

FOCUS ON WILLS, ESTATES, CHARITIES & TRUSTS

SCC decides on religious freedom

By Terrance S. Carter
and Nancy E. Claridge

Following on the heels of the Federal Court of Appeal's decision in *Fuaran Foundation v. Canada Customs and Revenue Agency*, 2004 FCA 181 (the "Fuaran Foundation decision"), which narrowly construed the practices constituting "advancing religion" in the charitable sense, the Supreme Court of Canada said the State cannot regulate personal religious beliefs.

The landmark 5-4 SCC ruling in *Syndicat Northcrest v. Amselem*, (the "Amselem decision", see *The Lawyers Weekly*,), held that when

courts undertake to analyze religious doctrine in order to determine the truth or falsity of a contentious matter of religious law, or when courts attempt to define the very concept of religious obligation, "they enter forbidden domain." This greatly impacts religious freedom in Canada.

At issue in the Amselem decision was the ability of Orthodox Jews to erect religious huts on the balconies of their individual condominium units during the festival of Succot, the practice of which was opposed by the luxury condo's management.

Such a structure was said to

violate the terms of the condo's by-laws in the declaration of ownership by constituting a safety hazard and reducing the property value. The Quebec Court of Appeal affirmed a permanent injunction prohibiting the Appellants from setting up succahs and, if necessary, permitting their demolition.

In Amselem, Justice Iacobucci, writing for the majority, found that the trial judge and the Court of Appeal took a "dubious, unwarranted and unduly restrictive" view of religious freedom, stating that its basic principles consist of "the freedom to harbour beliefs and

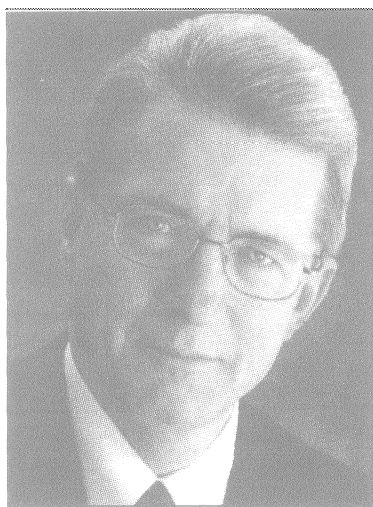
undertake practices, having a nexus with religion, in which an individual demonstrates that he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or in conformity with the position of religious officials."

Consequently, Justice Iacobucci held that both obligatory and voluntary expressions of faith should be protected under the Charter, and an inquiry into the mandatory nature of an alleged religious practice is both inappropriate and plagued with difficulties. Justice Iacobucci explained that those advancing a freedom of religion claim must show the court that: "he or she has a practice or belief,

having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or in conformity with the position of religious officials; and he or she is sincere in his or her belief."

Once religious freedom is triggered, a court must ascertain whether there has been sufficient interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion. It will suffice for a

see RELIGION p.15



Terrance S. Carter

5-4 SCC

RELIGION

—continued from page 9—

claimant "to show the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial." However, harmful conduct or conduct interfering with the rights of others will not automatically be protected; the ultimate protection of any particular Charter right must be measured in relation to other rights and

with a view to the conflict's context.

In the increasingly politicized environment concerning religious freedom, be it questions of religion in schools or same-sex marriage, there are several important implications to draw from the Amselem decision in addition to it being the first time that the Supreme Court of Canada has given a definition to religion.

First, it is an affirmation by Canada's highest court of the paramountcy of religious freedom. The decision makes clear that religious practice, as opposed to religious belief only, must be accom-

modated and cannot be easily trumped by matters of taste or personal preference of others impacted by that religious practice.

Second, it provides a clear test to determine when freedom of religion is triggered.

Third, the decision does away with the distinction between obligatory and optional in the protection of religious freedom. This could have a significant impact in other situations, such as those where public officials deny Christians the right to assemble for Bible study and/or prayer because it is considered an optional reli-

gious practice.

Fourth, it makes clear that the State and judges must not inquire into the validity of an individual's religious beliefs or practices, which may impact the extent to which Canada Revenue Agency can consider what constitutes advancing religion when reviewing applications for charitable status on those grounds.

Finally, in certain situations, the decision enables the religious freedom protections found in provincial and federal charters or bill of rights to prevail over declarations of co-ownership and similar contractual documents.