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FEDERAL COURT OF APPEAL WEIGHS IN ON DEFINITION OF ADVANCING RELIGION

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A. INTRODUCTION

The Federal Court of Appeal recently dismissed an appeal of Canada Revenue Agency's ("CRA") decision not to register the Fuaran Foundation ("Appellant") as a charity under the *Income Tax Act* (the "Act"), finding the Appellant's resources were not devoted to charitable activities.[1] This decision may make it more difficult for religious organizations to obtain charitable status based upon the charitable grounds of advancing religion, particularly those using secondary activities not directly related to the narrow confines of doctrine and practice of a religion. While a subsequent Supreme Court of Canada decision discussed in the next *Charity Law Bulletin* ("*Bulletin*") may limit the effect of this decision, religious charities should be aware of the possible implications of this Federal Court decision, which are outlined in this *Bulletin*.

B. FACTS OF THE CASE

The main activity upon which the Appellant relied to establish its rights to charitable status was the support and operation of a Christian retreat centre in Great Britain. The Appellant entered into an agreement with a private limited company incorporated and registered under the laws of England and Wales to act as agent for the Appellant in operating the retreat, located on an estate bought by the Appellant in the Lake Region of

[1] *Fuaran Foundation v. Canada Customs and Revenue Agency*, 2004 FCA 181 ("*Fuaran Foundation*").

England. The listed objects and purposes of the Appellant focused on the advancement of the Christian religion and the advancement of education through programs and projects in pursuit of these purposes, including:

a) providing financial assistance for the establishment and continued support of individual Christians and Christian organizations engaged worldwide in:

   i) teaching the Word of God and preaching the Gospel of Jesus Christ to all persons

   ii) assisting all persons through teaching and discipleship to accept and develop a Christian and Biblical lifestyle which discerns and applies the principles of Christian living as set out in the Holy Bible and revealed by the Holy Spirit of God; and

   iii) assisting the poor, the sick, and the needy by acts of Christian charity.

The brochure advertising the Christian retreat centre in Great Britain made reference to Christian life and spirituality, as well as non-religious pursuits.

The CRA refused the registration for a number of reasons, the primary reasons being:

a) the language of the appellant's constitution was so broad as to allow it to undertake non-charitable activities, including provision of financial assistance to non-qualified donees; and

b) attendees at the appellant's workshops have complete discretion as to whether or not they will participate at all in the religious activities. 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.

C. FINDINGS OF THE COURT

1. Standard of Review

Writing for the court, Justice Sexton applied the standard of review suggested by Justice Iacobucci in *Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue*,[2] namely that when determining whether activities are charitable, the appropriate standard of review is reasonableness.

2. Analysis re: provision of financial assistance

Justice Sexton began his analysis with the finding that the conclusions of the CRA were not unreasonable. Especially fatal to the charitable application was the absence of a provision requiring that donees be "qualified donees" within the meaning of the Act. The court further concluded that an undertaking of the Appellant to only donate to qualified donees was insufficient and there was "no authority to suggest that an undertaking [could] effectively narrow the objects in its constitution."

3. Analysis re: definition of advancing religion

In concluding the activities of the Appellant were not exclusively for the purpose of advancing the Christian religion, the court adopted the definitions of what it means to advance religion from the English courts in *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council*[3] and *Keren Kayemeth Le Jisroel Ltd. v. The Commissioners of Inland Revenue*.[4] In *United Grand Lodge*, the court defined advancing religion as: "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." In *Keren Kayemeth*, it was defined as: "the promotion of the spiritual teaching of the religious body concerned and the maintenance of the spirit of doctrines and observances upon which it rests." These definitions were analogized to Iacobucci J.'s analysis of the "advancement of education" in *Vancouver Society*, wherein he stated:

[2] [1999] 1 S.C.R. 10 ("*Vancouver Society*").
[3] [1957] 1 W.L.R. 1080 ("*United Grand Lodge*").
[4] [1931] 2 K.B. 465 (C.A.) ("*Keren Kayemeth*").

> To my mind, the threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others, whether through formal or informal instruction, training, plans of self-study or otherwise. Simply 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.[5]

Applying Justice Iacobucci's definition to the case at bar, the court found the Appellant's plan amounted to making a place available where religious thought may be pursued, with no targeted attempt to promote religion or to take positive steps to sustain and increase religious belief. Continuing, the court said there seemed to be no structured program relating to advancement of religion and the focus in the advertising was not solely religious but also on personal enjoyment and quiet retreat. As such, the court held that it could not be said all of the Appellant's resources were devoted to charitable activities, and consequently dismissed the appeal.

D. IMPLICATIONS OF THE CASE

The Federal Court of Appeal's decision in *Fuaran Foundation* appears to be a narrowing of the traditionally broad approach the courts have taken in the interpretation of the advancement of religion. The analogy to the advancement of education rejects previous findings that the definition of advancing religion can encompass certain activities that are not overtly spiritual in nature by themselves; that the advancement of religion includes the promotion and manifestation of the religious belief in a believers' daily life.

Advancement of religion has historically been recognized as one of the four principle classifications of charitable activities.[6] As such, in order for a prospective charity to qualify under advancement of religion, it has been recognized that the court must be able to determine what religion is being advanced by the organization and how it advances its religion.[7] In *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth*, the Chief Justice wrote: "it is not an exaggeration to say that each person chooses the content of his own religion. It is not for a court, upon some *a priori* basis, to disqualify certain beliefs as incapable of being religious in character."[8] Similarly, the Ontario Law Reform Commission in its 1996

[5] *Vancouver Society*, *supra* note 2 at ¶ 171.
[6] See Lord MacNaghten's decision in *Special Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.) ("*Pemsel*"), wherein he stated that there were four heads of charity at common law: relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community not falling under any of the preceding heads.
[7] Don Bourgeois, *The Law of Charitable and Non-profit Organizations* (Toronto: Butterworths, 1995).
[8] (1943), 67 C.L.R. 116 at 124 (Aust. H.C.).

Report on the Law of Charities asserted that religious purposes should be given a wide meaning in order to avoid conflicts between the judicial and public view, given the evolving nature of religion. Justice Gonthier, writing the dissent in *Vancouver Society*, noted the *Pemsel* classification provided a framework within which the courts may adapt the law as social needs change. "In the absence of clearly defined principles in this area, the courts … may become too wedded to outdated conceptions of the existing categories and lose sight of the underlying principles which motivate the law of charity."[9] U.S. courts have gone so far as to indicate that a religious organization will be determined to be organized for religious purposes where it asserts that its purposes and activities are religious and where such assertions are *bona fide*.[10]

It is also well recognized in the common law that religion may be advanced indirectly. In *Re Charlesworth*, a trust established to pay the expenses of dinners consumed by a society of clergymen was upheld by the court, saying the main purpose of such a trust was the advancement of religion insofar as the provision of dinners furthered the usefulness of the society through increased attendance at meetings.[11] The rationale behind this decision was that the benefits given to these members were for furthering charitable purposes, and not for personal benefits.

Justice Iacobucci, in *Vancouver Society*, stressed it is really the purpose in furtherance of which an activity is carried out, and not the character of the activity itself, which determines whether or not it is of a charitable nature. This supports the findings of earlier courts.[12] As many commentators have noted, however, there has been confusion on this point due in part to judges using the phrase "charitable activities" and "charitable purposes" interchangeably, and the *Income Tax Act*'s uneven reference to charitable purposes and charitable activities.[13] By the Federal Court of Appeal applying the standard that exists for demonstrating the

[9] *Vancouver Society*, *supra* note 2 at ¶ 36.
[10] See *Holy Spirit Association for the Unification of World Christianity v. Tax Commission of the City of New York*, 435 N.E. 2d 662 (1982).
[11] (1910), 101 L.T. 908.
[12] See *Re Scowcroft*, [1898] 2 Ch. 638, wherein the furtherance of religious and mental improvement was found to be the essential portion of a gift, and the furtherance of Conservative principles was only a subsidiary part, thereby upholding the gift as being charitable at law. In *Re Hood*, the English Court of Appeal held that where the purpose of an action is in and of itself non-charitable, it will be found to be charitable where it is done for the larger purpose of advancing religion. In that case, a residual estate gift was given for the larger purpose of spreading Christianity, but the activity was to take steps to stop the drinking of alcohol. Such a gift was determined to be a good charitable gift at law as its purpose was intended to be secondary to the spreading of Christian principles.
[13] Deborah J. Lewis, "A Principled Approach to the Law of Charities in the Face of Analogies, Activities and the Advancement of Education" (2000) 26 Queen's L.J. 679.

advancement of education, to the determination of the advancement of religion, the court is requiring that an organization's purposes *and* the character of their activities be exclusively charitable, departing from the principle developed in common law and confirmed by the ruling in *Vancouver Society*.

E. CONCLUSION

The Federal Court of Appeal's decision in *Fuaran Foundation* constricts the common law definition of advancing religion to the detriment of all organizations that do not have as their aim a focused purpose of either proselytizing or worship. Using primarily secondary activities that are not directly related to the narrow confines of doctrine and practice of a religion may make it more difficult for religious organizations to obtain charitable status based upon the charitable grounds of advancing religion. This will be particularly troublesome for churches and other related religious charities that have assumed that they automatically fall under the advancing religion categorization. This assumption no longer appears to apply, at least in the opinion of the Federal Court of Appeal.

The subsequent Supreme Court of Canada's decision in *Syndicat Northcrest v. Amselem*, [2004] S.CJ. No. 46, 2004 SCC 47 (the "*Amselem* decision"), may mean the *Fuaran Foundation* decision will not have a lasting effect. In the *Amselem* decision, the Court held that a court enters a forbidden domain when it analyzes religious doctrine to determine the truth or falsity of a contentious matter of religious law, or when it attempts to define the very concept of religious obligation. See *Charity Law Bulletin No. 51* for further discussion of the *Amselem* decision.

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