law that governs the voluntary sector in Quebec. While there are statutory and jurisprudential nuances to the *Income Tax Act*[61] concept of charity (*bienfaisance*), the general impact of the current legal framework is clear : organizations that seek to promote fine arts culture or the needs of immigrants or the Catholic faith are eligible for charitable status, while those that seek to promote Quebec culture or intercultural dialogue or a non-spiritual view of the world are not.

This legal framework has a tangible, financial impact on organizations whose objects fall on the wrong side of the common law line : they are denied the ability to issue tax receipts to potential donors. Arguably, however, the framework has an equally powerful, symbolic impact on "non-charitable" organizations seeking to promote their vision of the social good, for it clearly implies that these organizations are less beneficial to society, and thus less worthy of the state's fiscal support, than organizations with charitable status. It is not difficult to imagine why a group of persons committed to improving Quebec society through the promotion of cultural diversity or the advancement of humanist principles might object to this state of affairs.

There are at least two potential bases of objection to the implicit message of this paper, which is that the disjuncture between the law governing the voluntary sector in Quebec and the social context within which the sector operates has become significant enough to merit a closer look. The first objection is that this disjuncture is not unique to Quebec, that it is equally objectionable that in 21st century Canada we exclude

60. Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles (Québec), "Bouchard-Taylor Commission citizen's Forums : Absence of a Notable Divide Between Montréal and the Rest of Québec", *Press Releases*, December 19, 2007, [Online], [www.accommodements.qc.ca/communiques/2007-12-19-en.html] (June 9, 2008).

61. *Income Tax Act*, *supra*, note 5.

multiculturalism from the charitable sector in Vancouver, and deny charitable status for the promotion of Acadian culture on the East Coast. As a matter of policy, this may well be the case. As a matter of law, however, the issue of whether the common law of charity "fits" Quebec society is uniquely tied to the issue of whether the common law should be functioning as the suppletive law giving meaning to the statutory concept of charity (*bienfaisance*) in Quebec at all. In Quebec, in other words, the question is not only "why have we let the common law of charity become so out of touch with our modern social needs?", but "why should the common law apply at all?" Because of its autonomy in matters of provincial taxation, Quebec is also presently the only province with the ability to redefine the concept of charity (*bienfaisance*) for provincial income tax purposes.

The second, more fundamental objection to this paper's message has to do with the setting of boundaries, and the truism that not every public-minded object can be recognized as charitable if the concept is to retain any meaning and the tax privilege is to be contained. This line of objection, which has marked several national attempts to reform the law of charity[62], emphasizes the difficulty of drafting a satisfactory definition of charity, and accords substantial deference to the accumulated wisdom and flexibility of the common law tradition. The question it raises bears asking: could Quebec, whether by relying on the civil law or by enacting a provincial definition of charity (*bienfaisance*), really define the elusive concept of charity better than ten generations of common law courts?

If the objective of defining the statutory concept of charity (*bienfaisance*) was to attribute some kind of universal meaning to the term, the answer to this question might well be no, for the concepts of *charity* and *bienfaisance* are normative and inherently plural, and one tradition's definition might well be as "good" as the next. However, if the real objective of defining the statutory concept of charity (*bienfaisance*), as the Supreme Court of Canada has suggested, is to identify those organizations that are considered to be "of special benefit to society", the strength of any given definition must necessarily depend on what "society" it is that we are talking about. The task of identifying the appropriate civil society may well cause controversy, at least within the context of tax privileges granted under the federal *Income Tax Act*. Nonetheless, I would suggest that by articulating our definitional objective as the formulation of a standard

62. For a review of attempts to reform the legal definition of charity in different jurisdictions, see Peter BRODER, *The Legal Definition of Charity and Canada Customs and Revenue Agency's Charitable Registration Process*, Toronto, Canadian Centre for Philanthropy, Public Affairs, August 2001, [Online], [www.ccp.ca/files/publicaffairs/definition.pdf] (June 9, 2008).

which provides a rational and constitutionally sound basis for granting a certain set of entities special tax relief *within a given society*, we may cast the debate over charitable tax status in a new and brighter light. The common law definition of charity may well have fulfilled this objective in 19th and 20th century England. However, the experience of the Bouchard-Taylor Commission suggests that within 21st century Quebec, at least, the line between charitable and non-charitable may well need to be redrawn.