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ADVANCING RELIGION AS A HEAD OF CHARITY: WHAT ARE THE BOUNDARIES?

By Terrance S. Carter, B.A., LL.B. and Trade Mark Agent

Assisted by Anne-Marie Langan, B.A., B.S.W., LL.B.

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Without the values and principles which underlie not only the Charter but also our democratic institutions and policy, there can be no recourse to rights or freedoms.
The Honourable Justice Frank Iacobucci[1]

A. INTRODUCTION

All world religions, including Judaism, Hinduism, Buddhism and Islam follow some form of equivalent to the "Golden Rule" for Christians of : "Do for others what you would like them to do for you," or "love your neighbour as yourself."[2] This principle is also what forms the basis of tort law in common law jurisdictions, as reflected in Lord Atkin's comment in *Donoghue v. Stevenson* that, "[t]he rule that you are to love your neighbour becomes in law, you must not injure your neighbour."[3]

[+] This article has been expanded and updated by the author (as of April 2005), from an earlier paper by Carter, Terrance S. & Jacqueline M. Connor. "Advancing Religion as a Charity: Is it Losing Ground?" (2004) *Church Law Bulletin* No.6. Available at www.churchlaw.ca. The author would like to recognize the contribution of Jacqueline M. Connor who co-authored and D. Ann Walters who assisted with *Church Law Bulletin* No.6. Any errors in this paper are solely those of the author.

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[1] The Honourable Mr. Justice Frank Iacobucci, "The Evolution of Constitutional Rights and Corresponding Duties: The Leon Ladner Lecture" (1992) U.B.C. Law Review 1 at 18. ["Justice Iacobucci"]

[2] Gospel of Mathew 7:12, New Living Translation; see Appendix II of Sorensen, H.R. & A.K. Thompson. *The Advancement of Religion is Still a Valid Charitable Object in 2001* (Centre for Philanthropy and Non-Profit Studies, Queensland University of Technology, 2000) ["Sorensen"] that provides a list of world religions, including Confucianism, Hinduism, Judaism, Buddhism, Islam, Zoroastrianism, Bahai, Jainism and Sikhism which hold a similar belief.

[3] *Donoghue v. Stevenson*, [1932] A.C. 562 at 580.

The majority of individuals who hold religious convictions would agree that participating in practical applications of their faith, such as teaching others about their religious experience in the practical context of everyday life, or relieving poverty and/or suffering by assisting in different forms of humanitarian relief as a demonstrative expression of their faith, is as important as engaging in regular religious worship. Thus, for most religious faiths, religious worship and practical applications of faith are not and cannot be made to be mutually exclusive in relation to determining the appropriate boundaries for advancement of religion as a head of charity, as they constitute two sides of the same coin.

It is the practical manifestations of faith in everyday life that makes religion of value to society. Society depends, to a great extent, on religion to teach morality and civility to its members. In this regard, the Chief Justice of the High Court of Australia recently remarked that,

> [i]t is the general acceptance of values that sustains the law, and social behaviour; not private conscience. Whether the idea is expressed in terms of teaching, or communication, there has to be a method of getting from the level of individual belief to the level of community values. Religion is one method of bridging that gap. What are the alternatives? Apart from religion, what is it that forms and sustains the moral basis upon which much of our law depends? How are community values developed and maintained in a pluralist society? [4]

The principle that religion should be broadly defined in order to include practical manifestations of religious beliefs was recently affirmed in the Supreme Court of Canada decision in *Syndicat Northcrest v. Amselem*[5]. This was the first opportunity that the Supreme Court of Canada has had to articulate the boundaries of freedom of religion. In that case, the court stated that religious practice is as important as religious belief in defining religion and acknowledged that a broad definition should be afforded to the definition of religion. This approach was echoed in the Supreme Court's *Reference re Same-Sex Marriage*, decision in which the court confirmed that "[t]he protection of freedom of religion afforded by s.2(a) of the Charter [of Rights and Freedoms][6] is broad and jealously guarded in our Charter jurisprudence."[7]

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[4] Chief Justice Gleeson. "The Relevance of Religion" (2001) 75 A.L.J. 93 at 95.
[5] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46; 2004 SCC 47. ["Amselem" decision] See *Church Law Bulletin* No 6, available at www.churchlaw.ca, that provides a case comment on the Amselem decision.
[6] *Canadian Charter of Rights and Freedoms*, 1982 s.2(a). [the "Charter"]
[7] *Reference re Same-Sex Marriage*, [2004] S.C.J. No.75 at para. 53. ["Marriage Reference" decision]

Historically, there are four heads of charity recognized by the courts: relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community[8]. In Canada, the Charities Directorate of Canada Revenue Agency ("CRA") functions in an administrative role as regulator in defining the boundaries of advancement of religion. CRA determines at first instance whether charitable status should be granted or denied to a religious organization that is applying for charitable status or attempting to maintain its status as a result of an audit. CRA's role in this regard arises from its administrative authority under the *Income Tax Act*[9] to establish policies and procedures that assist in determining whether an applicant is charitable at common law. Since unsuccessful applicants can seldom afford to judicially challenge CRA's denial of charitable registration, the administrative decisions of CRA often become the de facto equivalent of the rule of law in determining charitable status. In recent years, the other three heads of charity (i.e. the relief of poverty, the advancement of education and other purposes beneficial to the community) have generally been broadened in both their scope and application by the courts as well as by CRA, as is evident in the new policy issued by CRA entitled *Assisting Ethnocultural Communities*.[10] In this regard, it is the expectation of religious charities in Canada that the definition of advancement of religion should similarly be broadened in order to not only reflect the diversity of faiths Canada, but also to facilitate the breadth in the practical manifestations of those faiths.

Given this context, the purpose of this paper is to provide an explanation of the historical perspective concerning advancement of religion as a head of charity by examining the case law that has been most influential in defining the scope of advancement of religion. A discussion then follows regarding how the Charter has impacted the definition of religion and may impact advancing religion as a head of charity in the future. Finally, an analysis is provided of recent developments in Canada concerning advancement of religion compared with parallel developments in other jurisdictions, some of which have attempted to provide, or are currently in the process of providing a legislative definition of advancement of religion.

As a result of somewhat inconsistent judicial decisions over the years, it is difficult to predict what will happen in Canada in the future concerning advancement of religion as a head of charity.

[8] *Special Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.). ["Pemsel" decision]
[9] *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.). ["ITA"]
[10] CRA, Proposed Policy, "Applicants Assisting Ethnocultural Communities" (16 September 2004). Available at: www.cra-arc.gc.ca/tax/charities/policy ["Ethnocultural Communities" policy].

Nevertheless, this paper attempts to address the question posed in its title: "Advancing religion as a head of charity: What are the boundaries?" and suggests that based upon the predominance of judicial decisions to date, the overarching value of religion to society, and Charter considerations, advancement of religion as a head of charity should be broadly interpreted by the courts and by CRA when determining whether religious organizations should be granted and / or allowed to retain their charitable status under the ITA.

B. OVERVIEW OF ADVANCEMENT OF RELIGION

1. Historical Background for the Advancement of Religion as a Head of Charity

When considering whether a purpose is charitable at law, the courts and CRA have historically relied upon the decision of the House of Lords in *Special Commissioners of Income Tax v. Pemsel*,[11] which decision emanates from the preamble of the *Statute of Elizabeth* 1601[12], in which a list of charitable purposes recognized at law at that time was provided.[13] Hubert Picarda suggests that "[t]he purpose of the preamble was to illustrate charitable purposes rather than to draw up an exhaustive definition of charity."[14] He notes that at the time that the *Statute of Elizabeth* 1601 legislation was being promulgated, Sir Francis Moore advocated that advancement of religion should be purposely excluded from the preamble,

[11] Pemsel decision, *supra* note 8.

[12] *Statute of Elizabeth*, (1601) 43 Eliz 1 c.4. ["Statute of Elizabeth"] Also known as the *Charitable Uses Act.* The preamble of the *Statute of Elizabeth 1601* lists the following purposes as being charitable: *The relief of aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poorer maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.*

[13] Some historians suggest that the Preamble was taken from the following poem entitled: *The Vision of the Piers Plowman*, written in 1377:

And therewith repair hospitals
Help sick people
Mend bad roads
Build up bridges that have broken down
Help maidens to marry or to make them nuns
Find food for prisoners and poor people
Put scholars to school or to some other craft
Help religious orders and
Ameliorate rents or taxes.

[14] Picarda, Hubert. *Law and Practice Relating to Charities*,3rd ed.(London, Butterworths, 1999) at 62. ["Picarda"]

> …lest the gifts intended to be employed upon purposes grounded upon charity might, in charge of times (contrary to the minds of the givers) be confiscated into the King's Treasury. For religion being variable according to the pleasure of succeeding princes, that which at one time is held for orthodox, may at another be accounted superstition, and then such lands are confiscated.[15]

In this statement, Moore recognized that it should not be the role of politicians or the courts to delineate the boundaries of religion, since the recognition of one religion over another in law could lead to a tyranny of a majority religion over minority religions. This is reflective of Moore's era in which gifts that were made for the purposes of advancing less recognized religions, such as Catholicism and Judaism, were held by courts to be invalid and were expressly excluded by legislation.[16]

By the 19th Century, courts had begun to recognize that it was inappropriate to draw distinctions between one religion and another when determining whether or not a gift made for the purposes of advancing religion was valid. In *Thornton v. Howe*, for example, the court showed deference towards sincerely held religious beliefs, even those that were on the fringe of a particular faith[17]. This principle was subsequently affirmed in *Bowman v. Secular Society Ltd*.[18] and *National Anti-Vivisection Society v. Inland Revenue Commissioners.*[19]

Despite the fact that advancement of religion was not specifically recognized as a charitable purpose in the preamble of the *Statute of Elizabeth* 1601, it is clear that even prior to the Reformation, "gifts for religious purposes were accepted as charitable because of their piety, and without further consideration of the question of public benefit."[20] This recognition developed because during the Middle Ages, the Church was responsible for administering intestate estates and other charitable gifts, as well as for providing most of the "welfare" services for the state. As one historian explains:

> In the Middle Ages, under the influence of the Church, great importance was attributed to charitable giving as both a Christian duty and a means of

[15] Sir Francis Moore, "Readings upon the Statute 43 Elizabeth" in Duke, *Law of Charitable Uses* (1676) 131 at 132.
[16] Picarda, *supra* note 14 at 63.
[17] *Thornton v. Howe* (1862), 54 E.R. 1042. ["Thornton" decision]
[18] *Bowman v. Secular Society Ltd*., [1917] A.C. 406. (H.L.). ["Bowman" decision]
[19] *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1947] 2 All E.R. 217 at 220 (HL). ["National Anti-Vivisection" decision]
[20] Picarda, *supra* note 14 at 82.

> salvation. The Church obtained the right to administer intestate estates and to distribute a portion of it *ad pias causas*. Apart from gifts for the advancement of religion, the Church became the recipient of most other charitable gifts- it being the administrator of pious causes- such welfare and educational services as existed at that time had been largely instituted and developed by the Church. Thus in the Middle Ages the Church was the provider of welfare services (including education) for the general population, funded by gifts from the public who were encouraged by religious exhortation to make such donations or gifts.[21]

As a result of the Pemsel decision in 1891, advancement of religion was clearly recognized as a head of charity. Lord Pemsel, the plaintiff in that case, was a treasurer of the Moravian Church who sued the Income Tax Commissioners on behalf of the church for having denied the church a property tax rebate that was normally given to charities. The main issue at trial was whether the Moravian Church, the stated purpose of which was to maintain, support and advance missionary establishments among heathen nations, could be considered a charitable trust.[22] At first instance, the court rejected Pemsel's application and found that the purposes of the Moravian church were not charitable as they were not solely directed towards the relief of poverty.

This decision was reversed on appeal, and was further appealed by the Tax Commissioners to the House of Lords, where Lord MacNaghten rejected the notion that relief of poverty is the only valid charitable object and acknowledged that advancement of religion can take various practical forms, including the zealous missionary work undertaken by the Moravians. The following passage best illustrates the principle established by that decision:

> How far then, it may be asked, does the popular meaning of the word "charity" correspond with its legal meaning? "Charity in its legal sense comprises four principal division: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trust for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.[23]

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[21] Sorensen, *supra* note 2 at 8.
[22] Pemsel, *supra* note 8, as explained by Bromley, Kathryn. "The Definition of Religion in Charity Law in the Age of Fundamental Human Rights" *Advancing The Faith In Modern Society* (Canadian Council of Christian Charities, 2000) ["Kathryn Bromley"]; also presented at the Canadian Bar Association Continuing Legal Education Program on Friday October 27, 2000.
[23] *Ibid.* at 587 per Lord MacNaghten.

This statement clearly negated the narrow view of the definition of charity expressed by the Crown's counsel who argued in the case that,

> [c]harity implies the relief of poverty and that there must be in the mind of the donor an intention to relieve poverty.[24]

Canadian courts and CRA have historically relied upon the Pemsel decision to determine what is a charity at common law and, as such, have consistently recognized advancing religion as an accepted head of charity, unique from and not necessarily related to the relief of poverty. As recently as 1999, in *Vancouver Society of Immigrant and Minority Women v. Canada (Minister of National Revenue)*[25], the Supreme Court of Canada reaffirmed the existence of the four heads of charity enumerated in the Pemsel decision and their origin in the preamble of the *Statute of Elizabeth* 1601.*[26]* However, the court in the Vancouver Society decision remarked that charitable purposes listed in this statute are "not to be taken as the only objects of charity but are given as instances"[27] and that "the court has always had the jurisdiction to decide what is charitable."[28]

2. How do the Courts Determine What is Charitable at Law?

The Supreme Court in the Vancouver Society decision explained that a charitable purpose is one that "seeks the welfare of the public" and "is not concerned with the conferment of private advantage."[29] The courts have held that a charitable purpose trust must have purposes that are exclusively and legally charitable and must be established for the benefit of the public or a sufficient segment of the public[30]. Therefore, in general, only "religious services tending directly towards the instruction or edification of the public" are considered "charitable".[31] This "public benefit" requirement applies to all four heads of charity, but is "attenuated under the head of poverty".[32]

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[24] *Ibid.* at FN 4 per Sir E. Clarke S.G. and Dicey Q.C.
[25] *Vancouver Society of Immigrant & Visible Minority Women v. Canada (Minister of National Revenue),* [1999] 1 S.C.R. 10 at para. 146. ["Vancouver Society" decision]
[26] Statute of Elizabeth, s*upra* note 12.
[27] Vancouver Society decision, *supra* note 25 at 146.
[28] *Ibid.* at 146.
[29] *Ibid.* at para. 147.
[30] Pemsel decision, *supra* note 8.
[31] *Gilmour v. Coats*, [1949] A.C. 426 in the abstract. ["Gilmour" decision]
[32] Vancouver Society decision, *supra* note 25 at para. 147.

In the *Vancouver Society* decision, the Supreme Court stated that the focus of the court's analysis should be more on the purpose of the charitable activity than on the benefit that results to the community from the activity.[33] The Supreme Court emphasized that, "it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, that determines whether or not it is of a charitable nature."[34] In his dissenting judgment, Justice Gonthier provides the following example to illustrate this point:

> Supposing the example of a company which published the Bible for profit, and compare it to one which published the Bible without a view to profit, but with the purpose of distributing copies of it to the public. In each case, the activity engaged in—publishing the Bible –is identical. But the purposes being pursued are very different, and consequently the status of each company also differs. Although the former company clearly would not be pursuing a charitable purpose, the latter almost certainly would be.[35]

3. What is it That Makes Religion Charitable?

Carl Juneau, the former Assistant Director of Communications of the Charities Directorate of CRA, posed a question which has not often been addressed by the courts: "Why is any *bona fide* religion charitable?"[36] Mr. Juneau answered this question as follows:

> In essence, what makes religion "good" from a societal point of view is that it makes us want to become better- it makes people become better members of society.[37]

People who are religiously motivated also have a greater tendency to volunteer and donate their money in order to assist others in society.[38] In all likelihood, this propensity towards volunteering and assisting in other ways is based on the ethical mores taught by most religions. Religion has "taught us to respect property; it has taught us to respect God's creation; it has taught us to abhor violence; it has taught us to help one another; it has taught us honesty," along with other ethical

[33] *Ibid.* at para.148.
[34] *Ibid.* at para.152.
[35] *Ibid.* at para. 54.
[36] Juneau, Carl. "Is Religion Passé as a Charity?" (1999) *Church and the Law Update* v.2 No.5 at 5, available at http://www.carters.ca/pub/update/church/volume02/chchv2n5.pdf. ["Is Religion Passé"]
[37] *Ibid.* at 6.
[38] Statistics Canada, catalogue 71-542-XIE, *Caring Canadians, involved Canadians, Highlights from the 1997 National Survey of Giving, Volunteering and Participating*, at 17.

principles which make us better citizens.[39] Religion is one of the few catalysts that exists through which a private conscience can become a public conscience. Thus,

> [i]nstitutional religion in society, and institutional religion alone, seems to reliably and consistently provide that collector function. Institutional religion has had an undefined role in mustering and shaping collective conscience and values in moral ways - and when institutional religion is pluralized, so much the better, for we avoid the excesses that Alexis de Tocqueville identified so long ago when he coined his colourful phrase, 'the tyranny of the majority".[40]

This principle was clearly articulated in several US court decisions which describe religion as a "valuable constituent in the character of our citizens"; "the surest basis on which to rest the superstructure of social order"; and as "necessary to the advancement of civilization and the production of the welfare of society".[41]

As well, the Honourable Mr. Justice Iacobucci, in the following passage of his article on the evolution of Constitutional rights, affirmed that society's understanding of rights and responsibilities and our societal notions of freedom are based on moral and theological principles:

> My thesis is quite simple: legal rights and freedoms cannot be properly understood without appreciating the existence of corresponding duties and responsibilities. This understanding of rights-duties and freedoms-responsibilities in turn rests ultimately on moral and theological principles which inform our Western political, religious and philosophical cultures and traditions.[42]

In this regard, he acknowledged that, "without the values and principles which underlie…our democratic institutions and policy, there can be no recourse to rights or freedoms".[43] This was echoed by the Hounourable Justice Sopinka in a criminal proceeding involving Charter issues in which he stated that "much of the criminal law is based on moral conceptions of right and wrong:".[44] The following example was given by Justice Iacobucci to illustrate his point that the law would be

[39] Is Religion Passé, *supra* note 36 at 36.
[40] Sorensen, *supra* note 2 at 3.
[41] Picarda, *supra* note 14 at 84.
[42] Justice Iacobucci, supra note 1 at 1.
[43] Justice Iacobucci, *supra* note 1.
[44] *R. v. Butler* (1992), 89 D.L.R. (4th) 449 at 477.

hollow and ineffectual in the absence of the values and principles that underlie it and support it, which are often shaped and informed by religion:

> Quite apart from these legal duties, however, if you see someone drowning, and you turn to me and ask, "what shall I do?" and I tell you that you have no legal duty to throw the life preserver in your hand to the person drowning, you would hardly be satisfied with my answer. That you have no legal duty to save someone's life when it is within your power to do so says nothing about your moral or civil duty to act. I think everyone would accept that, even in the absence of a prior relationship with the person drowning, the fact that you are a human being gives you a moral duty to throw the life preserver to save the drowning person.[45]

Even though it is most often religion that teaches us how to be ethical, the courts have drawn a distinction between religion and ethics for the purposes of determining where the boundaries of advancement of religion lie. As was stated in *Re South Place Ethical Society*, "religion is concerned with man's relation with God, and ethics are concerned with man's relation with man."[46]

Despite the fact that the ethical teachings of religion are part of what makes religion for the public benefit, the courts have held that in order for advancement of religion to qualify as a charitable purpose, two essential elements are necessary, "faith in a God, and Worship of that God".[47] In addition, in order for a prospective charity to qualify under advancement of religion, the court must be able to ascertain that the organization in question is, in fact, advancing a bona fide religion and how it is that the organization advances that religion.[48] It follows that in order to qualify as advancing religion, a religious organization generally must pursue a religious purpose that promotes faith in a God and worship of that God. This leads to the question that the courts have often had to address: What constitutes a religious purpose?

[45] Justice Iacobucci, *supra* note 1 at 15.
[46] *Re South Place Ethical Society* (also referred to as *Barralet et al. v. A.G.*), [1980] 3 All E.R. 918 at 77 para. G. ["Re South Place Ethical Society" decision]
[47] *Ibid.* at 78 para. E.
[48] Bourgeois, Don. *The Law of Charitable and Non-Profit Organizations*, 3rd ed. (Markham: Butterworths Canada, 2002) at 22.

4. What Constitutes a Religious Purpose?

In the Bowman decision[49] and the National Anti-Vivisection Society decision,[50] the respective courts held that any charitable purpose that is intended to advance a particular religion is charitable in nature, provided that the purpose is otherwise lawful. In this regard, the courts are generally willing to defer to sincerely held religious beliefs, including those on the fringe of a particular religious faith, and are reluctant to distinguish between various religious beliefs. [51] The underlying reasoning behind this approach is that,

> [t]he law must accept the position that it is right that different religions should each be supported irrespective of whether or not all of its beliefs are true. A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.[52]

As noted by the Ontario Law Reform Commission ["OLRC"], religious purposes should be given a wide meaning in order to avoid conflicts between the judicial and public view and to reflect the evolving nature of religion. [53] The courts have not become involved in questioning the doctrinal beliefs of a particular religion out of respect for the right to religious freedom as guaranteed in section 2(a) of the Charter.[54] The general consensus in the courts seems to be that "any religion is at least likely to be better than none" and that, consequently, promoting religion is for the common good.[55] This was the principle which was expressed in the *Hanlon v. Logue* decision:

> Since the court cannot know whether any particular doctrine is true and therefore able to produce the intended benefit for others, it must accept the view of the religion in question on this matter, the only alternative being for the court to reject all acts of worship as being beyond proof of spiritual benefit.[56]

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[49] Bowman decision, *supra* note 18.
[50] National Anti-Vivisection Society decision, s*upra* note 19 at 220 (H.L.).
[51] Thornton decision, *supra* note 17.
[52] Gilmour decision, *supra* note 31.
[53] Ontario Law Reform Commission, *Report on the Law of Charities*, (Toronto, 1996). ["OLRC" report]
[54] *Ibid*. at 191.
[55] *Neville* Estates *v. Madden*, [1962] Ch.162, ["Neville Estates" decision] at 853 as cited in Waters, Donovan, *The Law of Trusts in Canada*, 2nd ed. (Toronto, The Carswell Company Limited,1984) ["Waters, 2nd Ed."].
[56] *Hanlon v. Logue*, [1906] 1 I.R. 247 (C.A.), as explained by Waters, Donovan. *The Law of Trust in Canada*, 3rd ed. (2005, unpublished) at 705.

Courts in other common law jurisdictions have also recognized the need to define religion as broadly and inclusively as possible. In July 2001, in its *Report of the Inquiry into the Definitions of Charities and Related Organizations,*[57] the Australian Charities Committee recommended that the definition of advancement of religion should be amended and be based on the following principles: *"Belief in a supernatural Being, Thing or Principle and; acceptance and observance of canons of conduct in order to give effect to that belief."* In commenting on this definition, an Australian commentator remarked that:

> The principal reason for the breadth of the definition of 'religion' is that it promotes religious liberty, which is enshrined in the Australian Constitution and in the New Zealand Bill of Rights and it is moreover consistent with the law's concern with protecting minorities.[58]

The U.S. Courts have traditionally been the most inclusive and expansive when defining religion, as exemplified by the fact that they determined that the Church of Scientology was a religion, whereas the U.K. courts did not. One U.S. court held that a religious organization will be considered to be organized for religious purposes where it asserts that its purposes and activities are religious and where such assertions are *bona fide",*[59] while another held that a religious belief is one that occupies a position in the mind of the adherent equivalent to the position afforded a belief in God.[60]

5. Charitable Activity Versus Charitable Purpose

As was previously noted, the determination of whether a religious activity is charitable or not cannot be addressed without reference to its purpose.[61] This is because,

> [t]he character of an activity is at best ambiguous; for example, writing a letter to solicit donations for a dance school might well be considered charitable, but the very same activity might lose its charitable character if the donations were to go to a group dissemination hate literature.[62]

[57] Available on-line at http://www.cdi.gov.au/html/report.htm.
[58] Dal Pont, Gino. *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) at 149.
[59] *Holy Spirit Association for the Unification of World Christianity* v. *Tax Commission of the City of New York*, 435 NE 2d 662 (1982). ["Holy Spirit Association" decision]
[60] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[61] Vancouver Society decision, *supra* note 25.
[62] *Ibid.* at para. 152.

The above example demonstrates how it is the purpose behind an activity that is the determining factor in whether a religious activity will be considered to be a "charitable activity". As Prof. Maurice Cullity (now the Honourable Justice Cullity) explained:

> The distinction between ends and means is fundamental in the law of charity. It is the ends, or purposes, not the means by which they are to be achieved, which determine whether a trust or corporation is charitable in law. It follows that one cannot determine whether a body or trust is charitable merely by focusing on the activities that it is authorized to pursue. A further question is necessary: are the activities to be construed as ends in themselves or are they really means to some other end? Only when that question is answered can the charitable or non-charitable nature of the body or the trust be determined.[63]

Thus, a religious activity can only be charitable in so far as its purpose is charitable. As a result,

> [o]nce it has been determined that the body is a charity, it is contradictory to suggest that any of its activities, that have been determined to be lawful means of achieving a charitable object, are prohibited because they are not charitable. [64]

6. Is Public Benefit Presumed?

To be charitable at common law, a religious organization must not only engage in activities that are intended to achieve its religious purpose, but such activities must also result in a benefit to the public, or a sufficient section of it. In *Re Compton*,[65] and subsequently in *Oppenheim v. Tobacco Securities Trust Co.*[66], the court explained that, "the potential beneficiaries of a charity must not be numerically negligible, and there must be no personal relationship between the beneficiaries and any named person or persons." In some common law jurisdictions, it is a well established legal principle that the advancement of religion is prima facie charitable and is assumed to be for the public benefit.[67] In *Re Watson*, the court stated that "a religious charity can only be shown not to be for the public benefit if its doctrines are adverse to the foundations of all religion and subversive of all

[63] Cullity, Maurice C. "The Myth of Charitable Activities" (1990), *Estates and Trusts Journal* 17, at 10.
[64] *Ibid.* at 13.
[65] *Re Compton*, [1945] Ch.123; [1945] 1 All E.R. 198 (C.A.).
[66] *Oppenheim v. Tobacco Securities Trust Co.*,[1951] A.C.297.
[67] *Re Caus*, [1934] Ch. 162, Gilmour decision, *supra* note 31; Nelville Estates Decision, *supra* note 55; *Re Watson*, [1973] 3 All E.R. 678, ["Re Watson" decision]; and U.K. Charity Commission, *Application for Registration as a Charity by the Church of Scientology* (England and Wales, November 1999). ["Application by Church of Scientology" decision]

morality"[68], and in *Thornton v. Howe,* the court stated that a gift for the advancement of religion should be upheld unless the religion at issue, "inculcate(s) doctrines adverse to the very foundations of all religion."[69] Finally, in *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, the Charity Commissioners confirmed that "in the absence of evidence to the contrary, public benefit is presumed."[70]

In the Gilmour decision, the court recognized that the law "assumes that it is good for man to have and to practice a religion."[71] The court stated as follows:

> A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true, and a religious service can be regarded as beneficial to all those who attended it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.[72]

In this regard, the courts have historically rejected the notion that charity is limited to the relief of poverty and suffering and have recognized other charitable purposes as being for the public benefit. Not only have the courts recognized advancing religion as a charitable purpose, they have presumed that advancing religion is for the public benefit.

In the context of advancing religion, the public benefit requirement has resulted in a debate in the case law over whether a distinction should be drawn between public worship and private worship when determining whether a public benefit exists. In the often cited English case of *Gilmour v. Coates*, it was held that a gift to a contemplative order was not charitable, as it did not provide a discernable public benefit. The court identified that the problem with this type of religious organization is that "you [can]not demonstrate one way or another whether intercessory prayer or edification by the example of such lives is for the benefit of the public."[73] On the other hand, another English Court found that members of a Jewish synagogue, by virtue of the fact that the synagogue was theoretically open to the public and that the members lived their lives in the world,

[68] Re Watson decision, *supra* note67.
[69] Thornton decision, *supra* note 17.
[70] Application by Church of Scientology decision, *supra* note 67 at 13 ff.
[71] Gilmour decision, *supra* note 31 at 458.
[72] *Ibid.* at 458-9.
[73] Gilmour decision, *supra* note 31, as explained in Waters, 2nd ed., *supra* note 55 at 578.

were worshipping in a sufficiently public way to qualify for charitable status.[74] Courts have also held that,

> [t]he fact that m]ost gifts for religious purposes are directed to a particular denomination does not infringe the public benefit requirement because, the courts have reasoned, it is open for any member of the public to join the denomination or congregations should he or she choose.[75]

As explained in a recent unreported Australian decision, "[i]t is always a matter of degree whether or not the activity which takes place is open to the public or not." [76] The issue that was adjudicated in the Jensen decision was whether a meeting room that was used by the Brethren was being used for "public worship," which was a necessary requirement in order to be eligible for a property tax deduction. The court determined that the room was being used for public worship, despite the fact that some of the events held in the meeting room were not open to the public, such as the Lord's Supper, Care Meetings and Special Meetings.[77] The findings of this case reflect the principle which is stated above; that worship should be deemed to provide a public benefit as long as the services are open to the public, albeit in a limited way.

Canadian caselaw does not provide clear direction about whether or where a line should be drawn between "public" and "private" religious worship. Prof. James Phillips was of the opinion that, "it is unlikely that Canadian courts would follow it (i.e. the Gilmour decision) down the road of declaring private masses to be non-charitable, for there is a line of cases accepting them."[78] If Canadian courts were to adopt the Gilmour position and deny charitable status to groups who participate in private worship, they would be creating somewhat of a contradiction for themselves. This was suggested by Prof. Phillips in the following statement;

> How can charity law assert that public benefit from religion is a thing to be proved rather than assumed and that not all religious purposes are charitable,

[74] Waters, 3rd ed., *supra* note 56 at 711, referring to Neville Estates decision, *supra* note 67.
[75] Dal Point, *supra* note 58 at 167 taken from *Association of Franciscan Order of Friars Minor v. City of Kew,* [1967] VR 732.
[76] *Jensen v. Brisbane City Council* (18 March, 2005), Brisbane BC200501276 (unreported) at para. 88. ["Jensen" decision]
[77] *Ibid.* at para. 90.
[78] Phillips, James. "Religion, Charity and Canadian Public Law*" in Between State and Market: Perspectives on Charities Law and Policy in Canada* (1999) at 14. Prof. Phillips does not provide us with a list of the cases accepting this principle, but instead refers us to Waters, 2nd Ed, *supra* note 55 at 578, in which an analysis of some of these cases is provided.

> then concede that such matters are beyond legal proof, then steadfastly ignore the issue of benefit in the vast majority of cases?[79]

It would be more consistent and logical for the courts to adopt the position suggested by the OLRC that:

> [i]f one accepts that the advancement of religion is charitable per se...then one does not value religion mainly as a means to some other good or for its by-products.[80]

Drawing a distinction between public and private worship could be interpreted as having a discriminatory effect, since the courts would then be expressing "a preference for religions which do not go in for private observance or discalced[81] communities."[82]

7. How Far Does a Religious Purpose Extend?

Religious purposes that have been deemed by the courts to be charitable include, but are not limited to the promotion of spiritual teachings, the maintenance of doctrines and spiritual observances, the organization and provision of religious instruction, the performance of pastoral and missionary work and the establishment and maintenance of buildings for worship and other religious use.[83] In some instances, the courts have even found gifts for ancillary projects to be charitable. An example of this can be found in the case of *Re Armstrong*,[84] in which the Nova Scotia Supreme Court decided that a direction in a will to an estate trustee to make payments to a church for ancillary projects to be used at the discretion of the estate trustee fell within the definition of advancement of religion as a head of charity, since the projects were connected to the church's main activities.

Canadian courts have generally taken the position that the concept of religious freedom means that it is not the role of the courts to determine the religious or devotional significance of certain practices of a religious organization.[85] As a result, the courts in Canada have been reluctant to exclude any

[79] *Ibid.* at 13.
[80] OLRC report, *supra* note 53 at 200.
[81] The word "discalced" means barefoot, unshod and is used to refer to a branch of the Carmelite order which underwent a reform and returned to its original rule, which required a stricter observance of the vow of poverty.
[82] Phillips, *supra* note 78 at 16.
[83] Phillips, *supra* note 78.
[84] *Re Armstrong* (1969), 7 D.L.R. (3d) 36 (N.S.S.C.).
[85] *Donald v. Hamilton Board of Education,* [1945] 3 D.L.R. 424 (Ont. C.A.).

religious practices, whether they be public or private. The same can be said of the English and U.S. Courts.

For example, in the English decision in *Keren Kayemeth Le Jisroel Ltd. V. Inland Revenue Commissioners,*[86] which was affirmed in Canada in *Re Anderson,*[87] the court held that "the promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances which serve to promote and manifest it – not merely a foundation or cause to which it can be related."[88]

U.S. judicial decisions have also reflected a respect for the integrity of church doctrine and precepts. While a court may determine whether a particular religious doctrine is asserted in good faith, that is, whether it is sincerely held, it may not, however, judge its reasonableness or validity.[89] In the case of *Holy Spirit Association for the Unification of World Christianity* v *Tax Commission of the City of New York,*[90] the court was even willing to concede that where political and economic beliefs are fundamental to a religious organization's religious beliefs, then such political and economic beliefs will be considered to be part of its religious beliefs. In this regard, the OLRC report confirmed that,

> [i]n the prevailing approach of the law, there is some reluctance to apply a rigorous definition of "religion". Instead, the law applies a minimalist definition, one which assumes that some religion is better than none but expects that no religion is, or no religion should be permitted to be, harmful to the public interest, Perhaps the law is wise to err initially on the side of over-inclusiveness. The wisdom is easy to appreciate: there is an extraordinary risk of chauvinism in this particular decision, and the importance of religion to individual identity makes mistaken evaluations particularly harmful.[91]

8. Advancement of Religion Inherently Involves Dissemination and Propagation of Religious Beliefs

Courts in most common law jurisdictions have affirmed that advancement of religion at its core involves the promotion, dissemination and propagation of one's religious beliefs to others and that

[86] *Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners,* [1931] 2 K.B. 465 (C.A.), at 477; on appeal [1932] A.C. 650, [1932] All E.R. Rep. 971 (H.L.) ["Keren Kayemeth" decision].
[87] *Re Anderson* (1943), 4 D.L.R. 268 (Ont. H.C.).
[88] *Ibid.* at para. 7, per Plaxton, J.
[89] *United States* v. *Ballard,* 322 U.S. 78 (1944); and *Presbyterian Church* v. *Hull Church,* 393 U.S. 440 (1969) at 449.
[90] Holy Spirit Association decision, *supra* note 59.
[91] OLRC report, *supra* note 53 at 192-193.

"freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship."[92] In the Australian case of *Church of the New Faith v. Commissioner of Pay-Roll Tax*, the court acknowledged that a central element of religion is the acceptance and promotion of moral standards of conduct which give effect to a belief.[93] This principle was perhaps best expressed in the *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council* decision, where it was stated that,

> [t]o advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.[94]

Canadian courts have also affirmed that religion involves matters of faith and worship and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship. In *Fletcher* v. *A.G. Alta*., the Supreme Court of Canada wrote that,

> [r]eligion, as the subject matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship.[95]

9. Advancing Religion Includes Addressing Social, Moral and Ethical Issues

The courts have also acknowledged that advancement of religion extends beyond worship only and includes related activities, such as addressing social, moral and ethical issues. In relation to this inclusive approach, the O.L.R.C. remarked that,

> [t]he domain of religious activity is essentially, but by no means exclusively spiritual, and that there is a necessity for an established doctrine and an element of doctrinal propagation, both within and sometimes outside the membership.[96]

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[92] *Walter* v. *A.G. Alta.*, [1969] 66 W.W.R. 513 at 521.
[93] *Church of the New Faith* v. *Commissioner of Pay-Roll Tax*, 83 A.T.C. 4, 652. ["Church of the New Faith" decision]
[94] *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council*, [1957] 1 W.L.R. 1080 at 1090; All E.R. 281 (Q.B.D.) at 285. ["United Grand Lodge" decision] Affirmed in *Wood v. R.*, [1977] 6 W.W.R. 273, 1 E.T.R. 285.
[95] *Fletcher* v. *A.G. Alta.*, [1969] 66 W.W.R. 513 at 521.
[96] OLRC report, *supra* note 53 at 193.

This approach is also reflected in Keren Kayemeth decision, where the court held that "the promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances which serve to promote it."[97]

In *Re Scowcroft*, the court affirmed the principle that despite that the nature of a particular activity may in and of itself not appear to be charitable, it may still be held to be charitable where it is done for the larger purpose of advancing religion.[98] In the Re Scowcroft decision, the court accepted that a gift of a reading room "to be maintained for the furtherance of Conservative principles and religious and mental improvement" was made for the purposes of advancing religion, and was therefore charitable.[99] This principle was reflected again in *Re Hood*, where the court determined that a gift that was made to spread Christianity by encouraging others to take active steps to stop the drinking of alcohol was a charitable gift, since it was made for the purpose of advancing religion.[100] In that decision, the court held:

> In this will it is not necessary for me, having regard to the view which I take, to express an opinion whether a gift for the suppression of drink traffic would or would not be a good charitable gift, because it seems to me that the essential part of the will is that part which deals with the application of Christian principles to all human relationships. I cannot bring myself to doubt that a gift for the spreading of Christian principles is a good charitable gift and falls within the views expressed by Stirling J. in *In re Scowcroft*, the question relating to the drink traffic being only subsidiary to the main question of the spreading of Christian principles. I therefore hold that the disposition constitutes a good charitable trust.[101]

In his text on the law of charities, Hubert Picarda also indicates that where an activity of a charity is incidental to its main charitable purpose, it is an acceptable activity even though it is not in and of itself charitable at law. In this regard, Picarda writes:

> Where an authorised activity is in fact a means to an end (and not an end in itself), the fact that it is not on its own a charitable activity is irrelevant provided the end is charitable… If non-charitable activities or benefits do not represent a collateral or independent purpose, but are incidental to and

[97] Keren Kayemeth decision, *supra* note 86 at 478.
[98] *Re Scowcroft*, [1989] 2 Ch. 638.
[99] *Ibid.* at 638.
[100] *Re Hood*, [1931] 1 Ch. 240. ["Re Hood" decision]
[101] *Ibid.* at 244 to 245.

> consequent upon the way in which the charitable purpose of the body in question is carried on the body is charitable.[102]

Picarda cites the cases of *IRC* v. *Temperance Council*[103] and the National Anti-Vivisection Society decision[104] wherein the courts found that the promotion of legislation was ancillary to the attainment of the fundamental object of the charity, which was the advancement of religion, and held that the promotion of such legislation is merely a means to an end and will not negatively impact the charitable nature of the organization. As well, in the Re Neville Estates decision, where a synagogue was not only used for religious services and instruction but also for social activity, the court found that a charitable trust existed and characterized the social activity as merely ancillary to the religious activities.[105] In addition, in *Ontario (Public Trustee) v. Toronto Humane Society*, the Ontario High Court of Justice stated that a charity was permitted to engage in political activities as long as these activities were ancillary and incidental to charitable purposes. In that case, the court decided that since the political activities are incidental and ancillary to the educational purpose and not ends in themselves, they do not disqualify the Society from being a charity.[106]

In summary, the courts have recognized that advancing religion can encompass activities that are not in and of themselves overtly spiritual in nature , but which nevertheless maintain the crucial element of being based within, and serving to promote, a recognized religious doctrine. It is within this context that a religious organization whose work has an emphasis upon a practical application of religious principles should be able to be recognized as charitable under the head of advancement of religion. In this regard, the Chief Justice of the Australian court, Justice Gleeson, correctly points out that,

> [p]eople sometimes react with surprise and even indignation when church leaders make a public affirmation of religious doctrine. But what is to be expected of church leaders if they do not, from time to time, do that? Have people really considered what the social consequences would be if the great religions abandoned their teaching role?[107]

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[102] Picarda, *supra* note 14 at 214 and 216.
[103] *IRC* v. *Temperance Council* (1926), 10 TC 748.
[104] National Anti-Vivisection Society decision, *supra* note 19.
[105] Re Neville Estates decision, *supra* note 67.
[106] *Ontario (Public Trustee) v. Toronto Humane Society* (1987), 60 O.R. (2d) 236.
[107] Justice Gleeson, *supra* note 4 at 95.

10. Religious Charities Must Actually be Advancing a Religion

Even though Canadian courts have generally been liberal when defining what constitutes a religion and a religious purpose, they have been reluctant to grant charitable status to religious organizations that define their objects too broadly. Specifically, in *Fuaran Foundation v. Canada Customs Revenue Agency*,[108] the Federal Court of Appeal endorsed CRA's decision not to register a religious organization (the Fuaran Foundation) as a charity because the foundation had defined its objectives too broadly and was not seen as actually advancing religion.

The Fuaran Foundation was a Canadian foundation that supported a Christian retreat centre in Great Britain. The foundation's application listed its purposes as being advancement of religion and advancement of education. However, the promotional materials that the foundation used for the retreat centre did not make it sufficiently clear that the retreat centre was for religious and educational purposes. One pamphlet published by the foundation invited people to come, "for a day of quiet or for a day of creativity using your hidden talents to produce a drawing, painting, wood carving, cut gemstone, icon or photograph".[109] Attendees at the retreat centre had complete discretion whether to participate in the religious activities that were provided there. In addressing the appeal, the courts agreed with the position taken by CRA that the foundation's objects were overly broad and could allow it to undertake non-charitable purposes.

Justice Sexton was not convinced that the foundation's activities were exclusively for the purpose of advancing the Christian religion, since "the appellant has not made it clear whether the primary activity will involve conducting religious retreats or merely the operation of a resort like any quiet inn or lodge." The court further explained that,

> [w]hat the appellant proposes is to simply make available a place where religious thought may be pursued. There is no targeted attempt to promote religion or take positive steps to sustain and increase religious belief.[110]

As a result, he ruled that it was not unreasonable for CRA to deny registration on the basis that the foundation's objectives were not "exclusively charitable".

[108] *Fuaran Foundation v. Canada Customs and Revenue Agency*, [2004] F.C.J. No. 825. ["Fuaran" decision]
[109] *Ibid.* at para. 3.
[110] *Ibid.* at para. 15.

In reaching this decision, the court analogized Justice Iacobucci's position in *Vancouver Society* on the threshold requirement for registering a charity. In that case, Justice Iacobucci stated that:

> [s]imply providing an opportunity for people to educate themselves, such as by making available materials with which this might be accomplished, but need not be, is not enough.[111]

In concluding that the foundation's activities did not fall within the ambit of advancing religion or of advancing education, the court narrowly construed what practices constitute "advancing religion" in the charitable sense. As a result, concern has been expressed that this decision could be a hurdle to religious organizations that do not have as their aim a focused purpose of either religious proselytizing or worship.[112] However, as will be seen below, the subsequent decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* [113] is likely to overshadow any limiting effect of the Fuaran decision.

C. ADVANCING RELIGION AND THE CHARTER OF RIGHTS AND FREEDOMS

With the advent of the *Charter of Rights and Freedoms* in 1982, CRA and the courts have had to grapple with the issue of how the guarantee of freedom of religion in s.2(a) of the Charter and the equality guarantee in s.15(1) of the Charter relate to advancement of religion as a head of charity.

1. The Charter Assists in Defining the Boundaries of Freedom of Religion

The recent Supreme Court of Canada decision in Anselem provides a definition of freedom of religion and uses the Charter to define the boundaries of this freedom[114]. In that decision, the Supreme Court of Canada rendered a broad interpretation of the Charter right to religious freedom. The appellants in that case were Orthodox Jews who co-owned residential units in a condominium complex. A by-law in their declaration of co-ownership restricted them from building structures on the balconies of their condominiums. At issue was the appellants' ability to erect a "succah" (a small

[111] Vancouver Society decision, *supra* note 28.
[112] For more details about this decision see Carter, Terrance S. "Federal Court of Appeal Weighs in on Definition of Advancing Religion" (2004) *Charity Law Bulletin* No. 50, available at www.carters.ca.
[113] Amselem decision, *supra* note 5.
[114] *Ibid.*

enclosed temporary hut or booth made of wood or other material and open to the heavens) on their individual balconies during the nine-day Jewish festival of Succot. When the appellants refused to remove the "succahs", the respondent Syndicate applied for and was granted an injunction on the basis that the by-law did not violate the Quebec Charter.

The trial judge who granted the injunction, Rochon J., did so on the basis that, in order for a contractual clause to infringe on a person's freedom of religion,

> …the impugned contractual clause must, whether directly or by adverse effect, either compel individuals to do something contrary to their religious beliefs or prohibit them from doing something regarded as mandatory by their religion.[115]

He based this conclusion on his opinion that,

> [f]reedom of religion can be relied on only if there is a connection between the right asserted by a person to practice his or her religion in a given way and what is considered mandatory pursuant to the religious teaching upon which the right is based…How a believer performs his or her religious obligations cannot be grounded in a purely subjective personal understanding that bears no relation to the religious teaching as regards both the belief itself and how the belief is to be expressed.[116]

and on the evidence provided at trial by Rabbi Barry Levy that,

> [t]here is no religious obligation requiring practicing Jews to erect their own succahs.[117]

Rochon's decision was later upheld by the Quebec Court of Appeal, which found that "the impugned provisions were neutral in application since they affected all residents equally in prohibiting all construction on balconies", and as such "…did not create a distinction based on religion."[118]

[115] *Ibid.* at 1905.
[116] *Ibid.* at 1907.
[117] *Ibid.* at 1909.
[118] *Ibid.* at para. 29.

However in the Supreme Court of Canada's Amselem decision, Justice Iacobucci rejected this "unduly restrictive" view of freedom of religion taken by the trial judge and by the Quebec Court of Appeal. Instead he found that the declaration of co-ownership infringed the appellants' religious rights under the Quebec Charter and concluded that freedom of religion includes;

> …freedom to undertake practices, and harbour beliefs, having a nexus with religion, in which and individual demonstrates 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 is in conformity with the position of religious officials. This understanding is consistent with a personal or subjective understanding of freedom of religion. **As such a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. It is the religious or spiritual essence of the action, not any mandatory or perceived-as-mandatory nature of its observance that attracts protection**.[119] [emphasis added]

The Supreme Court reiterated that there should be no legal distinction between "obligatory" and "optional" religious practices and that "it is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine."[120]

This decision resonates on two main points. It establishes that it is the spiritual essence of an action that is sincerely held, and not the mandatory nature of its observance that attracts protection, and it reinforces the point that it is inappropriate for courts to adjudicate questions of religious doctrine. These fundamental principles could expand the scope of protected freedom of religion to include all believers of a faith, even those who might be considered by some to be "on the fringes".

In addition, the Amselem decision may have an impact on how broadly CRA will define advancing religion when reviewing applications for charitable status, especially those applications which are made by organizations whose activities are believed by their members as advancing religion but which are not necessarily mandated by the doctrine, teaching or practice of that particular faith. At the very least, the Anselem decision should provide guidance to CRA concerning how it makes its decisions on charitable registration under advancement of religion.

[119] *Ibid.* at para. 46.
[120] *Ibid.* at para. 67.

2. Charter Challenge to the Existence of Advancement of Religion as a Head of Charity

An argument that has been advanced by proponents who wish to abolish or restrict advancement of religion as a head of charity is that "the freedom of religion and conscience is offended by the conferral of positive state benefits on the basis of religious status"[121] They point to *the Big M. Drug Mart* decision where Dickson J. stated that,

> [c]oercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alterative courses of conduct available to others. [122]

And argue that since "indirect forms of control" by the state can constitute coercion by using tax dollars, which Canadian citizens have all been compelled by the state to pay to subsidize religious charities, the state is engaging in indirect coercion of its citizens who are not in agreement with supporting these charities.[123]

This argument was rejected by the Manitoba Court of Appeal in *Re Mackay and Manitoba*[124], where a scheme which provided an expense rebate to politicians and political parties who succeeded in obtaining 10% or more of the vote was challenged on the basis that it infringed the applicant's s.2(a) and (b) rights. The appellant's argument in that case was remarkably similar to that outlined above, as he was alleging that he was being forced to contribute his tax dollars to political parties with whom he did not agree and that this constituted state coercion which impinged on his freedom of conscience. In its decision, the court concluded that:

> The impugned provisions of the *Elections Finances Act*, in providing for state reimbursement of some election expenses of a minority group, do not impede the freedom of the applicants, or anyone else, to think what thoughts they will as to the good or evil of the policies the subsidized minority espouses; nor do they restrict the applicants from expressing their own views and incurring whatever expenditure they think appropriate for the purpose. [125]

[121] *Ibid.* at para. 33.
[122] *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. 4th 321 at 354. ["Big M Drug Mart" decision]
[123] For a parallel discussion of the possibility of a taxed based challenge to the advancement of religion as a head of charity, see Boyle, Patrick J. "The Advancement of Religion and the Income Tax System: Current Issues" *Advancing The Faith In Modern Society* (Canadian Council of Christian Charities, 2000) at129.
[124] *Re Mackay and Manitoba* (1986), 24 D.L.R. 4th 587 (Man. C.A.). ["Re Mackay" decision]
[125] *Ibid.* at 6.

The court also stated that;

> Monetary support by the State for the expression of minority views, however distasteful to the majority or to another minority group, cannot offend the conscience of those opposed to the viewpoint.[126]

The conclusion reached in *Re Mackay* was further supported in *Edwards Books*, where the court explained that an infringement of s.2(a) rights will only be found in situations where the religious practices or beliefs of a group are directly being interfered with by the government as is exemplified in the following passage:

> For a state imposed cost or burden to be proscribed by s.2(a) it must be capable of interfering with religious belief or practice.[127]

As such, the courts have affirmed that an indirect subsidy that is achieved through the granting of charitable status does not constitute an affirmation by the state that one religious view is superior to another, especially if charitable status is be granted indiscriminately to any religious organization that meets the criteria of "advancing religion" as described above. It follows that the government is not infringing the s. 2(a) or 2.(b) Charter rights of those who are opposed to the views espoused by religious groups who are granted charitable status. Furthermore, by granting charitable status to a particular religious group, the government is not imposing a cost or burden on anyone or interfering with any other party's religious beliefs or practice. [128]

3. <u>The Relationship between Public Policy and the Freedom of Religion</u>

As broad as freedom of religion is, it is not unlimited. Courts have consistently held that an individual's freedom of religion is limited by the rights of others.[129] As was explained in *Ross v. New Brunswick School District No.15*:

> Freedom of religion ensures that every individual must be free to hold and to manifest without State interference those beliefs and opinions dictated by one's conscience. This freedom is not unlimited, however, and is restricted

[126] *Ibid.* at 7.
[127] *Edward Books and Art Ltd. et al. v. the Queen,* [1986] 2 S.C.R 713 at 34.
[128] See Kathryn Bromley's article, *supra* note 22, for a more in depth discussion on this point.
[129] Kathryn Bromley, *supra* note 22.

> by the right of others to hold and manifest beliefs and opinions of their own and to be free from injury from the exercise of the freedom of religion of others.[130]

Both the case law and CRA have taken the position that a "charity's activities must be legal and must not be contrary to public policy."[131] It is therefore conceivable that a religious organization could be denied charitable status if CRA determined that its objects were contrary to public policy or inconsistent with Charter values.

In this regard, the courts have found that a charitable trust can be found to be void as being contrary to public policy. The most recent example of this in Canada is the case of *Canada Trustco v. O.H.R.C.*,[132] which involved an educational trust established in 1923, in which the testator expressed an intention to exclude from benefit,

> …all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.[133]

The court concluded that this "trust was void on the ground of public policy to the extent that it discriminated on grounds of race, religion and sex."[134] However, the Ontario Court of Appeal recognized in this case that trusts should only be found void for public policy reasons "in clear cases, in which the harm to the public is substantially incontestable."[135] Professor Donovan Waters suggests that the reasoning behind this legal principle could be that,

> [t]he courts have always recognized that to declare a disposition of property void on the ground that the object is intended to contravene, or has the effect of contravening public policy, is to take a serious step. **There is the danger that the judge will tend to impose his own values rather than those values which are commonly agreed upon in society and, while the evolution of the common law is bound to reflect contemporary ideas on the interests of society, the courts also feel that it is largely the duty of**

[130] *Ross v. New Brunswick School District no. 15*, [1996] 1 S.C.R. 825 at 866.
[131] CRA, Employee Speech CES-001, "Registering a Charity for Income Tax Purposes" (30 January 1997). Available at http://www.cra-arc.gc.ca/E/pub/tg/t4063/t4063eq.html#P265_23190 at 6.
[132] *Canada Trustco v. O.H.R.C.* (1990), 74 O.R. (2d) 481 (O.C.A.). ["Canada Trustco" decision]
[133] *Ibid.* at 1.
[134] *Ibid.* at 2.
[135] *Ibid.* at 13.

> **the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.**[136] **[***emphasis added*]

This issue of how to resolve the conflict that occurs when the Charter rights of two people or two groups of people are apparently in conflict most recently arose in conjunction with the Supreme Court of Canada's *Reference Re Same Sex Marriage*.[137] In that case, the Supreme Court tried to address the conflict between the freedom of religion of those who are opposed to same-sex marriage and the right of same-sex couples to be equal before the law. The court rejected the notion that allowing same-sex couples to marry was an infringement on the religious freedom of those who are opposed to same-sex marriage. The Supreme Court took the position that,

> [t]he mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of the equality rights of one group cannot in itself constitute a violation of the rights of another.[138]

Presumably, this principle could be applied in reverse, and it could be argued that the recognition of the freedom of religion, which includes freedom from state coercion concerning religious beliefs, cannot constitute a violation of the rights of those who are in agreement with same-sex marriage. More broadly stated, allowing individuals to hold religious beliefs and to practice in accordance to those beliefs, is not a violation of the religious freedom of those who do not agree with the beliefs in question. This principle was recently affirmed in a case where the court rejected the application of a resident of a township who claimed that a non-denominational prayer that was regularly recited at a town council meeting which he occasionally attended, violated his freedom of conscience and religion, contrary to s.2(a) of the Charter.[139] The applicant in that case was a secular humanist who did not believe in God. He objected to the reference made to "Almighty God" in the prayer on the grounds that this was contrary to his beliefs. In its decision, the court found that the purpose of the

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[136] Waters 2nd ed., *supra* note 55 at 240.
[137] Marriage Reference decision, *supra* note 7.
[138] *Ibid.* at para. 47.
[139] *Allen v. Corporation of the County of Renfrew*, [2004] O.J. No.1231. For a broader discussion of the implications of this case, refer to White, Mervyn. "Recent Ontario Decision Revisits Prayer in Government Proceedings" (2005) *Church Law Bulletin* No. 10. Full text can be found at www.churchlaw.ca.

prayer was to "impose a moral tone on the proceedings and to promote certain values in particular good governance"[140] and agreed with the applicant that;

> [t]he prayer clearly reflects the belief that God is the source of these blessings and that the requested wisdom, knowledge and understanding derives from God. In this limited respect there is a religious message.[141]

Despite finding that the prayer was religious and that the beliefs being expressed in the prayer were contrary to those of the applicant, the court explained that,

> [i]n a pluralistic society, religious, moral or cultural values put forward in a public governmental context cannot always be expected to meet with universal acceptance…In my view, it would be incongruous and contrary to the intent of the Charter to hold that the practice of offering a prayer to God per se is a violation of the religious freedom of non-believers.[142]

As such, the court in that decision acknowledged that it is acceptable and not contrary to the freedom of religion of non-believers for religious beliefs to be expressed in the public context in this way.

The Supreme Court of Canada in the Marriage Reference decision explained that even in the event that a true "collision of rights" was found to exist, due to the difference in belief systems of two groups of people, when attempting to reconcile these rights,

> [t]he Court must proceed on the basis that the Charter does not create a hierarchy of rights and that the right to religious freedom enshrined in s.2(a) of the Charter is expansive.[143]

Furthermore, any attempt by the courts to promote or enforce a version of "public policy" which is contrary to the central beliefs of many religious believers could be seen as constituting an infringement of the freedom of religion of those who are opposed to the public policy being promoted. This is especially true since,

[140] *Ibid.* at para. 18.
[141] *Ibid.* at para. 18.
[142] *Ibid.* at para. 19.
[143] Marriage Reference decision, *supra* note 7 at para.52.

> [r]eligion is (in part) an attempt to ascertain whether there is a universal order of reason and human freedom, and to align oneself with that order. If such an order exists, and a person does not conform his actions and thoughts to what he believes it requires, then that person's integrity and moral character are harmed. For the state to force a person to carry out actions which are contrary to the order which a person is trying to bring to their life is to force the person to forego the benefits of acting according to conscience and instead to alienate that person from their actions. To force a person into this dis-integrity is to harm that person.[144]

By way of example, in the Marriage Reference decision it was clearly stated that for the state to force a religious official who was opposed to same-sex marriage on religious grounds to perform a same-sex marriage ceremony, or to force a religious group who is opposed to same-sex marriage on religious grounds to allow its facilities to be used for the purposes of a same-sex marriage ceremony, would be discriminatory and would be an infringement of their freedom of religion. More specifically, the Supreme Court of Canada stated that,

> **[t]he performance of religious rites is a fundamental aspect of religious practice**. It therefore seems clear that state compulsion of religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s.2(a) of the Charter. It also seems apparent that, absent exceptional circumstances which we cannot presently foresee, **such a violation could not be justified under s.1 of the charter**.[emphasis added][145]

In this passage, the Supreme Court of Canada once again recognizes the importance of the practical manifestations of religious belief and that the freedom to practice one's beliefs is at the core of the freedom of religion as guaranteed in s.2(a). As a result, the Marriage Reference decision could provide assistance for those advocating for a more expansive definition of religion as it confirms that, in the event of a conflict between the freedom of religion and another charter freedom, the courts should not read down the freedom to hold religious beliefs but, rather, should give s.2(a) an expansive interpretation.

[144] Centre for Cultural Renewal. "The Diminution of Freedom of Religion" (2000) *LexView 38.0* at 7. Full text can be found at http://www.culturalrenewal.ca/lex/lex-38.htm.
[145] Marriage Reference decision, *supra* note 7 at 58.

4. Charter Challenge Based on Discrimination Between Religious Groups

It is also possible that a religious group which has been denied charitable status might argue that in so doing, CRA in effect is saying that one religion is less worthy than another and therefore argue that they are being denied equality before the law and their freedom of religion as guaranteed in s.15(1) and 2(a) of the Charter.

The courts have previously rejected the notion that by supporting some religious organizations and not others, the government is discriminating against the religious organizations that it is not supporting. In *Adler v. Ontario*, the Supreme Court of Canada disagreed with a group of parents who were claiming that by funding Roman Catholic schools and secular public schools but not funding private religious schools, the province was discriminating against them on the basis of religion.[146] The Supreme Court of Canada confirmed that,

> [t]he failure to fund independent religious schools does not constitute a limit on the guarantee of freedom of religion. The parents are not compelled to violate the tenets of their religion with respect to education. The burden complained of, the cost of sending their children to private schools, being not a prohibition of a religious practice but rather the absence of funding for one, has not historically been considered a violation of freedom of religion.[147]

In other words, it was not a violation of s.2(a) of the Charter for the government to provide funding to some religions while withholding it to others.[148]

The government has also been challenged in the health care context for providing funding to some groups and not others. An example of this is the recent Supreme Court of Canada decision in *Auton v. British Columbia*, where the B.C. government won an appeal against parents of an autistic child who had won a s.15(1) Charter challenge against the B.C. Government for refusing to provide funding for a program for autistic children. In that decision, the Supreme Court of Canada confirmed once again that it is not always discriminatory for governments to be selective in their funding.[149]

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[146] *Adler v. Ontario* (1996), 140 D.L.R. (4th) 385.
[147] *Ibid.* at 389.
[148] Phillips, *supra* note 78 at 20.
[149] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No.71. ["Auton" decision]

In the Auton decision, the Supreme Court of Canada reaffirmed that,

> [t]he legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a mater of public policy, provided the benefit itself is not conferred in a discriminatory manner.[150]

The Supreme Court also stated that,

> [i]f,…,the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory.[151]

There can be no doubt that charitable status is a benefit that is provided by law, the statutory basis of which can be found in the ITA. What is less clear is what underlying public policy objectives the government is trying to promote when it chooses to grant charitable status to one religious group, and not to another. If the public policy objective underlying advancement of religion as a head of charity is that all religion is inherently good, it would be inconsistent to differentiate between religious doctrines when granting charitable status .

One way to avoid a Charter challenge to advancement of religion as a head of charity would be for CRA and the courts to exclude only those groups who break the law, have policies that are clearly contrary to public policy or who fail to meet the other generally accepted criteria that CRA has established for determining whether or not to grant charitable status. As a result, when deciding whether or not it is appropriate to grant charitable status to a religious group, CRA should be mindful of, "the principle that the law stands neutral between religions."[152] Furthermore, any court adjudicating on this issue must remember that,

> [n]o temporal court of law can determine the truth of any religious belief: it is not competent to investigate any such matter and it ought not attempt to do so.[153]

Also, as Prof. Donovan Waters suggests,

[150] *Ibid.* at para. 41.
[151] *Ibid.* at para. 2.
[152] *Ibid.* at 81.
[153] Gilmour decision, *supra* note 31 at 455.

> [t]here is no reason why any of the world's religion involving widely accepted creeds and public places of worship would not today be accepted as charitable.[154]

As a result, the focus should be on whether the group's purposes and activities are truly for the purpose of advancing their religion and not on the tenets of the religion at issue. In order to protect and encourage religious freedom as guaranteed in s.2(a) of the Charter, the courts and CRA should recognize and include as broad a range of religious activities as possible and should allow religious leaders to speak out on moral issues which affect the members of their religious group.

D. RECENT POLICIES BY CRA AFFECTING ADVANCEMENT OF RELIGION

CRA recently released two new proposed policies: *Applicants Assisting Ethnocultural Communities*[155] and *Guidelines for Registering a Charity: Meeting the Public Benefit Test*[156] that are relevant to various aspects of what constitutes advancement of religion. These proposed policies are integral to current and potential charitable organizations as they provide insights into the CRA standards that they will need to achieve in order to maintain or acquire charitable status under the ITA under the head of advancement of religion.

1. Consultation on Proposed Policy: Applicants Assisting Ethnocultural Communities

The proposed policy by CRA on *Applicants Assisting Ethnocultural Communities* sets out the guidelines for registering community organizations that assist disadvantaged ethnocultural communities in Canada. This policy is relevant for religious organizations that provide services for ethnocultural groups. In the policy, CRA acknowledges that ethnocultural groups represent a significant part of the Canadian demographic and that community organizations provide needed services to assist new Canadians in navigating the challenges and disadvantages they face. The proposed CRA policy is meant to inform these community organizations concerning the framework within which they can attain charitable status for the purposes of the ITA.

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[154] Waters 3rd ed., *supra* note 56 at 708.
[155] Ethnocultural communities policy, *supra* note 10 .
[156] CRA, Proposed Policy, "Guidelines for Registering a Charity: Meeting the Public Benefit Test" (30 September 2004). ["Public Benefit" policy] Available at http://www.cra-arc.gc.ca/tax/charities/consultations/publicbenefit-e.html.

Religious organizations that assist ethnocultural groups and wish to acquire charitable status must qualify under one of, or combinations of, the four heads of charitable purposes established in *Pemsel*, including advancement of religion. According to the proposed policy statement, an ethnocultural group is defined by the shared characteristics that are unique to, and recognized by that group, which include ancestry, language, country of origin, national identity and religion. However, religion is only considered to be a shared characteristic if it is inextricably linked to the group's racial or cultural identity.

A previous draft of this CRA policy suggested a narrowing of the definition of advancement of religion at common law by stating that,

> [i]n this category of charity, if the undertaking promotes the spiritual teachings of the religion concerned, public benefit is usually assumed. However, religion cannot serve as a foundation or a cause to which a purpose can conveniently be related. If the group's purposes are more secular than theological, it does not qualify as advancing religion. For example, opposing abortion and promoting or opposing same-sex marriage, while in keeping with the values of some religious believers and religions, cannot be considered charitable purposes in the advancement of religion category.

Section 36 of a previous draft of this proposed policy statement went on to provide some examples of both acceptable and unacceptable objects for religious worship based on a specific linguistic community. Among the examples of acceptable objects were the following:

> The promotion of spiritual teachings of the religion concerned and the maintenance of the spirit of the doctrines and observances on which it rests.

In contrast, the "pursuit of purposes that are more secular than theological" was listed as an unacceptable charitable object. This presumably would include those purposes previously listed in this policy statement, ie. opposing abortion and promoting or opposing same-sex marriage.

Several groups expressed concern that these sections of the proposed policy statement could be interpreted to mean that activities that are undertaken for the purpose of advancing religion, but which could also be viewed by some as having a secular purpose, would be characterized by CRA as not fitting within the category of activities that advance religion. Furthermore, the previously

proposed policy statement did not explain to what extent secular purposes can be pursued, how to distinguish between a secular purpose and a theological purpose, and what the implications would be if a purpose were identified as being both secular and theological in nature.

It is debatable whether secular and theological should be juxtaposed in this manner. Some argue that it is perfectly acceptable, and perhaps even desirable, for the secular world to be informed by religious beliefs.[157] In a recent case involving a charter challenge to a school board's decision to disallow the use of books depicting same-sex families intended for use in the curriculum for children in kindergarten to grade 7, the British Columbia Court of Appeal noted that,

> [m]oral positions must be accorded equal access to the public square without regard to religious influence. A religiously informed conscience should not be accorded any privilege, but neither should it be placed under a disability.[158]

This is the principle that Iain T. Benson advocates in the following passage:

> The often anti-religious stance embodied in secularism excludes and banishes religion from any practical place in culture. A proper understanding of secular…will seek to understand what faith claims are necessary for the public sphere, and a properly constituted secular government…will see as necessary the due accommodation of religiously informed beliefs from a variety of cultures.[159]

The policy previously proposed by CRA could possibly have had the effect of narrowing the scope within which religion could be advanced and, therefore, might have resulted in a narrowing of the activities and ventures that current religious charities could undertake. It could also have provided an obstacle for new religious charities attempting to qualify for charitable status under the ITA. In response to these concerns, CRA has recently advised that it is intending to amend these passages of the policy and to delete the reference previously made concerning secular versus theological and omit the examples that were given of abortion and same-sex marriage. The most recent (unpublished) draft of the proposed policy reads as follows:

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[157] Benson, Iain T. "Why Religion is a Public Good" *Advancing The Faith in Modern Society* (Canadian Council of Christian Charities, 2000) at 103-106.
[158] *Chamberlain v. Surrey School District* No. 36, [2000] B.C.J. No. 1875 at para. 28.
[159] Benson, Iain T. "Notes Towards a (Re)Definition of the "Secular"" (2000) *U.B.C. Law Review*, 33:3 at 520.

> 36. This category refers to promoting the spiritual teachings of a religious body, and maintaining the doctrines and spiritual observances on which those teachings are based. A religious body is considered charitable when its activities serve religious purposes for the public good. An example of accepted wording for this category would be 'to advance and teach the religious tenets, doctrines, observances and culture associated with the (specify faith or religion) faith.
> 37. Religious worship focused on a specific linguistic community would be acceptable.[160]

2. Can Religious Charities Meet The Public Benefit Test?

As indicated previously in this paper, one of the advantages that Canadian religious charities have had to date is that the courts and the CRA have presumed that charities that are advancing religion inherently provide a public benefit. This 'presumption of public benefit' can be challenged. There are some who argue that there should be no presumption of public benefit for religious charities so that, in order to qualify for charitable status, religious organizations would have to prove that they do, in fact, provide a public benefit. This could have a devastating effect on religious groups, such as cloistered nuns whose activities mostly involve private prayer and worship. How would they prove that their prayer and worship has a beneficial effect on the community?

The new proposed policy by CRA concerning *Meeting the Public Benefit Test* seeks to clarify the rules relating to "public benefit". Generally, the policy proposes a two-part public benefit test that requires proof of tangible public benefit being conferred. In relation to the question of when proof of public benefit is required, CRA indicates as follows:

> The extent to which an applicant charity is required to meet the first part of the public benefit test will depend, in large part, under which category the proposed purposes fall. When the purposes fall within the first three categories of charity, a presumption of public benefit exists.[161]

In a previous draft of this proposed policy, CRA indicated that the presumption of public benefit for the first three categories of charity could be challenged and used advancement of religion as an example of a situation in which this could occur:

[160] This new wording was provided directly to the author by CRA Charities Directorate and has not yet been published on CRA's website.
[161] Public Benefit policy, *supra* note 156 at s.3.1.1.

> The presumption however, can be challenged. So when the "contrary is shown" or when the charitable nature of the organization is called into question, proof of benefit will then be required. **For example, where a religious organization is set up that promotes beliefs that tend to undermine accepted foundations of religion or morality, the presumption of public benefit can be challenged.** When the presumption is disputed, the burden of proving public benefit becomes once again the responsibility of the applicant organization. [emphasis added][162]

In indicating that the presumption of public benefit could be challenged when the "contrary is shown", CRA cited the earlier-mentioned National Anti-Vivisection Society decision where an example was given of how the presumption of public benefit could be rebutted where a position is put forward by a religious organization that "undermines accepted foundations of religion and morality".[163] In contrast, in the Re Watson decision, the court stated that "a religious charity can only be shown not to be for the public benefit if its doctrines are adverse to the foundations of all religion and subversive of all morality…"[164] [emphasis added]. The statement by the courts in this case with reference to the qualifier "of all" is significantly different in substance from the statement by CRA above that does not include the qualifier "of all".

Concern was expressed by some commentators that this proposed CRA policy statement, although likely unintentionally, could have unnecessarily broadened the circumstances in which the presumption of public benefit under advancement of religion could be challenged, i.e. from a situation where a religious organization promotes beliefs that are contrary to the foundations of all religion and subversive to all morality to one where a religious organization promotes beliefs that are contrary to any accepted foundation of religion or morality. In recognition of this concern, CRA has indicated that it is proposing to amend this policy and remove the example cited above.

Given the wide-range of religious beliefs on many different issues, it is possible that some religious organizations might in certain situations be subject to a challenge of their presumed public benefit under advancement of religion because one or more of their promoted beliefs might be significantly different from those which are believed to be accepted societal norms dealing with morality, i.e. in

[162] *Ibid.*
[163] National Anti-Vivisection Society decision, *supra* note 19.
[164] Re Watson decision, *supra* note 67.

accordance with the more broad-based standard of religion and morality set out in this proposed CRA policy statement.

This issue was briefly raised in the Catholic Bishop's factum for the Supreme Court of Canada Reference Re Same Sex Marriage case165. The Bishops submitted that, once same sex marriage was legalized, it would become a moral norm, thereby making it outside the norm to be opposed to same-sex marriage. Their concern was that,

> [o]nce this social and moral orthodoxy is established, it would be a small step to remove charitable status and other public benefits from individuals, religious groups or affiliated charities who publicly teach or espouse views contrary to this claimed orthodoxy.[166]

This is essentially what happened to Alliance for Human Life (the "Alliance"), a pro-life group whose charitable status was revoked after many years because CRA deemed that their activities were overly political. CRA explained in a letter to the Alliance that,

> [f]or activities to be deemed as being for the advancement of religion they must be directly related to the "promotion of spiritual teachings" and the "maintenance of doctrines" associated with the religion and that the fostering of ethical or moral standards would not be seen as satisfying this test.[167]

CRA was also of the opinion that the Alliance's objectives could not fit under the advancement of education head of charity since,

> [f]or an activity to be deemed educational, efforts must be directed toward the training of the mind and that materials used for the purpose must be presented in an unbiased manner so as to allow the reader to make up his or her own mind on the position being advocated.[168]

CRA particularly emphasized that,

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[165] Marriage Reference decision, *supra* note 7.
[166] Sammon, William J., *Factum of the Intervener: The Canadian Conference of Catholic Bishops* (2004), available at www.samesexmarriage.ca
[167] *Alliance for Life v. M.N.R. (C.A.),* [1999] 3 F.C. 504 at para. 11.
[168] *Ibid.* at para. 11.

> [i]f the dissemination of information is directed at persuading the public to adopt a particular attitude of mind rather than to allow an individual to draw an independent conclusion on the basis of a reasonably full and unbiased presentation of the facts, the process is not regarded as charitable by the courts.[169]

The Alliance tried to challenge CRA's decision to revoke it's charitable status on the basis that their freedom of expression was being infringed. The court adamantly rejected this argument, saying that,

> [e]ssentially its (the Alliance's) argument is that a denial of tax exemption to those wishing to advocate certain opinions is a denial of freedom of expression on this basis. On this premise it would be equally arguable that anyone who wishes the psychic satisfaction of having his personal views pressed on his fellow citizens is constitutionally entitled to a tax credit for any money he contributes for this purpose. The appellant is in no way restricted by the *Income Tax Act* from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2(b) of the Charter is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held.[170]

CRA has made it clear that it will not register, and in some cases will revoke the charitable status of, a charity that is overtly political in its activities. As explained in a recent CRA policy statement on political activities:

> A charity may not take part in an illegal activity or a partisan political activity. A partisan political activity is one that involves direct or indirect support of, or opposition to, any political party or candidate for public office.[171]

Alternatively, the policy statement notes that,

> [a] charity may take part in political activities if they are non-partisan and connected and subordinate to the charity's purposes.[172]

CRA explains that it is appropriate for a charity to communicate with elected representatives or public officials and to advocate for a change in the law, policy or decision of government. However, charities must ensure that these activities are related and subordinate to their charitable purpose, and

[169] *Ibid.* at para. 11.
[170] *Ibid.* at para. 87.
[171] CRA, Policy Statement CSP-P02, "Political Activities" (25 October 2002) at 6.1. ["Political Activities" policy] Available at http://www.cra-arc.gc.ca/tax/charities/policy/cps/cps-022-e.html
[172] *Ibid.* at 6.2.

that the communications are "well-reasoned" and not misleading and are within the acceptable limits of expenditures established by CRA.[173]

Another factor that CRA will consider when determining whether the purpose of an activity is political or charitable is whether a group limits the services it offers to a specific group of people and warns that "all types of limitations have the potential of offending the public benefit test" and that "organizations that want an outright restriction of benefit or exclusions of services have a far greater burden of establishing public benefit than those organizations that want to focus attention on a specific group, but extend service delivery to the general public."[174]

As a result, there is a danger that religious organizations that are engaged in activities other than religious worship and teaching doctrine, particularly if they involve political activities, may become more vulnerable to having their charitable status revoked, or to be denied charitable status in the first instance on the basis that they are engaging in too much overt political activity or if their activities are seen by CRA as being discriminatory in some way. As Carl Juneau suggested:

> If anything, the best way to deal with the problem is to ensure that any organization that alleges to be religious should have a primary purpose and thrust that are indeed religious; that any political pronouncements a religious charity makes are incidental, and that they are clearly tied to religious observance. Otherwise it would seem difficult to defend actions on the basis of advancement of religion.[175]

E. ADVANCEMENT OF RELIGION IN OTHER JURISDICTIONS

Canada is not alone in considering the issue of advancement of religion. Governments and courts in other Commonwealth jurisdictions, such as the U.K. and Australia, have also been struggling to define the boundaries of advancing religion as a head of charity. Whereas the U.K.'s proposal is to remove the presumption of public benefit from all heads of charity, other common law jurisdictions, such as

[173] *Ibid.* at 7.3. For a full description of the expenditure limits on political activities, refer to section 9 of the Political Activities policy.
[174] Public Benefit policy, *supra* note 156 at 3.2.2.
[175] Juneau, Carl. *Defining Charitable Limits: Advocacy, Education and Political Activities* (LSUC Department of Continuing Legal Education, 1998).

Australia, are expanding the definition of advancing religion in order to be as inclusive of all religious groups as possible.

1. The UK Position

In May 2004, the Government of the U.K. released draft charities legislation.[176] This Bill was currently subject to legislative scrutiny by a Joint Committee of both Houses. The Government is considering the Report of the Joint Committee's recommendations released on September 30, 2004.[177] The draft Bill proposes an expansive list of descriptions of heads of charity. These are enumerated in paragraph 2(2) (a-k) of the Bill and include, among others, advancement of religion, advancement of human rights, and conflict resolution or reconciliation. Paragraph 2(2)(l) is a more general description, which brings in any other purposes that are analogous to the enumerated purposes in (a-k). In tandem, the Bill introduces a statutory public benefit test in a separate section.

The government decided not to include a statutory definition of public benefit in the Charities Bill in recognition of the fact that the common law approach allows for more flexibility and for the accommodation of diversity.[178] However, the Charties Bill would remove the existing common law presumption that purposes for the relief of poverty, advancement of education and advancement of religion are for the public benefit. Despite the Charity Commission's suggestion that this new requirement only represents a levelling of the field for all types of charities, this new requirement in effect narrows the current common law position for organizations applying under the traditional heads by imposing a new mandatory, but unclear, public benefit threshold requirement that must be met by an organization in order to be considered charitable.

Various groups and individuals have been participating in the consultation process concerning this Bill. One of these groups, the Churches Main Committee, has raised the question of what it means to advance religion. The Committee was of the opinion that the description of advancement of religion found in the current version of the Bill reflects a "rather narrow understanding of the types of

[176] *Charities Bill*, 2004. (HL). ["Charities Bill"]
[177] The *Charities Bill* was dropped in mid April due to the upcoming election in the UK. It is possible that the newly elected government will reintroduce the legislation, in which case it would have to start the legislative process from scratch.
[178] Charity Commission of England and Wales, *Charity Commission News*, Issue 20 (May, 2004) full text available at: http://www.charity-commission.gov.uk/tcc/ccnews20.asp

bodies currently entitled to charitable status under the head of advancement of religion, the breadth of activities those bodies undertake and the nature of the public benefit which may accrue from those activities."

For example, the churches pointed out that the statements made in the government publication on "Private Action, Public Benefit" imply that "all or most charities concerned with the advancement of religion are involved in providing opportunities for public worship or evangelistic/missionary activity. They go on to state that "in fact, currently accepted religious purposes in the Church of England are much broader and include the promotion of worship, the promotion of the work of religious communities, encouraging spiritual life, nurturing young people in the Christian faith, promoting particular aspects of the Christian Faith, such as the Anglican Society for the Welfare of Animals." The Churches also argue that the statements erroneously assume that "the benefit derived from religious belief and practice will be confined to adherents alone." Their concern is that "if the existing presumption of public benefit is removed, decisions about the public benefit of religious activities will not preserve the current breadth of religious purposes accepted as charitable at common law."[179]

Despite concerns that have been expressed about the potential for a narrowing of the scope of advancing religion, there is evidence in a new policy entitled, *Promotion of Religious Harmony for the Benefit of the Public,*[180] that the UK Charities Commission is open to recognizing new contexts in which religious organizations can qualify for charitable status. In this new policy, the Charities Commission recognizes that the promotion of religious harmony is a charitable object. The Commissioners draws an analogy between the promotion of religious harmony and the promotion of equality between the sexes and/or the promotion of racial harmony. Some of the benefits to the public from the promotion of religious harmony include the reduction of conflict and crime, the improvement of the mental and spiritual welfare of the community, and that "understanding other's religious beliefs leads to more appropriate provision of services, both in the public and the private sphere".[181] The commissioners also explain that the promotion of religious harmony is in keeping

[179] Archbishops' Council, *Response of the Archbishops' Council of the Church of England to the Report of the Strategy Unit "Private Act, Public Benefit"* (December 2002, unpublished). Available at www.cofe.anglican.org/info/papers/papb.doc.
[180] U.K. Charity Commission, *Promotion of Religious Harmony for the Benefit of the Public* (England and Wales, May 2003). Available at http://www.charity-commission.gov.uk/registeredcharities/harmony.asp.
[181] *Ibid.* at para. 6.

with The *Human Rights Act*, 1998, Articles 9(9) and 14(10) of the *European Convention on Human Rights* and a European Directive (2000/78/EC of 27 November 2000), which prohibits discrimination on the grounds of religion or belief.[182]

2. The Australian Position

In 2003, the Australian Government also released a draft Charities Bill.[183] However, after a consultation process, which exposed several deficiencies in their Charities Bill, the Australian Government decided to continue to use the common law definition of charity and to pass new legislation that has the effect of extending the common law definition of charity to include charitable purposes, such as the provision of childcare on a non-profit basis, self-help groups with open and non-discriminatory membership and closed or contemplative religious orders that offer prayerful intervention to the public.[184] The Explanatory Memorandum that accompanies this legislation recognizes the difficulties that closed and contemplative orders have had in obtaining charitable status in the past due to their inability to meet the public benefit requirement, and explains that contemplative orders that offer a public interface (i.e. that offer prayerful intervention to any members of the faith community who seek it) will be deemed by virtue of this legislation to meet the public benefit criteria.[185]

Some of the submissions made to the Board of Taxation Inquiry into the Definition of Charity in Australia expressed a concern that by defining religion in the Charities Bill, the Australian Government might inadvertently be discriminating against some religious groups. In this regard, the National Aboriginal Torres Strait Islander Ecumenical Commission noted that:

> Religion as interpreted by clause 12 is a predominantly Western concept: one that fails to respond adequately to the diversity of traditions within contemporary Australian society…The danger is that, in reflecting that heritage, other traditions which also merit being described as religious will

[182] *Human Rights Act 1998* (Cth.); *European Convention on Human Rights;* European Directive 2000/78/EC of 27 November 2000.
[183] *Charities Bill 2003* (Cth.). Available at http://www.taxboard.gov.au/content/downloads/charities_bill.pdf
[184] Austl., Commonwealth, Australian Taxation Office, *Final Response to the Charities Definition Inquiry* (Non-Profit News Service No. 0060, May 2004) available at http://www.ato.gov.au/print.asp?doc=/content/44462.htm; the *Charities Bill* 2003 referred to is the *Extension of Charitable Purposes Act 2004* (Cth.), available at http://scaleplus.law.gov.au/html/comact/12/6863/pdf/1072004.pdf
[185] Austl., Commonwealth, Parliamentary Library, *Extension of Charitable Purposes Bill 2004* (Bills Digest, June 2004) at 5.

> be excluded, or may have to work much harder to justify their inclusion. NATSIEC is concerned both with traditional Christian theology and with Indigenous spirituality. While Christianity clearly falls within clause 12, some Indigenous people would not see their beliefs as constituting a religion in the sense defined by that section and would therefore be at risk of falling outside its scope.[186]

In response to this concern, the Board of Inquiry into the Definition of Charity endorsed the idea of maintaining advancement of religion as a head of charity and the common law definition of advancement of religion as expressed in the Church of New Faith decision where it was held that religion could be defined as,

> First, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.[187]

In its final report, the Board of Taxation highlighted the important role that religion plays in society as follows:

> It is clear that a large proportion of the population have a need for spiritual sustenance. Organizations that have as their dominant purpose the advancement of religion are for the public benefit because they aim to satisfy these needs by providing systems of beliefs and the means for learning about beliefs and for putting them into practice.[188]

Now that the Australian Government has decided not to replace the common law definition of charity with a statutory one, it will be left up to the Australian courts to continue to define the boundaries of advancement of religion in that country. However, it is apparent from the *Extension of Charitable Purposes Act* described above, as well as from the commentary published by the Australian government on this topic that the Australian government intends to continue to support advancement of religion as a head of charity and would appear sympathetic to a broadening of its application.

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[186] Austl., Commonwealth, The Board of Taxation, *Consultation on the Definition of a Charity: A Report to the Treasurer* (2003) at Ch.6 at 4. ["Board of Taxation Report"] Available at http://www.taxboard.gov.au/content/Charity_consultation/index.asp.
[187] Church of the New Faith decision, *supra* note 93 at 74.
[188] The Board of Taxation Report, *supra* note 186 at Ch.20 at 5.

F. CONCLUSION

One of the questions that many common law jurisdictions have struggled with is: who should decide what the boundaries of advancement of religion as a head of charity should be? Is it the role of the courts to continue to define religion for the purposes of charity law, or should the government intervene and pass legislation which provides a definition of religion?

In Canada, it will likely be left to the courts, as well as, to a certain extent, to CRA from an administrative context, to decide the future of advancement of religion. In reviewing the approach that the Supreme Court of Canada has taken in the *Amselem* decision in relation to the interpretation of the scope of religious freedom and the definition of religion that has been articulated by courts in other jurisdictions, it appears that a broader definition of advancement of religion is warranted. While historically the case law has not been clear on how expansive advancement of religion is, recent decisions have made it clear that the state and the courts must not inquire into the validity of an individual's religious beliefs or practices. Furthermore, if the definition of religion is too narrowly construed, Charter challenges could be brought against the government for discriminating against those religions that are not included in the charitable definition of religion.

From the case law and commentary noted in this paper, it is apparent that "religion can and does have a significant role in identifying and promoting values that advocate and encourage personal attitudes towards others and conduct between citizens which, even in a non-legal sense, is charitable."[189] In order for religion to be effective, those who believe must be allowed to engage in practical manifestations of their faith. It is, therefore, appropriate for the state to provide broad support for religious organizations by granting them charitable status, since in doing so, the state is acknowledging the benefit that comes from advancing religion within a pluralistic society.

[189] Sorensen, *supra* note 2 at 15.

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