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**Advancing Religion as a Head of Charity:
What Are the Boundaries?**

(Power Point Presentation)

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OVERVIEW OF TOPICS

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- Overview of Advancing Religion as a Head of Charity
- Advancing Religion and the Charter of Rights and Freedoms
- Recent Policies by CRA Affecting Advancing Religion
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A. Introduction

- The Golden Rule for Christians of “Love your neighbour as yourself” is found in all world religions, i.e. Judaism, Hinduism, Buddhism, Islam, etc.
- Religious practice is as important as religious belief in defining advancement of religion. They are not mutually exclusive
- It is the practical manifestations of faith in everyday life that makes religion of value to society

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- The importance of the practical manifestation of religious belief was recently affirmed by the SCC in *Syndicat Northwest v. Amselem*
- The SCC has also acknowledged that a broad definition should be afforded to the definition of religion
- “The protection of freedom of religion afforded by s.2(a) of the Charter [of Rights and Freedoms] is broad and jealously guarded in our Charter jurisprudence.”
Reference re Same Sex Marriage (S.C.C.)

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- Other heads of charity are generally being afforded a broader interpretation by the courts and by Canada Revenue Agency (CRA)
- Based upon judicial decisions to date, the overall value of religion to society, as well as Charter considerations, advancement of religion as a head of charity should be granted a broad interpretation

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B. Overview of Advancing Religion as a Head of Charity

- What makes religion charitable?
 - “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.” Carl Juneau
 - Propensity towards volunteering and assisting others is based on ethical mores taught by religions

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- Religion is one of the few catalysts that exist by which private conscience can become part of the public conscience
- Society’s understanding of rights and responsibilities and our societal notions of freedom are fundamentally based on the morality and values that emanate from religion
- Law would be hollow and ineffectual in the absence of the values and principles that underlie it and support it, which are shaped and informed by religion

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• **Historical background**

- In the Middle Ages, the Church was responsible for administering intestate estates and other charitable gifts, and provided most of the “welfare” services for those in need in society
- *Statute of Elizabeth 1601* “The purpose of the preamble was to illustrate charitable purposes rather than to draw up an exhaustive definition of charity”
- Sir Francis Moor at that time advocated that advancement of religion should be purposely excluded from the preamble in order to protect it from political influence

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- In the 19th Century, the courts began to recognize that it was inappropriate to draw distinctions between one religion over another
- *Special Commissioners of Income Tax v. Pemsel* in 1891 recognized advancement of religion as a head of charity
 - § “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.”

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- **What are the fundamentals of advancement of religion as a head of charity?**
 - In general:
 - § “the court has always had the jurisdiction to decide what is charitable” *Vancouver Society*
 - § Must have purposes that are exclusively and legally recognized as charitable
 - § Must be established for the benefit of the public or a sufficient segment of the public

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– Advancement of religion requires that there be a religious purpose which permits faith in a God and worship of that God

– Charitable purpose v. charitable activity

§ It is the purpose in furtherance of which an activity is carried out, not the character of the activity itself that determines whether or not an activity is of a charitable nature

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§ This is because:

“The 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” *Vancouver Society*

§ As such, an activity will only be of a charitable nature in so far as its purpose is charitable

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• What is a religious purpose?

§ Religious purposes should be given a wide meaning in order to avoid conflicts between the judicial and public views and to reflect the evolving nature of religion: *Ontario Law Reform Commission*

§ Court should not decide on the truth of religious doctrine:

“Since the court cannot know whether any particular doctrine is true, 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” *Hanlon v. Logue*

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- **Presumption of Public Benefit:**
 - 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
 - “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” *Re Watson and Thornton v. Howe (emphasis added)*

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- **Public v. private religious observance**
 - § A debate has arisen whether a distinction should be drawn between public worship and private worship when determining whether a public benefit exists
 - § In *Gilmour v. Coates*, a gift to a contemplative order was held not to be charitable, as it did not provide a discernable public benefit
 - § However, in *Neville Estates Ltd. V. Madden*, the fact that a synagogue was theoretically open to the public and that the members lived their lives in the world was found to be worshipping in a sufficiently public way

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- § In the recent case of *Jensen v. Brisbane City Council*, the court determined that a 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
- § 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” Prof. J. Phillips

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- Advancing religion can involve speaking out on social, moral and ethical issues
 - “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.” *Keren Kayemeth Le Jisroel Ltd. V. IRC* as followed in *Re Anderson*

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- Where political and economic beliefs are fundamental to a religious organization’s religious beliefs, such political and economic beliefs will be considered to be part of its religious beliefs. *Holy Spirit Association v Tax Commission of N.Y.*

§ Common law examples:

- *Re Scowcroft*, a gift of a reading room “to be maintained for the furtherance of Conservative principles and religious and mental improvement” was found to be charitable

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- *Re Hood*, where the court determined that a gift that was made to spread Christianity by encouraging others to take active steps to stop the drinking of alcohol was found to be a charitable gift
- *Ontario (Public Trustee) v. Toronto Humane Society*, the Ontario High Court of Justice held that a charity was permitted to engage in political activities as long as these activities were ancillary and incidental to charitable purposes

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- Religious charities must be actually advancing religion
 - In *Fuaran Foundation v. CRA* the Federal Court of Appeal denied registered status to the applicant because it had defined its objects too broadly and was not seen as actually advancing religion
 - In construing the foundations activities, the court gave a narrow ambit to advancement of religion
 - However, the broadening effects of the SCC decision in *Amselem* is likely to overshadow any limiting effect of the *Fuaran* decision

- C. Advancing Religion and the Charter of Rights and Freedoms**
- Effect of Charter on the Definition of Religion
 - Supreme Court of Canada decision in *Amselem* provides a broad definition of freedom of religion:
 - § “freedom to undertake practices, and harbour beliefs, having a nexus with religion, in which an 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”

- § Subjective and personal notions of religious belief, obligation, precept, commandment, custom or ritual are encompassed by this freedom
- Involved the appellants’ ability to erect a “succah” on their individual balconies during the nine-day Jewish festival of Succot
- Court found that “ It is the religious or spiritual essence of the action, not any mandatory or perceived-as-mandatory nature of its observance that attracts protection”

– Courts should avoid judicially interpreting and determining the content of a subjective understanding of a religious requirement

– The SCC decision resonates on two main points

- § It is the spiritual essence of an action that is sincerely held and not the mandatory nature of its observance that attracts protection
- § It reinforces the principle that it is inappropriate for the courts to adjudicate on the question of religious doctrine

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- Possible Charter Challenges to Advancing Religion

– Argument 1: freedom of religion and conscience is offended by the conferral of positive state benefits on the basis of religious status

- § Rejected in *Re Mackay and Manitoba*: Monetary support by the State for the expression of minority views cannot offend the conscience of those opposed to the viewpoint

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- § Indirect subsidy that is achieved through the granting of charitable status does not constitute an affirmation by the state that one religious view is superior to another, especially if charitable status is be granted indiscriminately to any religious organization that meets the criteria of “advancing religion”

– Argument 2 : a charitable purpose cannot be contrary to public policy: *Canada Trustco v. O.H.R.C*

- § A charitable purpose will only be found void for public policy reasons “in clear cases, in which the harm to the public is substantially incontestable”

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§ 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

§ Recent Ontario case law: *Allen v. Corporation of the County of Renfrew*, found that non-denominational prayer at council meeting did not infringe s.2(a) of the Charter

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§ 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. *Reference Re Same Sex Marriage* (SCC)

§ Freedom to practice one's beliefs is at the core of the freedom of religion as guaranteed in s.2(a) of the Charter

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– Argument 3: by denying charitable status to a religious group, it could be argued that CRA is in effect saying that one religion is less worthy than another and that therefore the religious group is being denied equality before the law

§ Not a violation of s.2(a) of the Charter for the government to provide funding to some religious groups while withholding it to others *Adler v. Ontario; Auton v. Canada*

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§ Courts should exclude only those groups who break the law, have policies that are clearly contrary to public policy or who fail to meet the other generally accepted criteria that CRA has established for determining whether or not to grant charitable status

§ Focus should be on whether the group's purposes and related activities are for the purpose of advancing their religion and not on the tenets of the religion at issue or on the merit of the related activities

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D. Recent Policies by CRA Affecting Advancing Religion

- Applicants Assisting Ethnocultural Communities
 - Guidelines for registering community organizations that assist disadvantaged Ethnocultural communities in Canada
 - Religious organizations that assist ethnocultural groups and wish to acquire charitable status must qualify under one of, or combinations of, the four heads of charitable purposes established in *Pemsel*, including advancement of religion

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- Religion is only considered to be a shared characteristic if it is inextricably linked to the group's racial or cultural identity
- Concern that previous draft of policy would have narrowed scope of advancing religion i.e. because of its implied reference to opposing abortion and promoting or opposing same sex marriage
- CRA policy is expected to eliminate this reference in response to the concerns raised to date

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- Meeting the Public Benefit Test
 - The courts and CRA have presumed that charities that are advancing religion inherently provide a public benefit
 - Draft policy on public benefit proposed a two-part public benefit test that requires proof of tangible public benefit being conferred
 - § “The extent to which an applicant charity is required to meet the first part of the public benefit test will depend... under which category the proposed purposes fall. When the purposes fall within the first three categories of charity, a presumption of public benefit exists

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- presumption of public benefit could be challenged when the “contrary is shown”
- “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” *Re Watson [emphasis added]*
- Example used in previous draft stated that: “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” *[emphasis added]*

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- Example deleted in response to concerns that this would have broadened the circumstances in which the presumption of public benefit under advancement of religion could be challenged
- i.e. from promoting beliefs that are contrary to the foundations of all religion and subversive to all morality to promoting beliefs that are contrary to any accepted foundations of religion or morality

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E. Advancement of Religion in Other Jurisdictions

- **The UK position**
 - In May 2004, the Government of the U.K. released draft charities legislation
 - *Charities Bill* was dropped in mid April 2005 due to the upcoming election in the UK
 - Would have created a new statutory definition of charity, including an expansive list of descriptions of heads of charity
 - Would remove the existing common law presumption of public benefit for the relief of poverty, advancement of education and advancement of religion – resulting in unclear public benefit threshold

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- Recent decision of U.K. Charities Commission entitled *Promotion of Religious Harmony for the Benefit of the Public*
 - § Charities Commission recognizes that the promotion of religious harmony is a charitable purpose
 - § Draws an analogy between the promotion of religious harmony and the promotion of equality between the sexes and/or the promotion of racial harmony

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- § Understanding other’s religious beliefs leads to more appropriate provision of services, both in the public and the private sphere
- § Promotion of religious harmony is in keeping with *The Human Rights Act, 1998* and the *European Convention on Human Rights*, which prohibits discrimination on the grounds of religion or belief
- **The Australian Position**
 - In 2003, the Australian Government released its own draft Charities Bill but was never passed

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– The Australian Government decided to continue to use the common law definition of charity and to pass new legislation (*Extension of Charitable Purposes Act*) that has the effect of extending the common law definition of charity to include:

- § Provision of childcare on a non-profit basis
- § Self-help groups with open and non-discriminatory membership
- § Closed or contemplative religious orders that offer prayerful intervention to the public

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– Australian Government recognizes the important role that religion plays in society:

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

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F. Conclusion

- In Canada, it will be left to the courts and to CRA from an administrative context to decide the future of advancement of religion
- As a result of the *Amselem* decision concerning the practical manifestations of faith as an aspect of religious freedom under the Charter and broad recognition of the nature and extent of religion by the courts in all jurisdictions, a broader definition of awareness of religion is necessary

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- Religion has 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
- Those of faith should be allowed to engage in their religion not only in worship but also through practical manifestations of their faith
- It is therefore appropriate for the state to continue to provide broad support for religious organizations by granting and maintaining their charitable status, since this acknowledges the public benefit that comes from advancing religion within a pluralistic society

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