
ADVANCEMENT OF RELIGION DISCUSSION REKINDLED

*By Jennifer M. Leddy and Terrance S. Carter**

A. INTRODUCTION

Professor Donovan Waters, QC, the esteemed scholar, and author, with Professors Mark Gillen and Lionel Smith, in the 3rd ed., 2005, of *Waters' Law of Trusts in Canada*, has published two articles in the Journal *Trusts and Trustees* in order to stimulate a discussion about the meaning of advancement of religion as a charitable purpose in a pluralistic society. The first article is titled "The advancement of religion in a pluralist society (Part I): distinguishing religion from giving to charity"¹ and the second is titled "The advancement of religion in a pluralist society (Part II): abolishing the public benefit element."² This *Church Law Bulletin* offers some brief preliminary comments on the first article as a response to Professor Water's invitation for a discussion, which will hopefully continue in other settings.

B. COMMENTARY

1. Overview of Professor Waters' Article

In his first article, Professor Waters establishes the historical links between the Christian concept of charity as love of God and love of neighbour and the legal concept of charity. He also traces the historical

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¹ Donovan Waters, "The advancement of religion in a pluralist society (Part I): distinguishing religion from giving to 'charity'" (2011) 17 Oxford Journals: Trusts and Trustees 652 (made available at <http://www.carters.ca/pub/article/church/2011/DWatersPI.pdf> by permission of Oxford University Press, originally published at <http://tandt.oxfordjournals.org/content/17/7/652.full.pdf+html>).

² Donovan Waters, "The advancement of religion in a pluralist society (Part II): distinguishing religion from giving to 'charity'" (2011) 17 Oxford Journals: Trusts and Trustees 729 (made available at <http://www.carters.ca/pub/article/church/2011/DWatersPII.pdf> by permission of Oxford University Press, originally published at <http://tandt.oxfordjournals.org/content/17/8/729.full.pdf+html>).

development of charity in the common law over several centuries in England and Wales, the Commonwealth and elsewhere, as well as, recent government studies and legislative developments. He concludes that religion should be distinguished from charity because of today's religious pluralism and because religion is essentially about belief and spirituality, the "byproducts of belief", such as care of the sick and education, being charitable in their own right.

2. Overview of Response

In our view, the existing common law, broadly interpreted, is sufficient to include a wide range of religions in addition to Christianity and to embrace a definition of religion that includes belief, worship and practical manifestations of those beliefs. Just because a particular kind of charitable activity can be done by both a religious group and a secular group does not mean that it loses its religious character when done by an organization established for religious purposes.

3. Advancing Religion in a "wide variety of ways"

In the examples Professor Waters gives of accepted means of advancing religion, he appears to narrow the charitable purpose of advancement of religion to overt dissemination of the faith and worship: e.g. places of worship, services and rituals and the accoutrements associated with the services, church halls, burial grounds, support of church leaders, religious summer camps, pilgrimages to holy sites and missionary work. By contrast, the existing case law allows for advancing religion in "a wide variety of ways" that includes practical expressions of religion as long as they can be linked to the religion.³ These practical expressions of faith would include helping people in need or educating people, even though these activities could also be recognized as furthering the separate charitable purposes of relieving poverty and advancing education. For Christians, love of neighbour in the sense of service of others remains a constituent element of the faith, and an important way of advancing and manifesting their faith. We would submit that a similar concept is part of most other religions today.

4. Beyond the Judaeo-Christian Concept of a Personal God

Professor Waters underlines that most of the case law describing the attributes of religion for the purpose of charity law was developed in the western world in the Judaeo Christian context of a personal God, which

³ *United Grand Lodge v Holborn*, BC [1957] 1 WLR 1080; *Re: Banfield*, [1968]1 WLR 846.

could theoretically exclude some of the world's great recognized religions such as Buddhism. However, it is our view that the leading English case of *In Re South Place Ethical Society*,⁴ allows for a broader interpretation than faith in a personal God by its use of the phrase "higher unseen power." The Australian case of *Church of the New Faith v Commissioner of Pay-Roll Tax*,⁵ which Professor Waters discusses in depth, provides even more scope to embrace the ancient realized Asian religions, which may not worship a personal God, by its reference to belief in a "supernatural Being, Thing or Principle."

5. Arguments For and Against Separating Religion from Charity

Professor Waters very fairly sets out the arguments for and against "separating religion from the law's concept of charity." He begins the argument for separation with the opinion that in today's multi-cultural society, the combination of faith and culture can lead to isolation rather than integration into society with the result that the principle of charity benefiting the whole of society is lost. Secondly, many in society today take the view that any tax assisted relief for non-governmental activity must be based on the demonstrated "utility" of the activity, which religion cannot establish, being primarily about belief in the supernatural.

In our view, the arguments that Professor Waters provides for maintaining the connection between religion and charity are much more persuasive than those for separating them, even though he does not adopt them. The first argument is that belief and faith are but one characteristic of religion, that "faith and good works" go hand in hand, that codes of conduct and doctrines lead to care for the needs of others and respect for order in society which benefits all. He also notes that religion has inspired the visual and performing arts for centuries and that theology and religious philosophy have contributed to scholarship and intellectual development. In short religion is "a force for good in society."

Professor Waters concludes that religion should be treated separately from charity because it can't satisfy the utility test which charity must meet. With respect, this argument is not persuasive because of the presumption that advancement of religion is a public benefit. Even without the presumption, the good works of religious organizations benefit society as a whole, even if you just take into account the number of marriages and funerals that they perform, as well as the countless examples of social outreach. In addition, the 2007 Canada Survey on Giving, Volunteering and Participating, published by Statistics Canada, found

⁴ *In Re South Place Ethical Society*, [1980] 1 WLR 1565.

⁵ *Church of the New Faith v Commissioner of Pay-Roll Tax*, Vic[1983]HCA 40 (1983) 154 CLR 120, ALR 65.

that one of the characteristics of donors who volunteer the most and give the most financially are those who are “religiously active.” In addition, those who are “religiously active” tend to give more when they donate, and while most of their donations go to religious organizations, they also donate significant amounts to non-religious organizations.

C. CONCLUSION

A significant concern about Professor Waters’ proposal is that it doesn’t offer a concrete alternative tax treatment for religious organizations beyond the general statement that “We should extend to religious groups, or to gifts for the furtherance of religion, those tax or other considerations that policy suggests religious practice, considered on its own, should enjoy.” Apart from simply postponing the conversation to another forum and being less than reassuring to the religious community, the proposal would uproot charity from its religious origins in love of neighbour and service to the community and unnecessarily isolate the religious organizations that have played a key role in the charitable sector and currently represent almost 40% of all registered charities.

Professor Waters should be commended for initiating this important discussion and others who might like to participate in this discussion are encouraged to also express their views. If we are sent copies of those views, we may publish them in a future issue of *Charity Law Update*.



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