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ADVANCING RELIGION AS A CHARITY: IS IT LOSING GROUND?

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A. INTRODUCTION: THE CHANGING LANDSCAPE

Historically, it has not been clear how broadly advancement of religion as a head of charity could be defined. However, the recent Supreme Court of Canada decision in *Syndicat Northcrest v. Amselem*[1] has seen the judiciary in Canada for the first time give a definition of freedom of religion and, in doing so, the court has stated that religious practice, in addition to religious belief, is equally as important in defining religion. This case is an important turning point in the evolving landscape of advancement of religion as a head of charity.

In recent years, the other three heads of charity (relief of poverty, advancement of education and other purposes beneficial to the community in a way that the law regards as charitable) have been expanded in both their scope and application by the courts and the Charities Directorate at Canada Revenue Agency ("CRA"). As a result, existing and potential religious charities in Canada are hopeful that the definition of advancement of religion can be similarly expanded and, by such an expansion, match the ongoing changes that have taken place in the beliefs and practices of the numerous religious communities in Canada. While CRA intends to release a consultation draft on the issue of advancement of religion, based on the references concerning the scope of religion in recently released policy statements by the CRA in the fall of 2004 regarding "Applicants

[1] *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, 2004 SCC 47. See our firm's *Charity Law Bulletin* #51, available at www.charitylaw.ca, that provides a case comment on the Amselem decision.

Assisting Ethnocultural Communities," and "Meeting the Public Benefit Test," it is not known whether such an expansion of the definition of advancement of religion is reasonable to expect in the future or if, instead, a more limited view of advancement of religion in Canada may develop.

The purpose of this Charity Law Bulletin is to first provide the reader with a general outline of the historical caselaw concerning the definition of advancement of religion. Next, a summary of the ongoing parallel activities in other jurisdictions, the most recent Canadian caselaw and the latest proposed policy statements of the Charities Directorate addressing the definition of advancement of religion is provided. Finally, a brief overview of the possible implications of these recent trends in relation to the definition of advancement of religion is provided, together with a review of their potential impact on both existing and future religious and para-religious charities in Canada.

B. OVERVIEW OF ADVANCEMENT OF RELIGION IN EXISTING CASELAW

1. Advancement of Religion as a Head of Charity

In order to be charitable under the common law, an organization must satisfy both of the following requirements:

a) It must have purposes that are exclusively and legally charitable; and
b) It must be established for the benefit of the public or a sufficient segment of the public.

In relation to the first requirement, the starting point for determining whether a purpose is charitable at law is the decision of the House of Lords in *Special Commissioners of Income Tax v. Pemsel*.[2] In that case, Lord MacNaghten 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. This classification has been generally adopted by both English and Canadian courts in determining whether a particular purpose could be characterized as being "charitable." Most recently, this classification was confirmed by the Supreme Court of Canada in

[2] *Special Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.).

the *Vancouver Society of Immigrant & Visible Minority Women v. Canada (Minister of National Revenue)*.[3]

The second requirement to be a charity at common law is that an organization's purposes must also be directed to the public benefit. This public benefit requirement applies to all four heads of charity, although in varying degrees. It is well established that the advancement of religion is *prima facie* charitable and assumed to be for the public benefit[4] 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…"*[5] [emphasis added], while in the *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, the Charity Commissioners held that *"in addition, in order to be charitable, the trust must not only be for the advancement of religion, it must also be of public benefit…. In the absence of evidence to the contrary, public benefit is presumed...."*[6] However, it is important to be aware that the presumption of public benefit for the first three heads of charity, including advancement of religion, is *prime facie* assumed unless the contrary can be shown to be the case.[7]

2. Religion has been given a broad interpretation by the courts.

The terms, "religion" and "advancement of religion" have been broadly defined in the caselaw. Don Bourgeois in his text book, *The Law of Charitable and Non-profit Organizations*, 8 stated that in order for a prospective charity to qualify under advancement of religion, the court must be able to determine what religion is being advanced by the organization and how it advances its religion. In this regard, Mr. Bourgeois pointed out that the Canadian courts have generally taken a broad interpretation of the

[3] *Vancouver Society of Immigrant & Visible Minority Women v. Canada (Minister of National Revenue*, [1999] 1 S.C.R. 10. (Vancouver Women).
[4] *Re Caus*, [1934] Ch. 162, *Gilmour* v. *Coats*, (1949), 1 All E.R. 848, *Neville Estates Ltd*. v. *Madden*, [1962] Ch. 832, *Re Watson*, [1973] 3 All E.R. 678 and *Holmes* v. *Attorney General*, The Times [1981] Ch. Comm. Rep., and U.K. Charity Commission, *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, November 17, 1999.
[5] *Re Watson*, [1973] 3 All E.R. 678 (Re Watson).
[6] Charity Commission for England & Wales, *Application for Registration as a Charity by the Church of Scientology (England and Wales)*, November 17, 1999 at 13 ff.
[7] *National Anti-Vivisection Society v. Inland Revenue Commissioners*, [1948] A.C. 31 at 42 (National Anti-Vivisection).
[8] (3rd ed. Markham: Buttersworths Canada, 2002) at 22.

definition of religion, one example of which was seen in *Re Armstrong*.9 In that case, the Nova Scotia Supreme Court decided that a direction in a Will to an estate trustee to make payments to a church for ancillary projects fell within the definition of advancement of religion as a head of charity, where such projects were connected to the church's main activities.

The decision of the English courts in *Thornton* v. *Howe*,[10] found the court reluctant to intervene in religious beliefs. Rather, the court was willing to defer to sincerely held religious beliefs, including those on the fringe of a particular religious faith. In the subsequent English decisions of *Bowman* v. *Secular Society Ltd.*, [11] as well as *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*,[12] it was held that a charitable object that is intended to advance a particular religion is charitable in nature, provided that the object is otherwise lawful.

The Ontario Law Reform Commission in its 1996 *Report on the Law of Charities*[13] asserted the position that religious purposes should be given a wide meaning in order to avoid conflicts between the judicial and public view and as well as to reflect the evolving nature of religion. Further, the Commission noted that the courts have not become involved in questioning the doctrinal beliefs of a particular religion partly because of the right to religious freedom guaranteed in the *Charter of Rights and Freedoms*..[14]

In July 2001, in its *Report of the Inquiry into the Definitions of Charities and Related Organizations,*[15] the Australian Charities Committee recommended the adoption of a broad definition of religion. Specifically, it recommended that the definition of advancement of religion should be amended and 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."*

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9 *Re Armstrong*, (1969), 7 D.L.R. (3d) 36 (N.S. S.C.).
10 *Thornton* v. *Howe*, (1862), 54 E.R. 1042.
11 *Bowman* v. *Secular Society Ltd.*, [1917] A.C. 406 (H.L.).
12 *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*, [1947] 2 All E.R. 217 at 220 (H.L.).
13 Ontario Law Reform Commission, *Report on the Law of Charities*, (Toronto: Ontario Law Reform Commission, 1996), (OLRC).
14 Ibid, at. 191.
15 http://www.cdi.gov.au/html/report.htm.

As pointed out by Carl Juneau in his article, "Is Religion Passé as a Charity?,"[16] the British case, *Re South Place Ethical Society; Barralet v. A.G*[17] stands for the proposition that the worship of God is at the heart of the meaning of religion. In that decision, the court stated "…*Religion … is concerned with man's relations with God ...*"[18] and "*[I]t seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god*."[19] In his article, Mr. Juneau stated that "*an organization would normally meet the criteria of worship if the belief in God found its expression in conduct indicative of reverence or veneration of God. Worship may manifest itself in particular activities, which include acts of submission, veneration, praise, thanksgiving, prayer or intercession.*"[20]

The U.S. Courts have also broadly defined the term religion.[21] In *Holy Spirit Association for the Unification of World Christianity* v. *Tax Commission of the City of New York,*[22] it was held 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*. In *Sherbert v. Verner,*[23] the U.S. Supreme Court held that when a party raises a free exercise claim, a court must make two inquiries. First, the court must determine whether the belief system qualifies as a religion. The Supreme Court allows a broad category of belief systems to be considered "religious": that is, those beliefs that occupy a position in the mind of the adherent equivalent to the position afforded a belief in God. Second, the court must decide whether the aspect of the religion in question merits free exercise exemption from government control and regulation. Taking a position partially based on the writings of Thomas Jefferson, the Supreme Court held that belief and opinion remain strictly protected, while religious practice is given greater protection than before. Therefore, a practice based on a sincerely held religious belief may be overridden only when confronted by a compelling state interest that can be accomplished by no less restrictive alternative.

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16 (2002) 17:2 The Philanthropist, 34 -45.
17 *Re South Place Ethical Society; Barralet v. A.G,* [1980] 3 All E.R. 918.
18 Ibid, at. 1571.
19 Ibid, at. 1572.
20 The Philanthropist, *supra* note 16 at 42.
21 Regarding the US caselaw discussion, please note the US constitutional separation mandates a broad approach to defining religion.
22 *Holy Spirit Association for the Unification of World Christianity* v. *Tax Commission of the City of New York,* 435 NE 2d 662 (1982).
23 *Sherbert v. Verner,* 374 U.S. 398 (1963).

3. Religion includes worship of a deity, as well as related religious observances and practices.

In the English courts decision in *Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners*,[24] which was affirmed by a Canadian court in *Re Anderson*,[25] 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.*" [Emphasis added] Canadian courts have taken the position that the concept of religious freedom ensures that it is not the role of the courts to determine the religious or devotional significance of certain practices of a religious organization.[26]

In the United States, the decision in *Malnak v. Yogi*[27] stands for the proposition that the test to determine whether a particular belief is religious is a subjective one, not objective. The three useful indicia which are basic to traditional religions are: (1) the ultimate nature of the ideas presented; (2) the comprehensiveness of the set of ideas; and (3) the existence of any "*formal, external or surface signs that may be analogized to accepted religions.*" Other U.S. court decisions indicate that secular courts must respect the integrity of church doctrine and precepts. The decisions held that 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.[28] Finally, in the case of *Holy Spirit Association for the Unification of World Christianity v Tax Commission of the City of New York*,[29], the court found 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*. Where political and economic beliefs are fundamental to a religious organization's religious beliefs, then such political and economic beliefs will be considered to be religious beliefs.

The Ontario Law Reform Commission, in its Report on the Law of Charities, 1996, stated the following: "…the worship of God is identified as core to the meaning of religion, and the established

[24] *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).
[25] *Re Anderson*, (1943) 4 D.L.R. 268 (Ont. H.C.).
[26] *Donald v. Hamilton Board of Education*, [1945] 3 D.L.R. 424 (Ont. C.A.).
[27] *Malnak* v. *Yogi*, 592 F 2d 197 (3d. Cir.)(1979).
[28] *United States* v. *Ballard*, 322 U.S. 78 (1944) and *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 at 449 (1969).
[29] *Holy Spirit Association for the Unification of World Christianity* v *Tax Commission of the City of New York*, 435 NE 2d 662 (1982).

doctrines and observances are understood as contributing to or as facets of the knowledge and the worship of God."[30] In his article, "Is Religion Passé as a Charity?," relying on the Ontario Law Reform Commission's 1996 Report, Carl Juneau noted that *"[a]lso essential to religion is the need for an established doctrine and an element of doctrinal propagation – both within and sometimes outside the church membership – and a need for practices and observances. The established doctrines and observances are understood as contributing to, or as facets of, the knowledge and worship of God."*[31] [Emphasis added]

4. Advancement of religion inherently involves dissemination and propagation of religious beliefs, i.e. changing public opinion.

Advancement of religion at its core involves the promotion, dissemination and propagation of one's religious beliefs to others. Specifically, the court in the *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn Borough Council* case stated *"[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."*[32] [emphasis added]

Canadian courts have affirmed that religion involves matters of faith and worship and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship. In *Fletcher* v. *A.G. Alta*., the Supreme Court of Canada wrote that *"[r]eligion, as the subject matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of worship."*[33]

[30] OLRC, *supra* note 13 at 91.
[31] The Philanthropist, *supra* note 16 at 42.
[32] *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 at 285 (Q.B.D.) (United Grand Lodge), which was affirmed in *Wood v. R.*, [1977] 6 W.W.R. 273, 1 E.T.R. 285.
[33] *Fletcher* v. *A.G. Alta*., [1969] 66 W.W.R. 513 at 521.

Other countries have similarly held that religion involves more than just worship. In the United States, as seen in the California Court of Appeal decision in *Fellowship of Humanity* v. *County of Alameda*[34], religion includes a system of moral practice manifested in the lives of its believers directly resulting from an adherence to its beliefs. In the Australian case of *Church of the New Faith* v. *Commissioner of Pay-Roll Tax*,[35] the court held that *"for the purposes of the law, the criteria of religion are two-fold: 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."* [Emphasis added] This definition of religion was recommended for adoption by the Australian Committee in the Inquiry into the Definitions of Charities and Related Organizations in its June 2001 Report.

5. Advancement of religion can involve speaking out on social, moral and ethical issues.

As previously indicated, the common law provides much commentary upon the definition of the advancement of religion. The courts have looked at the relationship between the advancement of religion and other related issues, such as social, moral and ethical issues, and have taken an inclusive approach. In this regard, the following summary from the Ontario Law Reform Commission's Report on The Law of Charities, 1996, is instructive:

> Thus, in 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.[36] [emphasis added]

In defining what constitutes recognized "spiritual teaching," the courts in the *Keren Kayemeth* and *United Grand Lodge* decisions have recognized that it too is to be given a broad interpretation:

[34] *Fellowship of Humanity* v. *County of Alameda*, 315 P2d 394 (1957).
[35] *Church of the New Faith* v. *Commissioner of Pay-Roll Tax*, 83 A.T.C. 4652.
[36] OLRC, *supra* note 13 Vol. 1, at 192-193.

> 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 that serve to promote and manifest it.[37] [emphasis added]
>
> To 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.[38] [emphasis added]

In commenting upon these excerpts, the Ontario Law Reform Commission stated that *"[i]n these two definitions, it is recognized that the 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…"*[39] [emphasis added]

The courts have held that where the nature of a particular activity is, in and of itself, non-charitable, such an activity will still be held to be charitable where it is done for the larger purpose of advancing religion. In the English decision of *Re Scowcroft,*[40] where the furtherance of religious and mental improvement was determined to be the essential portion of a gift, the court found that the furtherance of conservative principles was only a subsidiary part and the gift was upheld as being charitable at law.

The principles of *Re Scowcroft* were then applied in the subsequent decision of the English Court of Appeal in *Re Hood*[41]. In that decision, the Court of Appeal found that where a residual estate gift was given to spread Christianity, specifically to encourage active steps to be taken to stop the drinking of alcohol, such gift was determined to be a charitable gift at law as this purpose was intended to be a means of and secondary to the spreading of Christian principles. Specifically, where a testator directed the residue of his estate to be used in propagating specific Christian principles and in taking active steps to minimize and extinguish the drinking of alcohol contrary to Christian teaching in this regard, the court found that the overriding intention of the testator was to advance the Christian faith, with the particular method articulated to achieve that intention being the elimination of the drinking of alcohol. In the decision, the court held:

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37 Keren Kayemeth, *supra* note 24.
38 United Grand Lodge, *supra*, note 32 at 1090.
39 OLRC, *supra*, note 13 Vol. 1, at 193.
40 *Re Scowcroft,* [1898] 2 Ch 638.
41 *Re Hood*, [1931] 1 Ch. 240 (Re Hood).

> 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 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.[42]

The above-mentioned quotes illustrate that the courts have recognized that the definition of advancing religion can encompass certain activities that are not overtly spiritual in nature by themselves, 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 an organization whose work has an emphasis upon any practical application of religious principles should be able to be recognized as charitable under the head of advancement of religion.

C. RECENT JUDICIAL DECISIONS ON ADVANCEMENT OF RELIGION

1. The Federal Court of Appeal Decision in *Fuaran Foundation*

The 2004 Court of Appeal decision in *Fuaran Foundation v. Canada Customs Revenue Agency*[43] is the most recent case in which the courts endorsed CRA's decision not to register an organization (the Fuaran Foundation) as a charity under the *Income Tax Act* (Canada) because it did not fall under the advancement of religion head of charity. In this case, the Fuaran Foundation was a Canadian foundation that supported a Christian Retreat Centre in Great Britain, which was operated on the Fuaran Foundation's behalf by its agent.

While the Fuaran Foundation's listed objectives in its application for charitable status were focused on the advancement of religion, in addressing the appeal, the courts agreed with the CRA position that the operations did not advance religion for the following reasons: the Foundation's objects were overly broad and could allow it to undertake non-charitable activities and attendees at the Retreat Centre had

[42] Re Hood, *supra* note 41 at 224-245.

[43] *Fuaran Foundation v. Canada Customs Revenue Agency*, 2004 FCA 181 ("Fuaran Foundation"). See our firm's *Charity Law Bulletin* #51, available at www.charitylaw.ca, for more information on the Fuaran Foundation decision.

complete discretion as to whether to participate in religious activities. In dismissing the appeal, Justice Sexton was not convinced that the Foundation's activities were exclusively for the purpose of advancing the Christian religion and ruled that it was not unreasonable for the CRA to deny registration on this basis.

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

> 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.[44]

In addition the court referred to the definition of what it means to advance religion from the English decision in *Keren Kaymeth* as:

> Promoting spiritual teaching of the religious body concerned and the maintenance of the spirit of doctrines and observances upon which it rests.[45]

In concluding that the Foundation's activities did not fall within the ambit of advancing religion, the court demonstrated deference to tradition and narrowly construed the practices constituting "advancing religion" in the charitable sense. As a result, some may be concerned 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. However, as will be seen below, the subsequent decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* [46] may mean that the *Fuaran* decision will not have a lasting effect.

2. <u>The Supreme Court Decisions in Amselem and Congregations Des Temoins</u>

There have been two recent Supreme Court of Canada decisions that have raised the issue of Charter rights in relation to freedom of religion. The first case is the previously mentioned *Amselem* decision and the second case is *Congregation des Temoins de Jehovah de St-Jerome-Lafontaine v Lafontaine*

[44] Vancouver Women, *supra* note 3 at 171.
[45] Keren Kayemeth, *supra* note 24.
[46] Amselem, *supra* note 1.

(Village).[47] In general, these two cases are important since determining the scope of freedom of religion under the Quebec (and Canadian) Charters will likely provide some boundaries within which the definition of advancement of religion should operate. Even though both cases were decided differently, the principles that the courts endorsed in these cases and the resulting implications that these cases have for expanding what it means to advance religion as a head of charity are important.

a) *Amselem* Decision

In *Amselem*, the Supreme Court of Canada rendered a broad interpretation of the Charter right to religious freedom. In this case, the two appellants were Orthodox Jews who co-owned residential units in a condominium complex. A by-law in their declaration of co-ownership restricted them from building structures on their balconies. 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.

In the Supreme Court's decision, Justice Iacobucci rejected the "unduly restrictive" view of freedom of religion taken by the Court of Appeal. In finding that the declaration of co-ownership infringed the appellants' religious rights under the Quebec Charter, Justice Iacobucci for the majority, 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. [emphasis added]

[47] *Congregation des Temoins de Jehovah de St-Jerome-Lafontaine v Lafontaine (Village)*, [2004] S.C.J. No. 45 (Congregations Des Temoins).

Justice Iacobucci reiterated that: "freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion." In addition, he stated that "it is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine." He also stated that there should be no legal distinction between "obligatory" and "optional" religious practices.

The Supreme Court decision in *Amselem* resonates on two main points. Firstly, 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. Further, it reinforces that it is inappropriate for courts to decipher contentious matters of religious law. Together, these principles expand the scope of protected freedom of religion to practitioners and not just to believers of a faith.

This decision is also important to potential applicants for charitable status because it makes clear that the state and judges must not inquire into the validity of an individual's religious beliefs or practices. Therefore, this may impact on the extent to which CRA will consider what constitutes advancing religion when reviewing applications for charitable status 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. As a result, it is hoped that this Supreme Court decision could provide significant guidance to CRA concerning how it makes its decisions on charitable registration under advancement of religion.

b) *Congregation des Temoins* Decision

In *Congregation des Temoins*, a Jehovah's Witness congregation (congregation) appealed a Quebec Court of Appeal decision dismissing their application for mandamus, ie. a writ used to compel performance of a public duty, which in this case was done to compel a lower court to exercise its jurisdiction. In this case, based on a municipal by-law, places of worship could only be built in regional community use zones. After failing to acquire a lot in this zone, the congregation purchased a lot in the commercial zone and applied twice for a zoning change. On both occasions, the municipality refused their application without giving reasons. At trial, the judge dismissed the

application for mandamus on the basis that lots were available in the community use zone. The Quebec Court of Appeal set aside this finding of fact but dismissed the appeal on the basis that a lack of land was beyond the municipality's control and that the municipality was under no positive obligation to preserve freedom of religion.

The issue before the Supreme Court of Canada was whether the municipality lawfully denied the rezoning application to allow the congregation to build a place of worship. Chief Justice McLachlin, in a narrow 5 to 4 majority decision, allowed the appeal and remitted the matter to the municipality for reconsideration. Chief Justice McLachlin decided the case not on Charter grounds but on the basis that in refusing to provide reasons for its decisions, the municipality breached its duty of procedural fairness to the congregation.

It is noteworthy that the dissenting judgement in this case hypothesized that a congregation's religious rights could have been infringed if no land was available on which to build a place of worship. However, even then, the dissenting judgement would have restored the trial judge's finding of fact that there was a lot available that the congregation could purchase. As a result, in restoring the trial judge's finding of fact in this regard, there is a justification for dismissing the application of the congregation, since their freedom of religion charter rights could not have been violated when land was available. Since this case was decided by the court on procedural grounds, with no commentary on the definition of religion, the principles articulated in the *Amselem* decision remain as the judicial standard in defining the scope of religion.

D. RECENT PROPOSED POLICIES FROM CANADA REVENUE AGENCY (CRA) THAT REFER TO ADVANCEMENT OF RELIGION

The Canada Revenue Agency recently released the following two proposed policies: *Applicants Assisting Ethnocultural Communities*[48] and *Guidelines for Registering a Charity: Meeting the Public Benefit Test*[49]. These proposed policies are integral to current and potential charitable organizations, as they provide insights into the CRA standards they will need to achieve in order to maintain or acquire charitable status under the

[48] http://www.cra-arc.gc.ca/tax/charities/policy/ethno-e.html.
[49] http://www.cra-arc.gc.ca/tax/charities/consultations/publicbenefit-e.html.

Income Tax Act. In the following section, the scope of these proposed policies as they impact the issues of advancement of religion as a head of charity are set out for review and consideration.

1. Consultation on Proposed Policy: Applicants Assisting Ethnocultural Communities

The proposed policy by CRA on Applicants Assisting Ethnocultural Communities, sets out the guidelines for registering community organizations that assist disadvantaged ethnocultural communities in Canada. It acknowledges that, increasingly, ethnocultural groups represent a significant part of the Canadian demographic and that community organizations provide needed services to assist new Canadians navigate the challenges and disadvantages they face. The proposed CRA policy is, therefore, meant to inform these community organizations of the framework within which they can attain charitable status for the purposes of the *Income Tax Act* (Canada). As a starting point, these organizations that assist ethnocultural groups and wish to acquire charitable status must qualify under one of, or combinations of, the four heads of charitable purposes established in *Pemsel*, including advancement of religion.

According to the proposed policy statement, an ethnocultural group is defined by the shared characteristics that are unique to, and recognized by that group. Some examples of shared characteristics are ancestry, language, country of origin and national identity. In addition, the proposed policy statement points out that religion can be a shared characteristic as long as it is inextricably linked to the group's racial or cultural identity.

However, the way in which the proposed CRA policy statement articulates how a community organization could qualify under the head of advancement of religion may unwittingly suggest a narrowing of the definition of advancement of religion at common law. Specifically, in section 35 of the proposed policy statement, the following is stated in relation to advancement of religion:

> In 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 proposed policy statement then goes on to provide some examples of both acceptable and unacceptable objects for religious worship based on a specific linguistic community. Among the acceptable examples of 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, ie. opposing abortion and promoting or opposing same-sex marriage.

There is concern that in reviewing sections 35 and 36 of the proposed policy statement, they could be read to mean that activities that are undertaken for the purpose of advancing religion, but could be viewed as also having a secular purpose to them, would be characterized by CRA as activities that are not supporting advancing religion. Specifically, the proposed policy statement does not explain to what extent secular purposes can be pursued, how the determination of what a secular purpose is, as opposed to a theological purpose, is to be made and what the implications are where a purpose is determined to be both secular and theological in nature. As a result, it is unclear whether, for example, spiritual teachings with respect to what to others may be mere secular issues can be accommodated under advancement of religion. This requirement could be read as narrowing the scope within which religion can be advanced. Therefore, the position reflected in this proposed policy could result in narrowing the activities and ventures that current religious charities could undertake, as well as provide obstacles for new religious charities in qualifying for charitable status under the *Income Tax Act* (Canada).

2. Consultation on Proposed Guidelines for Registering a Charity: Meeting the Public Benefit Test

The proposed guidelines of CRA concerning Meeting the Public Benefit Test seek to clarify the rules relating to "public benefit" – one of the criteria all applicants must establish in order to be granted charitable status. The guidelines propose a two-part public benefit test that requires proof of tangible benefit being conferred and that the benefit has a public character. The test addresses what it means to

be the public or beneficiaries of the proposed charity and what applicants must prove in order to satisfy this test. In these proposed guidelines, CRA acknowledged the importance of articulating the underlying principles and application of the public benefit test, especially given the recent climate of regulatory reform both in Canada and other jurisdictions, such as in Australia and the U.K.

In relation to the question of when proof of public benefit is required, CRA indicated the following in section 3.1.1:

> 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.

However, CRA then goes on to indicate that the presumption of public benefit for the first three categories of charity can be challenged and uses 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. [emphasis added]

In indicating that the presumption of public benefit can be challenged when the "contrary is shown," CRA cites the earlier-mentioned *National Anti-Vivisection Society* case. In relying on this case in its policy statement, CRA provides an example of the presumption of public benefit being specifically rebuttable in the context of advancement of religion where a position is put forward by a religious organization which "undermines accepted foundations of religion and morality." However, no case citation was provided by CRA as the basis for the example of when the public benefit presumption may be rebuttable under advancement of religion. In this regard, reference should be made to the decision in the *Re Watson* case in which 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…"[50] [emphasis added]. The statement by the courts in this case with reference to the qualifier "of all" is significantly different in substance from the statement by CRA above that does not include the qualifier "of all."

As a result, there is a question that this proposed CRA policy statement, although likely unintentionally, may be seen as unnecessarily narrowing the circumstances where the presumption of public benefit under advancement of religion can 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. Accordingly, the questions then become when and under what circumstances does the presumption of public benefit become rebuttable.

Based on the proposed CRA policy statement, the answers to these questions are not as clear and nuanced as they could be. As a result, 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. In this regard, while it is always possible for an organization whose application for charitable status has not been granted to have its application reviewed by the courts, it is important to be aware that, practically speaking, few organizations are in a position to undertake such a review. As a result, this reality underscores why it is important for CRA to clarify these issues in its policy statements, as they will be used, in part, as the basis by which CRA will review future applications for charitable status.

Accordingly, the potentially unclear nature of the rebuttable presumption that is referenced in the draft policy statement may give a greater amount of discretion to CRA in deciding whether particular types of activities by religious organizations satisfy the public benefit test and will therefore be able to qualify for charitable status. As a result, the attaining of charitable status by religious organizations that are

[50] Re Watson, *supra* note 5.

engaged in activities other than pure religious worship and teaching doctrine may become more challenging in the future.

E. ONGOING WORK IN OTHER JURISDICTIONS CONCERNING ADVANCEMENT OF RELIGION

1. The UK Position

In May 2004, the Government of the U.K. released draft charities legislation (Charities Bill). This Bill is currently subject to legislative scrutiny by a Joint Committee of both Houses. The Government is considering the Report of the Joint Committee's recommendations released on September 30, 2004. If adopted, this Bill will create a new statutory definition of charity. The draft Bill proposes an expansive list of descriptions as heads of charity. These are enumerated in paragraph 2(2) (a-k) of the Bill and includes 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 which are analogous to the enumerated purposes in (a-k). In tandem, the Bill introduces the statutory public benefit test in section 3.

From a review of the explanatory notes on the draft provisions of the Bill, it appears the Bill is narrowing the current common law position in a number of ways. In relation to advancement of religion, one of the main areas of concern is in relation to the articulation of the public benefit test. If passed, this provision would remove the existing common law presumption that purposes for the relief of poverty, the advancement of education or the advancement of religion are for the public benefit. The explanatory notes state that this new requirement only represents a leveling of the field for all types of charities. However, in effect, this new requirement 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 issues concerning what it means to advance religion, which are similar to the concerns that have been earlier identified concerning the

position taken in relation to advancement of religion in relation to the recent CRA proposed policy statements.

In this regard, the churches expressed concern regarding the "rather narrow understanding of the types of body 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."

2. The Australian Position

Australia has also released a draft Charities Bill 2003. However, Australia's definition of advancement of religion for charitable purposes is more expansive in that, for example, it specifies the public benefit test, and provides a broader scope of the definition of advancement of religion. Section 10(1)(d) confirms advancement of religion as a charitable purpose, with section 10(2) defining "advancement" as including "protection, maintenance, support, research and improvement."

Section 12 then outlines the proposed definition of advancement of religion as follows:

> In determining, for the purposes of paragraph 10(1)(d), whether particular ideas, practices and observances constitute a religion, regard is to be had to:
>
> (a) whether the ideas and practices involve belief in the supernatural; and
> (b) whether the ideas related to people's nature and place in the universe and their relation to things supernatural; and
> (c) whether the ideas are accepted by adherents as requiring or encouraging them to observe particular standard or codes of conduct or to participate in specific practices having supernatural significance; and
> (d) whether, however loosely knit and varying in beliefs and practices adherents may be, they constitute one or more identifiable groups; and
> (e) whether adherents see the collection of ideas and/or practices as constituting a religion." [emphasis added]

In relation to the definition of advancement of religion, Section 12(2) states that this section does not limit the matters that may be considered in determining whether particular ideas, practices and observances constitute a religion.

F. CONCLUDING COMMENTS

In reviewing the approach that the Supreme Court of Canada has recently taken in the *Amselem* decision in relation to the interpretation of the scope of religious freedom, that is specifically recognizing not only freedom of belief but freedom of practice, it appears that a broader definition of advancement of religion can be supported. While historically the caselaw has not been clear on how expansive the definition of advancement of religion is, the *Amselem* decision is important in recognizing the significance of freedom of religious belief and freedom of religious practice by making clear that the state and the courts must not inquire into the validity of an individual's religious beliefs or practices. As a result, the *Amselem* case may have a significant impact in determining the extent to which CRA will consider what constitutes advancing religion when reviewing applications for charitable status by organizations whose activities are believed by their members as advancing religion but which are not necessarily made mandatory by the doctrine, teaching or practice of that particular faith.

In this regard, similar to the expansion which has taken place in relation to the other three heads of charity in recent years, it seem reasonable to expect that the definition of advancement of religion should also be expanded to have a more fulsome definition and then be broadly interpreted in reviewing applications for

charitable status under advancement of religion. This would be reflective of the fact that religious faith and practice are intrinsically connected for most, if not all, religious faiths.

By way of example, in the context of the Christian faith, many Christians feel that engaging in practices that are practical manifestations of their faith, such as undertaking relief of poverty or other forms of humanitarian relief, are equally as important and necessary as engaging in regular religious worship and adhering to the religious doctrines and dogmas of Christian faith. For some Christians, as well as adherents of other religious faiths, purely religious worship and practical manifestations of their faith are not mutually exclusive. Any interpretation of advancement of religion should therefore seek to reflect this duality, not restrict it.

As well, an expansion of the definition of religion would parallel the corresponding change in the religious beliefs and practices of many religious denominations in the 21st century that see them putting a greater emphasis on implementing their religious faith into practice through practical manifestations of faith in the secular world. In the Christian context, this is true of both the evangelical faiths, as well as the social Gospel movements. As a result, it is increasingly important for Christians, as well as adherents of other religious faiths in the 21st century to put their religious faith into action through practical activities in order to make a meaningful difference in society. Therefore, it is suggested that the definition of advancement of religion should be broadened as a matter of public policy based upon the more expansive view of religion recognized by the SCC in the *Amselem case.*

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