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Canadian Council of Christian Charities and Christian Legal Fellowship  
**SYMPOSIUM ON THE PLACE OF RELIGION IN SOCIETY**

**Toronto, Ontario - September 29, 2005**

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**ADVANCING RELIGION AS A HEAD OF CHARITY:  
WHAT ARE THE BOUNDARIES?  
(REVISED)**

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

*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<sup>1</sup>

**A. INTRODUCTION**

All world religions, including Judaism, Hinduism, Buddhism and Islam, follow some equivalent to the “Golden Rule” for Christians: “Do for others what you would like them to do for you,” or “love your neighbour as yourself.”<sup>2</sup> 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.”<sup>3</sup>

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<sup>+</sup> This article has been updated by the authors as of September 19, 2005 from an earlier version of the paper that was presented at the CBA/OBA 3<sup>rd</sup> National Symposium on Charity Law on May 6, 2005. The original paper was based, in part, on a Church Law Bulletin written 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](http://www.churchlaw.ca). The author would also like to recognize the contribution of Nancy Claridge, who is currently articling at Carter and Associates and assisted in editing the final version of this paper . Any errors in this paper are solely those of the authors.

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<sup>1</sup> Iacobucci, Justice Frank, “The Evolution of Constitutional Rights and Corresponding Duties: The Leon Ladner Lecture” (1992) *U.B.C. Law Rev.* 1 at 18. [“Justice Iacobucci”]

<sup>2</sup> 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”] which provides a list of world religions, including Confucianism, Hinduism, Judaism, Buddhism, Islam, Zoroastrianism, Bahai, Jainism and Sikhism which hold a similar belief.

<sup>3</sup> *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?<sup>4</sup>

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*.<sup>5</sup> This was the first opportunity the Supreme Court of Canada 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 decision in *Reference re Same-Sex Marriage*, 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]<sup>6</sup> is broad and jealously guarded in our Charter jurisprudence."<sup>7</sup>

<sup>4</sup> Gleeson, Chief Justice Anthony Murray. "The Relevance of Religion" (2001) 75 A.L.J. 93 at 95.

<sup>5</sup> *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](http://www.churchlaw.ca), which provides a case comment on the Amselem decision.

<sup>6</sup> *Canadian Charter of Rights and Freedoms*, 1982 s.2(a). [the "Charter"]

<sup>7</sup> *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.<sup>8</sup> 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 is 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*<sup>9</sup> 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*.<sup>10</sup> 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 in 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 concerning advancement of religion as a head of charity. Nevertheless, this paper

<sup>8</sup> *Special Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.). [“Pemsel” decision]

<sup>9</sup> *Income Tax Act*, R.S.C. 1985, c.1 (5<sup>th</sup> Supp.) [“ITA”].

<sup>10</sup> CRA, Policy Statement ,CPS-023, “Applicants Assisting Ethnocultural Communities” (16 September 2004). Available at: [www.cra-arc.gc.ca/tax/charities/policy](http://www.cra-arc.gc.ca/tax/charities/policy) [“Ethnocultural Communities” policy].

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*,<sup>11</sup> a decision emanating from the preamble of the *Statute of Elizabeth 1601*,<sup>12</sup> which provided a list of charitable purposes recognized at law at that time.<sup>13</sup> 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.”<sup>14</sup> 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,

... 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

<sup>11</sup> Pemsel decision, *supra* note 8.

<sup>12</sup> *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.*

<sup>13</sup> 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.*

<sup>14</sup> Picarda, Hubert. *Law and Practice Relating to Charities*, 3<sup>rd</sup> ed. (London, Butterworths, 1999) at 62. [“Picarda”]

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.<sup>15</sup>

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.<sup>16</sup>

By the 19<sup>th</sup> Century, courts began recognizing 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.<sup>17</sup> This principle was subsequently affirmed in *Bowman v. Secular Society Ltd.*<sup>18</sup> and *National Anti-Vivisection Society v. Inland Revenue Commissioners*.<sup>19</sup>

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."<sup>20</sup> 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 salvation. The Church obtained the right to administer intestate estates and to distribute a portion of it *ad pias causas* [for works of religion]. Apart from gifts for the advancement of religion, the Church became the recipient

<sup>15</sup> Moore, Sir Francis. "Readings upon the Statute 43 Elizabeth" in Duke, *Law of Charitable Uses* (1676) 131 at 132.

<sup>16</sup> Picarda, *supra* note 14 at 63.

<sup>17</sup> *Thornton v. Howe* (1862), 54 E.R. 1042. ["Thornton" decision]

<sup>18</sup> *Bowman v. Secular Society Ltd.*, [1917] A.C. 406. (H.L.). ["Bowman" decision]

<sup>19</sup> *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1947] 2 All E.R. 217 at 220 (HL). ["National Anti-Vivisection" decision]

<sup>20</sup> Picarda, *supra* note 14 at 82.

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.<sup>21</sup>

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.<sup>22</sup> 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 divisions: 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.<sup>23</sup>

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

<sup>21</sup> Sorensen, *supra* note 2 at 8.

<sup>22</sup> 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.

<sup>23</sup> *Ibid.* at 583 per Lord MacNaghten.

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

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. In the seminal Supreme Court of Canada decision, *Vancouver Society of Immigrant and Minority Women v. Canada (Minister of National Revenue)*,<sup>25</sup> 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*<sup>26</sup> was reaffirmed. 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”<sup>27</sup> and that “the court has always had the jurisdiction to decide what is charitable.”<sup>28</sup>

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

In the Vancouver Society decision, the Supreme Court explained that a charitable purpose is one that “seeks the welfare of the public” and “is not concerned with the conferment of private advantage.”<sup>29</sup>

In order to be considered charitable, two essential attributes are required:

- (1) voluntariness (or what I shall refer to as altruism, that is giving to third parties without receiving anything in return other than the pleasure of giving); and
- (2) public welfare or benefit in an objectively measurable sense.<sup>30</sup>

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.<sup>31</sup> Therefore, in general, only “religious services tending directly towards the instruction or

<sup>24</sup> *Ibid.* at FN 4 per Sir E. Clarke S.G. and Dicey Q.C.

<sup>25</sup> *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]

<sup>26</sup> *Statute of Elizabeth*, *supra* note 12.

<sup>27</sup> Vancouver Society decision, *supra* note 25 at 146.

<sup>28</sup> *Ibid.* at 146.

<sup>29</sup> *Ibid.* at para. 147.

<sup>30</sup> *Ibid.* at para. 37.

<sup>31</sup> Pemsel decision, *supra* note 8.

edification of the public” are considered “charitable.”<sup>32</sup> This “public benefit” requirement applies to all four heads of charity, but is “attenuated under the head of poverty.”<sup>33</sup>

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 activity itself.<sup>34</sup> 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.”<sup>35</sup> As a result,

... even the pursuit of a purpose which would be non-charitable in itself may not disqualify an organization from being considered charitable if it is pursued only as a means of fulfillment of another, charitable, purpose and not as an end in itself.<sup>36</sup>

In his dissenting judgment in the Vancouver Society Decision, Justice Gonthier provides the following example to illustrate this point:

... supposing the example of a company which published the Bible for profit, and compared 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.<sup>37</sup>

### 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?”<sup>38</sup> Mr. Juneau answered this question as follows:

<sup>32</sup> *Gilmour v. Coats*, [1949] A.C. 426 in the abstract. [“Gilmour” decision]

<sup>33</sup> Vancouver Society decision, *supra* note 25 at para. 147.

<sup>34</sup> *Ibid.* at para. 148.

<sup>35</sup> *Ibid.* at para. 152.

<sup>36</sup> *Ibid.* at para. 158..

<sup>37</sup> *Ibid.* at para. 54.

<sup>38</sup> 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”] [emphasis in original].

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.<sup>39</sup>

People who are religiously motivated also have a greater tendency to volunteer and donate their money in order to assist others in society.<sup>40</sup> 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 human life; it 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 principles which make us better citizens.<sup>41</sup> 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.”<sup>42</sup>

This principle was clearly articulated in several U.S. 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.”<sup>43</sup>

As well, in discussing the evolution of constitutional rights, Justice Iacobucci 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-

<sup>39</sup> *Ibid.* at 6.

<sup>40</sup> Statistics Canada, catalogue 71-542-XIE, *Caring Canadians, involved Canadians, Highlights from the 1997 National Survey of Giving, Volunteering and Participating*, at 17.

<sup>41</sup> *Is Religion Passé*, *supra* note 38 at 6.

<sup>42</sup> Sorensen, *supra* note 2 at 3.

<sup>43</sup> Picarda, *supra* note 14 at 84.

responsibilities in turn rests ultimately on moral and theological principles which inform our Western political, religious and philosophical cultures and traditions.<sup>44</sup>

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.”<sup>45</sup> This was echoed by the Honourable Justice Sopinka in a criminal proceeding involving Charter issues wherein he stated that “much of the criminal law is based on moral conceptions of right and wrong.”<sup>46</sup> The following example was given by Justice Iacobucci to illustrate his point that the law would be hollow and ineffectual in the absence of the values and principles that underlie 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.<sup>47</sup>

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 relations with God, and ethics are concerned with man’s relations with man.”<sup>48</sup> 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.”<sup>49</sup> 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,

<sup>44</sup> Justice Iacobucci, *supra* note 1 at 1.

<sup>45</sup> Justice Iacobucci, *supra* note 1 at 18.

<sup>46</sup> *R. v. Butler* (1992), 89 D.L.R. (4<sup>th</sup>) 449 at 477.

<sup>47</sup> Justice Iacobucci, *supra* note 1 at 16.

<sup>48</sup> *Re South Place Ethical Society* (also referred to as *Barralet et al. v. A.G.*), [1980] 3 All E.R. 918 at 77 [“*Re South Place Ethical Society*” decision].

<sup>49</sup> *Ibid.* at 78.

and how it is that the organization advances that religion.<sup>50</sup> 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 the courts have often had to address: What constitutes a religious purpose?

#### 4. What Constitutes a Religious Purpose?

In the Bowman decision<sup>51</sup> and the National Anti-Vivisection Society decision,<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup> The general consensus in the courts seems to be that “any religion is at

<sup>50</sup> Bourgeois, Don. *The Law of Charitable and Non-Profit Organizations*, 3<sup>rd</sup> ed. (Markham: Butterworths Canada, 2002) at 22.

<sup>51</sup> Bowman decision, *supra* note 18.

<sup>52</sup> National Anti-Vivisection Society decision, *supra* note 19 at 220 (H.L.).

<sup>53</sup> Thornton decision, *supra* note 17.

<sup>54</sup> Gilmour decision, *supra* note 32, per Lord Reid.

<sup>55</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, (Toronto, 1996). [“OLRC” report]

<sup>56</sup> *Ibid.* at 191.

least likely to be better than none” and that, consequently, promoting religion is for the common good.<sup>57</sup> This was the principle 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.<sup>58</sup>

Courts in other common law jurisdictions have also recognized the need to define religion as broadly and inclusively as possible. In its 2001 report, the Australian Charities Committee recommended the definition of advancement of religion 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.”<sup>59</sup> 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.<sup>60</sup>

The U.S. Courts have traditionally been the most inclusive and expansive when defining religion, as exemplified by their determination 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*,<sup>61</sup> while another held that a religious belief is one that occupies a position

<sup>57</sup> *Neville Estates v. Madden*, [1962] Ch.162, [“Neville Estates” decision] at 853 as cited in Waters, Donovan, *The Law of Trusts in Canada*, 2<sup>nd</sup> ed. (Toronto, The Carswell Co. Ltd., 1984) [“Waters, 2<sup>nd</sup> Ed.”].

<sup>58</sup> *Hanlon v. Logue*, [1906] 1 I.R. 247 (C.A.), as explained by Waters, Donovan. *The Law of Trusts in Canada*, 3<sup>rd</sup> ed. (Toronto: Thomson Carswell, 2005) at 705.

<sup>59</sup> Australia, Inquiry into the Definition of Charities and Related Organisations. *Report of the Inquiry into the Definition of Charities and Related Organisations* (Canberra: The Treasury, 2001), available on-line at <http://www.cdi.gov.au/html/report.htm>.

<sup>60</sup> Dal Pont, Gino. *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) at 149 [footnotes omitted].

<sup>61</sup> *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]

in the mind of the adherent equivalent to the position afforded a belief in God.<sup>62</sup> In one U.S. decision, a three part test for determining the religious nature of an organization was suggested:

- 1) whether the beliefs address fundamental and ultimate questions concerning the human condition;
- 2) whether the beliefs constitute an entire system of belief and are comprehensive in nature;
- 3) whether the beliefs are manifested in an external form.<sup>63</sup>

The U.S. Supreme Court placed emphasis on whether a “given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God,” and whether the belief occupies in the life of the individual involved “a place parallel to that filled by ... God’ in traditional religious persons.”<sup>64</sup>

#### 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.<sup>65</sup> 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 disseminating hate literature.<sup>66</sup>

As 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.<sup>67</sup>

<sup>62</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>63</sup> *United States v. Seeger*, 380 U.S. 163 (1965) at 165-166 as cited in Hopkins, B., *The Law of Tax Exempt Organizations*, 8<sup>th</sup> edition (New Jersey :John Wiley and Sons, 2003) [“Hopkins”].

<sup>64</sup> *Welsh v. United States*, 398 U.S (1970) at 340 as cited in Hopkins, *supra* note 63.

<sup>65</sup> Vancouver Society decision, *supra* note 25.

<sup>66</sup> *Ibid.* at para. 152.

<sup>67</sup> Cullity, Maurice C. “The Myth of Charitable Activities” (1990), *Estates and Trusts Journal* 17, at 10.

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.<sup>68</sup>

## 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 segment of it. In *Re Compton*,<sup>69</sup> and subsequently in *Oppenheim v. Tobacco Securities Trust Co.*,<sup>70</sup> the courts cautioned that the potential beneficiaries of a charity must not be numerically negligible, and no personal relationship can exist 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.<sup>71</sup> 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 morality,”<sup>72</sup> 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.”<sup>73</sup> 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.”<sup>74</sup>

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, but, as noted by Peter Luxton, there has been a presumption of public benefit which has been interpreted to mean

<sup>68</sup> *Ibid.* at 13.

<sup>69</sup> *Re Compton*, [1945] Ch.123; [1945] 1 All E.R. 198 (C.A.).

<sup>70</sup> *Oppenheim v. Tobacco Securities Trust Co.*, [1951] A.C.297.

<sup>71</sup> *Re Caus*, [1934] Ch. 162, Gilmour decision, *supra* note 32; *Nelville Estates Decision*, *supra* note 57; *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]

<sup>72</sup> *Re Watson* decision, *supra* note 71.

<sup>73</sup> *Thornton* decision, *supra* note 17.

<sup>74</sup> *Application by Church of Scientology* decision, *supra* note 71 at 13 ff.

that “unless it is shown that such doctrines are immoral, the court will treat them as charitable, no matter that it considers them foolish or even devoid of foundation.”<sup>75</sup> However, Luxton also cautions that the presumption does not extend to the religious purpose benefiting a sufficient section of the community, therefore “a public benefit must be shown.”<sup>76</sup>

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.”<sup>77</sup> 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, were worshipping in a sufficiently public way to qualify for charitable status.<sup>78</sup> Courts have also held that,

[t]he fact that most 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.<sup>79</sup>

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.”<sup>80</sup> The issue adjudicated in the Jensen decision was whether a meeting room 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.<sup>81</sup> The findings of this case reflect

<sup>75</sup> Luxton, Peter. *The Law of Charities* (Oxford: Oxford University Press, 2001) at 130.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Gilmour* decision, *supra* note 32, as explained in *Waters*, 2<sup>nd</sup> ed., *supra* note 57 at 578.

<sup>78</sup> *Waters*, 3<sup>rd</sup> ed., *supra* note 58 at 711, referring to *Neville Estates* decision, *supra* note 71.

<sup>79</sup> *Dal Point*, *supra* note 60 at 167 taken from *Association of Franciscan Order of Friars Minor v. City of Kew*, [1967] VR 732.

<sup>80</sup> *Jensen v. Brisbane City Council* (18 March, 2005), Brisbane BC200501276 (unreported) at para. 88. [“Jensen” decision]

<sup>81</sup> *Ibid.* at para. 90.

the principle 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 case law does not provide clear direction about whether or where a line should be drawn between “public” and “private” religious worship. Prof. James Phillips is 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.”<sup>82</sup> 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, then concede that such matters are beyond legal proof, then steadfastly ignore the issue of benefit in the vast majority of cases?<sup>83</sup>

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.<sup>84</sup>

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 disalced<sup>85</sup> communities.”<sup>86</sup>

The courts and CRA have had difficulty defining what constitutes a “sufficient segment of the community” for the purposes of the public benefit test. David Stevens suggests there are actually several different public benefit tests that can be deduced from the case law. He explains that when

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<sup>82</sup> 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, 2<sup>nd</sup> Ed, *supra* note 57 at 578, in which an analysis of some of these cases is provided.

<sup>83</sup> *Ibid.* at 13.

<sup>84</sup> OLRC report, *supra* note 55 at 200.

<sup>85</sup> The term “disalced” 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.

<sup>86</sup> Phillips, *supra* note 82 at 16.

considering whether an organization or trust whose stated purpose is the advancement of religion, the advancement of education or the relief of poverty is charitable at common law, the courts and CRA will often allow the trust or organization to focus its activities on a particular segment of the community which identifies itself by religion, race or some other attribute. However, if this type of organization or trust chooses to limit its membership or beneficiaries to a certain class of persons, then the distinction being drawn must relate directly to the purpose of the organization or trust being pursued and must not contravene the laws and policies governing unlawful discrimination. On the other hand, an organization or trust attempting to qualify under the fourth head of charity – other purposes beneficial to the community – must be found to be beneficial to the community as a whole.<sup>87</sup> As a result, although it may be appropriate for an organization or trust whose stated purpose is the advancement of religion to limit its membership or beneficiaries to members of a certain denomination, it may not be acceptable for an organization or trust trying to qualify under other purposes beneficial to the community to limit its membership in this way.

Underlying these various public benefit tests is a primary public policy concern that in order for a trust or organization to be considered charitable it cannot be for private advantage or contrary to public policy. A charity should be able to demonstrate that its objects “demonstrably serve and [are] in harmony with the public interest,” and they are a “beneficial and stabilizing influence in community life,” which is likely not the case if the organization is engaging in illegal activities or in activities clearly contrary to public policy.<sup>88</sup> In the *Bob Jones University* decision, a U.S. court found the IRS was correct in revoking the charitable status of the University due to their discriminatory policies.<sup>89</sup> However, that court also noted a “declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”<sup>90</sup>

This “public policy doctrine,” as it is referred to in the United States, was also applied by the

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<sup>87</sup> Stevens, David, “Advancing Religion: A Commentary on the Law’s Approach to Understanding Religion as a Charitable Good”, presented at the Third National Symposium on Charity Law hosted by the Canadian Bar Association (May 6, 2005) at 9 -11.

<sup>88</sup> *Bob Jones University v. United States*, 461 U.S. 574 (1983) [“Bob Jones University decision”] as cited in Hopkins, *supra* note

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.* at 592 as cited in Hopkins, *supra* note 63.

Ontario Court of Appeal in *Canada Trust Co. v. Ontario (Human Rights Commission)*,<sup>91</sup> which is discussed in more detail in the Constitutional Law section of this paper. The court in the Canada Trustco decision found that a trust restricted to white, protestant British subjects was void as being contrary to public policy as it had a discriminatory effect. Still, the court warned that, “public policy is an unruly horse,” and that as a result, it “should be invoked only in clear cases, in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds.”<sup>92</sup>

Representatives from religious charities in Canada opposed to the legalization of same-sex marriage on religious grounds expressed a concern that the public policy doctrine could be invoked as grounds for revoking their charitable status for speaking out against same sex-marriage or for having policies that allegedly discriminate against same-sex couples.<sup>93</sup> These concerns have largely been alleviated by a last minute amendment to the *Civil Marriage Act* providing that:

(6.2.1) For greater certainty, subject to subsections (6.1) and (6.2), a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms.<sup>94</sup>

## 7. How Far Does a Religious Purpose Extend?

Religious purposes 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.<sup>95</sup> In some instances, the courts have even found gifts for ancillary projects to be charitable. An example of this

<sup>91</sup> *Canada Trustco v. O.H.R.C.* (1990), 74 O.R. (2d) 481 (O.C.A.). [“Canada Trustco” decision]

<sup>92</sup> *Ibid.* at para 36, citing *Re Millar*, [1938] S.C.R. 1 at 7.

<sup>93</sup> *Civil Marriage Act*, 2005 c.33.

<sup>94</sup> *Ibid.* For more information on the Civil Marriage Act and the new amendments to it, see Carter, T. “Update Regarding Same-Sex Marriage Legislation” *Church Law Bulletin* No. 8 (February 28, 2005) and Carter, T and Langan, Anne-Marie, “Implications of Recent Amendments to Civil Marriage Act for Religious Groups and Officials” *Church Law Bulletin* No. 12 (September 6, 2005) full text of which is available at [www.churchlaw.ca](http://www.churchlaw.ca)

<sup>95</sup> Phillips, *supra* note 82.

can be found in the case of *Re Armstrong*,<sup>96</sup> in which the Nova Scotia Supreme Court decided a direction to an estate trustee in a will 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 it is not the role of the courts to determine the religious or devotional significance of certain practices of a religious organization.<sup>97</sup> As a result, courts in Canada have been reluctant to exclude any 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*,<sup>98</sup> which was affirmed in Canada in *Re Anderson*,<sup>99</sup> 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.”<sup>100</sup> CRA's interpretation of this decision is that it stands for the proposition that, “religion is advanced when people carry out the rights of the faith or propagate it.”<sup>101</sup>

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.<sup>102</sup> In the case of *Holy Spirit Association for the Unification of World Christianity v. Tax Commission of the City of New York*,<sup>103</sup> the court was even willing to concede that where political and economic beliefs are fundamental to a religious organization's religious beliefs, such political and economic beliefs will be considered a part of its religious beliefs. In this regard, the OLRC report confirmed that,

<sup>96</sup> *Re Armstrong* (1969), 7 D.L.R. (3d) 36 (N.S.S.C.).

<sup>97</sup> *Donald v. Hamilton Board of Education*, [1945] 3 D.L.R. 424 (Ont. C.A.).

<sup>98</sup> *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].

<sup>99</sup> *Re Anderson* (1943), 4 D.L.R. 268 (Ont. H.C.).

<sup>100</sup> *Ibid.* at para. 7, per Plaxton, J.

<sup>101</sup> CRA, “Discussion Paper- Advancement of Religion: Common Law Definition of Charity” presented at Muttart Foundation Charity Law Consultation in Banff, Alberta (May, 2005). (“CRA Muttart Paper”)

<sup>102</sup> *United States v. Ballard*, 322 U.S. 78 (1944); and *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969) at 449.

<sup>103</sup> *Holy Spirit Association decision*, *supra* note 61.

[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.<sup>104</sup>

## 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 “freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship.”<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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. Alberta*, 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.<sup>108</sup>

<sup>104</sup> OLRC report, *supra* note 55 at 192-193.

<sup>105</sup> *Walter v. A.G. Alta.*, [1969] 66 W.W.R. 513 at 521.

<sup>106</sup> *Church of the New Faith v. Commissioner of Pay-Roll Tax*, 83 A.T.C. 4, 652. [“Church of the New Faith” decision]

<sup>107</sup> *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.

<sup>108</sup> *Fletcher v. A.G. Alta.*, [1969] 66 W.W.R. 513 at 521.

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

Courts have acknowledged that advancement of religion extends beyond worship and includes related activities, such as addressing social, moral and ethical issues. In relation to this inclusive approach, the OLRC 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.<sup>109</sup>

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.<sup>110</sup> 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.<sup>111</sup> Again in *Re Hood*, the court determined a gift that was made to spread Christianity by encouraging others to take active steps to stop drinking alcohol was a charitable gift, since it was made for the purpose of advancing religion.<sup>112</sup> 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.<sup>113</sup>

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:

<sup>109</sup> OLRC report, *supra* note 55 at 193.

<sup>110</sup> *Re Scowcroft*, [1989] 2 Ch. 638.

<sup>111</sup> *Ibid.* at 638.

<sup>112</sup> *Re Hood*, [1931] 1 Ch. 240. [“*Re Hood*” decision]

<sup>113</sup> *Ibid.* at 244 to 245.

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 consequent upon the way in which the charitable purpose of the body in question is carried on the body is charitable.<sup>114</sup>

Picarda cites the cases of *IRC v. Temperance Council*,<sup>115</sup> and the National Anti-Vivisection Society decision,<sup>116</sup> wherein the courts found 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 would 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.<sup>117</sup> 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. Since the political activities were incidental and ancillary to the educational purpose and not ends\_in themselves, the court held that they did not disqualify the Society from being a charity.<sup>118</sup>

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 places 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

<sup>114</sup> Picarda, *supra* note 14 at 214 and 216.

<sup>115</sup> *IRC v. Temperance Council* (1926), 10 TC 748.

<sup>116</sup> National Anti-Vivisection Society decision, *supra* note 19.

<sup>117</sup> *Re Neville Estates* decision, *supra* note 71.

<sup>118</sup> *Ontario (Public Trustee) v. Toronto Humane Society* (1987), 60 O.R. (2d) 236.

people really considered what the social consequences would be if the great religions abandoned their teaching role?<sup>119</sup>

#### 10. Can a Single Issue Religious Organization be Charitable?

The question remains whether it is possible for a religious organization to be considered charitable where its main activity consists of something that in itself may not be intrinsically religious, but is done for a religious purpose. Such an organization is often referred to as a “single issue religious organizations”. CRA suggests that single issue religious organizations cannot be charitable, stating that “[t]he pursuit of one object which is not intrinsically religious and that may be pursued equally for religious and secular purposes is not charitable as advancing religion.<sup>120</sup> The reason CRA gives for this position is that;

... in general, when assessing charitable status, the motives behind the formation of the group are not considered, but the character of the activities engaged in are. Analysis of the activities engaged in is seen as allowing an objective analysis, preferred to a subjective one.<sup>121</sup>

CRA goes on to explain that in order to be charitable, a religious organization must contain a “significant element of religion” and be able to pass the “religious substance” test, which asks:

- Is the activity accepted in the writings or by a majority of the followers of that faith as central to the pursuit of that particular religion?
- Does it fit directly or by analogy into one of the categories of activities historically considered to advance religion, such as:
  - The maintenance and promotion of public worship, including the building and repair of churches etc.;
  - The orderly administration of divine services – support of clergy and;
  - Spreading religion.<sup>122</sup>

Presently, as a result of CRA’s policy in this respect, it would be very difficult for single issue religious organizations to obtain charitable status under the head of advancing religion. In order to qualify for charitable status, a single issue religious charity would have to show that it meets the criteria of one of the other three heads of charity: advancing education, the relief of poverty, or other purposes beneficial to the community, since it would otherwise not be able to meet the “religious substance” test required by CRA.

<sup>119</sup> Justice Gleeson, *supra* note 4 at 95.

<sup>120</sup> CRA Muttart paper, *supra* note 101 at 25.

<sup>121</sup> *Ibid.* at 25.

<sup>122</sup> *Ibid.* at 26-27.

However, even if a religious organization were successful in obtaining charitable status as a charity under one of the other three heads of charity, such organization might put its charitable status at risk if donations intended for the purpose of advancing religion were used for a different purpose, since the organization would be acting in a way that could be seen as contrary to the donor's intent. In such a situation, both the organization and its directors could be at risk of being exposed to liability for breach of trust. Additionally, even in the absence of donor-directed trust funds, such a religious organization could arguably be restricted from undertaking any religious activities; as such activities would not be related to the charitable purpose for which CRA had granted it charitable status.

World Vision Canada is arguably an example of a single issue religious charity, although CRA might not categorize it as such. World Vision Canada describes itself as “a Christian humanitarian organization reaching out to a hurting world,” and focuses on providing relief to poor children in third world countries. One of its “core values” is described in the following terms: “We are Christian. From the abundance of God's love, we find our call to ministry.”<sup>123</sup> On the CRA website, World Vision is currently listed in the category of “Missionary Organizations and Propagation of Gospel,”<sup>124</sup> which is interesting given the fact that the website of World Vision Canada does not mention either missionary activities or a focus on the “Propagation of Gospel.” Presumably, if World Vision Canada were to apply for charitable status today, it should be able to qualify under both the relief of poverty head and the advancing religion head, as its mission is to relieve poverty as a way of demonstrating God's love in response to a hurting world. However, if World Vision Canada were to qualify for charitable status under only the head of relieving poverty, as CRA would likely do given its recent policy on single issue religious charities, such designation would not reflect the true nature of the organization as a “Christian humanitarian organization”, and, as a result, could potentially be misleading to donors and thereby expose the directors to possible allegations of breach of trust.

By way of a further example, consider a religious organization that prepares food to be used for religious observance. In some faiths, such as some sects of the Hindu faith, properly prepared foods are not universally considered to be an essential requirement for adherents. Nevertheless, there is a

<sup>123</sup> See the World Vision website at: <http://www.worldvision.ca/home/about-us/core-values/>.

<sup>124</sup> See list of Canadian Charities on CRA website: <http://www.cra-arc.gc.ca/dchmf/haip/srch/sec/SrchInput03Render-e?bn=119304855RR0001>.

belief among certain segments of the Hindu faith that eating religiously prepared food is an act of worship. Similar to Kosher food, the food must be prepared by certain people in a certain way. The manner in which this food is prepared involves various religious rituals and can involve only certain ingredients. The food is purchased only by people who practice in the faith and these organizations are usually funded by donors who also practice the faith and whose intent it is to advance their religion. If you take away the religious aspect of the food preparation, such an organization would not likely qualify as charitable. The only way it could qualify as a registered charity is if it is accepted as an organization advancing religion. This would only be possible if CRA was willing to look at the motive driving the organization and not at the activity alone.

CRA's position, as outlined earlier, runs contrary to a fundamental principle in determining what is charitable, as expressed by the Supreme Court of Canada in the Vancouver Society decision: in that it is the motive or purpose behind the activities that must be scrutinized when determining whether an organization is charitable.<sup>125</sup> It is inconsistent for CRA to suggest that the motives behind the formation of a group are not relevant, choosing instead to look only at the activities in which the organization is engaging. Furthermore, the "religious substance" test outlined by CRA is very restrictive and is not consistent with the test the courts have been using in the most recent decisions concerning advancing religion. CRA's test appears to only recognize mainstream religious groups engaging in public worship as qualifying for charitable status, not recognizing that even within a particular faith, different subgroups often choose to practice and express their faith in different ways.

A more rational approach to the issue would be to look for indicia of a nexus between the activity that is taking place and the advancement of religion. Some of the factors that could be considered in this regard could include:

- Whether the organization adheres to a set doctrine, which preferably would be in writing;
- Whether the organization is putting the said doctrine into practice in various ways;
- Whether the structure and governance of the organization reflects that the organization is advancing religion;
- Whether the organization has a statement of faith of some kind;
- Whether the board of directors or board of trustees is made up entirely of members of the faith in question;

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<sup>125</sup> Vancouver Society decision, *supra* note 25.

- Whether the membership of the organization is made up entirely of people who are members of the faith and practice the faith;
- Whether the intention of the donors who donate gifts to the organization is to advance the faith;
- Whether the organization intends to give all of its assets to another organization that is advancing religion in the event of dissolution;
- Whether the organization is directly or indirectly connected or is accountable to a larger faith group;

From the above examples, it is evident that it does not make sense to take an activity out of context. If an organization has a truly religious purpose and meets the criteria outlined above, it should be able to qualify as charitable as advancing religion without having to fall under another head of charity.

#### 11. Religious Charities Must Actually be Advancing a Religion

CRA has also been reluctant to grant charitable status to religious organizations that define their objects too broadly. Specifically, in *Fuaran Foundation v. Canada Customs Revenue Agency*,<sup>126</sup> the Federal Court of Appeal endorsed CRA's decision not to register a religious organization (the Fuaran Foundation) as a charity because the foundation defined its objectives too broadly and was not seen as actually advancing religion.

The Fuaran Foundation was a Canadian foundation supporting 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 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."<sup>127</sup> Attendees at the retreat centre had complete discretion whether to participate in the religious activities provided. In addressing the appeal, the court agreed with the position taken by CRA that the foundation's objects were overly broad and could allow it to undertake non-charitable purposes.

<sup>126</sup> *Fuaran Foundation v. Canada Customs and Revenue Agency*, [2004] F.C.J. No. 825. ["Fuaran" decision].

<sup>127</sup> *Ibid.* at para. 3.

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.<sup>128</sup>

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." In reaching this decision, the court analogized Justice Iacobucci's position in *Vancouver Society* with respect to 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.<sup>129</sup>

In concluding the foundation's activities did not fall within the ambit of advancing religion or 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.<sup>130</sup> However, as will be seen below, the subsequent decision of the Supreme Court of Canada in *Syndicat Northcrest v. Amselem*<sup>131</sup> is likely to overshadow any limiting effect of the Fuaran decision.

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<sup>128</sup> *Ibid.* at para. 15.

<sup>129</sup> *Vancouver Society* decision, *supra* note 28.

<sup>130</sup> 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](http://www.carters.ca).

<sup>131</sup> *Amselem* decision, *supra* note 5.

### 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 *Amselem* provides a definition of freedom of religion and uses the Charter to define the boundaries of this freedom.<sup>132</sup> In that decision, the Court rendered a broad interpretation of the Charter right to religious freedom. The appellants were Orthodox Jews who co-owned residential units in a condominium complex in which a by-law in the declaration of co-ownership restricted them from building structures on the balconies of the condominiums. At issue was the appellants' ability to erect a "succah" (a small 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.<sup>133</sup>

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

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.* at 1905.

understanding that bears no relation to the religious teaching as regards both the belief itself and how the belief is to be expressed.<sup>134</sup>

In this respect, Rochon referred to the evidence provided at trial by Rabbi Barry Levy that “[t]here is no religious obligation requiring practicing Jews to erect their own succahs.”<sup>135</sup>

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.”<sup>136</sup>

However, on appeal to the Supreme Court of Canada, Justice Iacobucci rejected this “unduly restrictive” view of freedom of religion taken by the lower courts. 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.**<sup>137</sup>  
[emphasis added]

The Court reiterated that there should be no legal distinction between “obligatory” and “optional” religious practices and “it is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine.”<sup>138</sup>

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<sup>134</sup> *Ibid.* at 1907.

<sup>135</sup> *Ibid.* at 1909.

<sup>136</sup> *Ibid.* at para. 29.

<sup>137</sup> *Ibid.* at para. 46.

<sup>138</sup> *Ibid.* at para. 67.

This decision resonates on two main points. First, 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. Second, 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 Amselem decision should provide guidance to CRA concerning how it makes its decisions on charitable registration under advancement of religion.

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

An argument advanced by proponents wishing 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.”<sup>139</sup> They point to the *Big M. Drug Mart* decision where Justice Dickson 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 alternative courses of conduct available to others.<sup>140</sup>

It is also argued 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 in order to subsidize religious charities, the state is engaging in indirect coercion of its citizens who are not in agreement with supporting these charities.<sup>141</sup>

<sup>139</sup> *Ibid.* at para. 33.

<sup>140</sup> *R. v. Big M Drug Mart Ltd.* (1985), 18 D.L.R. 4<sup>th</sup> 321 at 354. [“Big M Drug Mart” decision]

<sup>141</sup> 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) at 129.

This argument was rejected by the Manitoba Court of Appeal in *Re Mackay and Manitoba*,<sup>142</sup> wherein a scheme providing an expense rebate to politicians and political parties who succeeded in obtaining 10 percent or more of the vote was challenged on the basis it infringed the applicant's s. 2(a) and (b) rights. The appellant's argument was remarkably similar to that outlined above, as he was alleging he was being forced to contribute his tax dollars to political parties with whom he did not agree, which constituted state coercion that 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.<sup>143</sup>

The court concluded: “[m]onetary 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.”<sup>144</sup>

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.”<sup>145</sup>

Accordingly, the courts have affirmed an indirect subsidy 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 being granted indiscriminately to any religious organization meeting the criteria of “advancing religion.” It follows that the government is not infringing the s. 2(a) or 2(b) Charter rights of those opposed to the views espoused by religious groups granted charitable status. Furthermore, by granting charitable status to a particular religious group, the

<sup>142</sup> *Re Mackay and Manitoba* (1986), 24 D.L.R. 4<sup>th</sup> 587 (Man. C.A.). [“Re Mackay” decision]

<sup>143</sup> *Ibid.* at 6.

<sup>144</sup> *Ibid.* at 7.

<sup>145</sup> *Edward Books and Art Ltd. et al. v. the Queen*, [1986] 2 S.C.R 713 at 34.

government is not imposing a cost or burden on anyone or interfering with any other party's religious beliefs or practice.<sup>146</sup>

### 3. The Relationship between Public Policy and the Freedom of Religion

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.<sup>147</sup> 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 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.<sup>148</sup>

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."<sup>149</sup> 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, a charitable trust can be found to be void as being contrary to public policy. The most recent example of this is the decision in *Canada Trustco v. O.H.R.C.*,<sup>150</sup> involving 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."<sup>151</sup>

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."<sup>152</sup> However, the Ontario Court of Appeal

<sup>146</sup> See Kathryn Bromley's article, *supra* note 22, for a more in depth discussion on this point.

<sup>147</sup> Kathryn Bromley, *supra* note 22.

<sup>148</sup> *Ross v. New Brunswick School District no. 15*, [1996] 1 S.C.R. 825 at 866.

<sup>149</sup> 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](http://www.cra-arc.gc.ca/E/pub/tg/t4063/t4063eq.html#P265_23190) at 6.

<sup>150</sup> *Canada Trustco v. O.H.R.C.* (1990), 74 O.R. (2d) 481 (O.C.A.). ["Canada Trustco" decision]

<sup>151</sup> *Ibid.* at 1.

<sup>152</sup> *Ibid.* at 2.

recognized that trusts should only be found void for public policy reasons “in clear cases, in which the harm to the public is substantially incontestable.”<sup>153</sup> Professor Donovan Waters suggests 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 the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.**<sup>154</sup> [emphasis added]

This issue of how to resolve the conflict occurring when the Charter rights of two people or two groups of people are apparently in conflict arose recently in conjunction with the Supreme Court of Canada’s *Reference Re Same Sex Marriage*.<sup>155</sup> The Court tried to address the conflict between the freedom of religion of those 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 opposed to same-sex marriage. The 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.”<sup>156</sup>

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 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

<sup>153</sup> *Ibid.* at 13.

<sup>154</sup> Waters 2<sup>nd</sup> ed., *supra* note 57 at 240.

<sup>155</sup> Marriage Reference decision, *supra* note 7.

<sup>156</sup> *Ibid.* at para. 47.

religion, contrary to s. 2(a) of the Charter.<sup>157</sup> The applicant was a secular humanist who did not believe in God and objected to the reference made to “Almighty God” in the prayer. In its decision, the court found that the purpose of the prayer was to “impose a moral tone on the proceedings and to promote certain values in particular good governance,”<sup>158</sup> agreeing 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.”<sup>159</sup>

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.<sup>160</sup>

As such, the court acknowledged 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 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.”<sup>161</sup>

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

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<sup>157</sup> *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](http://www.churchlaw.ca).

<sup>158</sup> *Ibid.* at para. 18.

<sup>159</sup> *Ibid.* at para. 18.

<sup>160</sup> *Ibid.* at para. 19.

<sup>161</sup> Marriage Reference decision, *supra* note 7 at para.52.

infringement of the freedom of religion of those opposed to the public policy being promoted. This is especially true since,

[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.<sup>162</sup>

By way of example, in the Marriage Reference decision it was clearly stated that it would be discriminatory and an infringement of an individual's or group's freedom of religion for the state to force a religious official opposed to same-sex marriage on religious grounds to perform a same-sex marriage ceremony, or to force a religious group opposed to same-sex marriage on religious grounds to allow its facilities to be used for the purposes of a same-sex marriage ceremony. More specifically, the Court 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.**<sup>163</sup> [emphasis added]

The Court once again recognized the importance of the practical manifestations of religious belief and acknowledged 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 provides 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.

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<sup>162</sup> 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>.

<sup>163</sup> Marriage Reference decision, *supra* note 7 at 58.

#### 4. Charter Challenge Based on Discrimination Between Religious Groups

It is possible that a religious group denied charitable status might argue that in denying that status, CRA in effect is saying one religion is less worthy than another, thereby denying equality before the law and the group's 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 certain religious organizations. 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.<sup>164</sup> The Court 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.<sup>165</sup>

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.<sup>166</sup>

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's refusal to provide program funding for autistic children was held not to violate s. 15(1) of the Charter. In that decision, the Court confirmed that it is not always discriminatory for governments to be selective in their funding,<sup>167</sup> stating 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 matter of public policy, provided the benefit itself is not conferred in a

<sup>164</sup> *Adler v. Ontario* (1996), 140 D.L.R. (4<sup>th</sup>) 385.

<sup>165</sup> *Ibid.* at 389.

<sup>166</sup> Phillips, *supra* note 82 at 20.

<sup>167</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.J. No.71. ["Auton" decision]

discriminatory manner.<sup>168</sup> The Court held that “[i]f ... the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory.”<sup>169</sup>

There can be no doubt that charitable status is a benefit 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 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.”<sup>170</sup> 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.”<sup>171</sup>

As Prof. Donovan Waters suggests, “[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.”<sup>172</sup>

Accordingly, 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.

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<sup>168</sup> *Ibid.* at para. 41.

<sup>169</sup> *Ibid.* at para. 2.

<sup>170</sup> *Ibid.* at 81.

<sup>171</sup> Gilmour decision, *supra* note 32 at 455.

<sup>172</sup> Waters 3<sup>rd</sup> ed., *supra* note 58 at 708.

#### D. RECENT POLICIES BY CRA AFFECTING ADVANCEMENT OF RELIGION

CRA recently released two new policies: *Applicants Assisting Ethnocultural Communities*,<sup>173</sup> and *Guidelines for Registering a Charity: Meeting the Public Benefit Test*,<sup>174</sup> both of which are relevant to various aspects of defining what constitutes advancement of religion. These policies are integral to current and potential charitable organizations, as they provide insights into the CRA standards to be met in order to maintain or acquire charitable status under the head of advancement of religion.

##### 1. New CRA Policy: Applicants Assisting Ethnocultural Communities

The newly released policy by CRA on *Applicants Assisting Ethnocultural Communities* sets out guidelines for registering community organizations that assist disadvantaged ethnocultural communities in Canada. 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. Through this policy, the CRA policy is providing information for these community organizations concerning the framework within which they can attain charitable status for the purposes of the ITA.

Religious organizations that assist ethnocultural groups and wish to acquire charitable status must qualify under one of, or a combination 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,

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<sup>173</sup> Ethnocultural communities policy, *supra* note 10 full text of which is available at: <http://www.cra-arc.gc.ca/tax/charities/policy/ethno-e.html>.

<sup>174</sup> 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>.

[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 the previous draft 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, i.e. opposing abortion and promoting or opposing same-sex marriage.

Several groups expressed concern that these sections of the draft could be interpreted to mean that activities 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 draft 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.<sup>175</sup> 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,

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<sup>175</sup> Benson, Iain T. "Why Religion is a Public Good" *Advancing The Faith in Modern Society* (Canadian Council of Christian Charities, 2000) at 103-106.

[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.<sup>176</sup>

This is the principle that Iain T. Benson advocates:

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.<sup>177</sup>

The previous draft of this policy could 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:

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.<sup>178</sup>

## 2. Can Religious Charities Meet the Public Benefit Test?

As indicated previously, one of the advantages Canadian religious charities have had to date is that the courts and the CRA have presumed that charities advancing religion inherently provide a public

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<sup>176</sup> *Chamberlain v. Surrey School District No. 36*, [2000] B.C.J. No. 1875 at para. 28.

<sup>177</sup> Benson, Iain T. “Notes Towards a (Re)Definition of the “Secular”” (2000) *U.B.C. Law Review*, 33:3 at 520.

<sup>178</sup> This new wording was provided directly to the author by CRA Charities Directorate and has not yet been published on CRA’s website.

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 their prayer and worship has a beneficial effect on the community?

The newly 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.<sup>179</sup>

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:

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.<sup>180</sup> [emphasis added]

In indicating that the presumption of public benefit could be challenged when the “contrary is shown,” CRA cited the National Anti-Vivisection Society decision in which 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.”<sup>181</sup> In

<sup>179</sup> Public Benefit policy, *supra* note 174 at s.3.1.1.

<sup>180</sup> *Ibid.*

<sup>181</sup> National Anti-Vivisection Society decision, *supra* note 19.

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.”<sup>182</sup> [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 that does not include the same qualifier.

Concern was expressed by some commentators that this proposed CRA policy statement, although likely unintentional, 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 it is proposing to amend this policy and remove the example.

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 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 in the same-sex marriage reference.<sup>183</sup> 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.<sup>184</sup>

<sup>182</sup> *Re Watson* decision, *supra* note 71.

<sup>183</sup> Marriage Reference decision, *supra* note 7.

<sup>184</sup> Sammon, William J., *Factum of the Intervener: The Canadian Conference of Catholic Bishops* (2004), available at [www.samesexmarriage.ca](http://www.samesexmarriage.ca)

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.<sup>185</sup>

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.”<sup>186</sup> CRA particularly emphasized that:

[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.<sup>187</sup>

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

[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.<sup>188</sup>

<sup>185</sup> *Alliance for Life v. M.N.R. (C.A.)*, [1999] 3 F.C. 504 at para. 11.

<sup>186</sup> *Ibid.* at para. 11.

<sup>187</sup> *Ibid.* at para. 11.

<sup>188</sup> *Ibid.* at para. 87.

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.”<sup>189</sup> 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.”<sup>190</sup>

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 these activities are related and subordinate to their charitable purpose, and the communications are “well-reasoned” and not misleading and are within the acceptable limits of expenditures established by CRA.<sup>191</sup>

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 “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.”<sup>192</sup>

As a result, there is a danger that religious organizations 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 be denied charitable status in the first instance on the basis 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:

<sup>189</sup> 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>

<sup>190</sup> *Ibid.* at 6.2.

<sup>191</sup> *Ibid.* at 7.3. For a full description of the expenditure limits on political activities, refer to section 9 of the Political Activities policy.

<sup>192</sup> Public Benefit policy, *supra* note 174 at 3.2.2.

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.<sup>193</sup>

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

### 1. The U.K. Position

In May 2004, the U.K. Government introduced draft charities legislation.<sup>194</sup> This Bill was subjected to legislative scrutiny by a Joint Committee of both Houses and recommendations were released by these committees on September 30, 2004.<sup>195</sup> 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).

The Charities Bill also introduces a statutory public benefit test and states that “it is not to be presumed that a purpose of a particular description is for the public benefit.”<sup>196</sup> This clause would have the effect of removing the existing common law presumption that purposes for the relief of

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<sup>193</sup> Juneau, Carl. *Defining Charitable Limits: Advocacy, Education and Political Activities* (LSUC Department of Continuing Legal Education, 1998).

<sup>194</sup> *Charities Bill*, 2004. (HL). [“Charities Bill”]

<sup>195</sup> The original Charities Bill fell victim to the dissolution of Parliament in May 2005 when an all-party agreement could not be secured to have the bill dealt with before Parliament dissolved. However, the same Charities Bill was included in the Queen's Speech on 17 May 2005, and it was reintroduced into the House of Lords on 18 May 2005. Following the second Committee debate in July, the government agreed to consider a number of amendments, which will be considered during the summer recess. The Report stage is provisionally scheduled for 12 October 2005..

<sup>196</sup> *Charities Bill*, *supra* note 194 at s. 3.

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 definition of advancement of religion found in the current draft of the Bill reflects a "rather narrow understanding of the types of 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."<sup>197</sup>

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*,<sup>198</sup> that the UK Charities Commission is open to recognizing new contexts

<sup>197</sup> 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](http://www.cofe.anglican.org/info/papers/papb.doc).

<sup>198</sup> 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>.

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 drew 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.”<sup>199</sup> The commissioners also explain that the promotion of religious harmony is in keeping 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.<sup>200</sup>

## 2. The Australian Position

In 2003, the Australian Government released a draft Charities Bill.<sup>201</sup> 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.<sup>202</sup> 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

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<sup>199</sup> *Ibid.* at para. 6.

<sup>200</sup> *Human Rights Act 1998* (Cth.); *European Convention on Human Rights*; European Directive 2000/78/EC of 27 November 2000.

<sup>201</sup> *Charities Bill 2003* (Cth.). Available at [http://www.taxboard.gov.au/content/downloads/charities\\_bill.pdf](http://www.taxboard.gov.au/content/downloads/charities_bill.pdf)

<sup>202</sup> 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>

community who seek it) will be deemed by virtue of this legislation to meet the public benefit criteria.<sup>203</sup>

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 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.<sup>204</sup>

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.<sup>205</sup>

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

<sup>203</sup> Austl., Commonwealth, Parliamentary Library, *Extension of Charitable Purposes Bill 2004* (Bills Digest, June 2004) at 5.

<sup>204</sup> 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](http://www.taxboard.gov.au/content/Charity_consultation/index.asp).

<sup>205</sup> Church of the New Faith decision, *supra* note 106 at 74.

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.<sup>206</sup>

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.

## 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, CRA in 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.

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<sup>206</sup> The Board of Taxation Report, *supra* note 204 at Ch.20 at 5.

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.”<sup>207</sup> 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.

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<sup>207</sup> Sorensen, *supra* note 2 at 15.

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