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

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OVERVIEW OF TOPICS

- The Current Context for Advancement of Religion as a Head of Charity
- Overview of Advancement of Religion
- Can a Single Issue Religious Organization be Charitable?
- Advancing Religion and the Charter of Rights and Freedoms
- Recent Policies by CRA Affecting Advancement of Religion
- Advancement of Religion in Other Jurisdictions
- Conclusion

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A. The Current Context for Advancement of Religion as a Head of Charity

- CRA is presently in the process of developing a draft policy on advancement of religion, expected to be released later in 2008 or early 2009
- In recent years there has been a perception that CRA has been narrowing the scope of advancement of religion as a head of charity
- For churches and other religious organizations, the narrowing of advancement of religion as a head of charity can constrain what is done outside of normal worship and mission work

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- For para-church organizations, a restriction on advancement of religion can narrow the ability to obtain charitable status
- For many faiths, charitable work is seen as a manifestation of faith in action
- Religious practice (i.e. charitable works) 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
- The importance of the practical manifestation of religious belief was recently affirmed by the SCC in *Syndicat Northwest v. Amselem*

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- B. Overview of Advancement of Religion**
- The courts and CRA recognize four heads of charity: relief of poverty, advancement of education, advancement of religion, and “other purposes” beneficial to the community
 - In order to obtain charitable status in Canada, an organization must be able to fit its objects and activities within one or more of these heads

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- Recently, the other three heads of charity have generally been broadened in both scope and application by the courts and CRA
- However, with inconsistent court decisions involving advancement of religion, the question remains what are the boundaries of advancing religion as a head of charity?
- What is it that makes religion charitable?
 - Religion makes us want to 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, all of 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

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– Sir Francis Moore at that time advocated that advancement of religion should be purposely excluded from the preamble in order to protect it from political influence

– 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

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- What are the fundamentals of advancement of religion as a head of charity?
 - The court has always had the jurisdiction to decide what is charitable [*Vancouver Society* decision]
 - 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
 - Must be a religious purpose which permits faith in a God and worship of that God

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- There is an important distinction between charitable purpose and charitable activities
 - 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. [*Vancouver Society* decision]
- Religious purpose 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, 1996*]

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- Courts should not decide on the truth of religious doctrine [*Hanlon* decision]
- Presumption of Public Benefit
 - Well established legal principle that 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 [*Thornton* decision]
- Impact of section 6.2.1 of the *Civil Marriage Act*

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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 made for the purpose of advancing religion and 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 actually be advancing religion
 - CRA has been reluctant to grant charitable status to religious organizations that define their objects too broadly
 - See *Fuaran Foundation v. CRA (2004)*
 - The applicant has to make it clear that the primary objective is advancement of religion
 - CRA has raised the issue of whether a Christian summer camp is advancing religion or promoting sports

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C. Can a Single Issue Religious Organization Be Charitable?

- The question remains whether it is possible for a religious organization to be considered charitable where its main activity consists of something that in itself may not be intrinsically religious, but is done for a religious purpose
- CRA suggests single issue religious organizations cannot be charitable – the pursuit of one object which is not intrinsically religious and that may be pursued equally for religious and secular purposes is not charitable as advancing religion

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- CRA looks at the character of the activities engaged in, not the purpose or motivation behind the formation of the group, when assessing charitable status
- In order to be charitable for CRA, a religious organization must involve a ‘significant element of religion’ and be able to pass the ‘religious substance’ test:
 - Is the activity accepted in the writings or by a majority of the followers of that faith as central to the pursuit of that particular religion?

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- Does it fit directly or by analogy into one of the categories of activities historically considered to advance religion, such as:
 - The maintenance and promotion of public worship, including the building and repair of churches
 - The orderly administration of divine services – support of clergy
 - Spreading religion
- As a result of this policy, a single issue religious charity would have to show it meets the criteria for one of the other three heads of charity in order to qualify for charitable status

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- **Example of a religious humanitarian organization**
 - World Vision Canada is an example of a single issue religious charity
 - World Vision Canada describes itself on its website as “a Christian humanitarian organization reaching out to a hurting world”
 - CRA lists World Vision Canada under the category of “Missionary Organizations and Propagation of Gospel”, even though World Vision Canada does not present itself as a missionary organization or otherwise pursues other forms of evangelization

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- Presumably, if World Vision Canada were to apply for charitable status today, one would assume that World Vision Canada should be able to qualify under both the relief of poverty head and the advancing religion head, as its mission is to relieve poverty as a way of demonstrating God’s love in response to a hurting world

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- However, given CRA’s current policy, World Vision Canada would likely only qualify for charitable status under the head of relieving poverty
- Such a designation would not reflect the true nature of the organization
- It could potentially be misleading to donors
- It could potentially expose directors to breach of trust
- It would also deny the ability of the charity and donor to make religious based restrictive gifts

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- **Example of faith-based food organization**
 - Consider a religious organization that prepares food to be used for religious observance and is considered an act of worship (i.e. some Hindu and Jewish adherents)
 - The manner in which the food is prepared involves various religious rituals which can involve only certain ingredients and be prepared by certain individuals as an act of worship

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- These organizations are funded by adherents whose intent it is to advance their religion
- Take away the religious aspect of food preparation and such an organization would not qualify as a charity
- **CRA would have to look at the purpose driving the organization and not the activity alone in order for the organization to be considered charitable**

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- **CRA policy at odds with Supreme Court of Canada**
 - CRA's position respecting single issue religious organizations runs contrary to the fundamental principle established by the Supreme Court of Canada with respect to determining what is charitable:
 - It is the purpose behind the activities that must be scrutinized when determining whether an organization is charitable [*Vancouver Society* decision]

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- Inconsistent to suggest that motives or purposes behind the formation of a group are irrelevant
- “Religious substance” test is very restrictive and is inconsistent with tests used by courts
- CRA’s test appears to only recognize mainstream religious groups engaging in public worship
- A more rational approach to the issue would be to look for indicia of a nexus between the activity taking place and the advancement of religion such as:
 - Whether the organization adheres to a set doctrine, which preferably would be in writing

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- Whether the organization is putting the said doctrine into practice in various ways
- Whether the structure and governance of the organization reflects that the organization is advancing religion
- Whether the organization has a statement of faith of some kind
- Whether the board of directors or board of trustees is made up entirely of member of the faith in question
- Whether the membership of the organization is made up entirely of people who are members of the faith and practice the faith
- Whether the intention of the donors who donate gifts to the organization is to advance the faith

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- D. Advancing Religion and the Charter of Rights and Freedoms**
- SCC 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

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- Subjective and personal notions of religious belief, obligation, precept, commandment, custom or ritual are encompassed by this freedom
- 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

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- Courts must proceed on the basis that the Charter does not create a hierarchy of rights and that the right to religious freedom enshrined in the Charter is expansive [*Same Sex Marriage Reference* decision]
 - Freedom to practice one’s beliefs is at the core of the freedom of religion

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- *R v. Badesha* (2008)
 - In 2008, the Ontario Court of Justice followed the SCC’s decision in *Amselem*
 - In *Badesha*, the applicant was stopped and ticketed while he was operating a motorcycle on a public roadway with no approved helmet
 - The applicant was a member of Sikh faith and believed that he must wear a turban at all times when in public and must not wear anything over it

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- The applicant was charged with having failed to wear an approved helmet while operating a motorcycle, contrary to s. 104(1) of *Highway Traffic Act*
- The court ruled that the applicant’s freedom of religion, contained in s. 2(a) of Canadian Charter of Rights and Freedoms, was breached
- The legislative scheme placed a burden on the applicant to choose between his religious beliefs and participating in activity open to other Ontarians

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- *Multani v. Commission Scolaire Marguerite-Bourgeoys (2006)*
 - The Supreme Court of Canada upheld an Orthodox Sikh student’s constitutional right to carry a kirpan (ceremonial dagger) to school
 - This sends a strong message that Canada’s public education institutions must embrace diversity and develop an educational culture respectful of the right to freedom of religion
 - Religious observances must be accommodated to the point of undue hardship by the party responsible for providing the accommodation

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- *Hutterian Brethren of Wilson Colony v. Alberta (2006)*
 - A Hutterian community challenged a provincial regulation requiring all individuals to be photographed in order to obtain an operator’s license because their religion prohibited the willing capture of their image in photographs
 - The Alberta Court of the Queen’s Bench held that the provincial regulation requiring a photograph was considered a violation of a *Charter* right. The court accepted the sincerity and validity of the Hutterites’ belief without question

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- In 2007, the SCC granted leave to appeal the Alberta Court of the Queen’s Bench decision
- The hearing before the SCC is set for October 7, 2008
- While the courts are willing to broaden their protection of freedom of religion, religious charities and churches should continue to clearly enunciate their religious doctrines in a Statement of Faith to avoid facing any discrepancy as to the sincerity of their beliefs

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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* decision: Monetary support by the state for the expression of minority views cannot offend the conscience of those opposed to the viewpoint
 - Indirect subsidy achieved through charitable status does not constitute state affirmation that one religious view is superior to another

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- Argument 2: a charitable purpose cannot be contrary to public policy [*Canada Trustco* decision]
 - A charitable purpose will only be found void for public policy reasons in clear cases in which harm to the public is substantially incontestable
 - 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

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– Argument 3: by denying charitable status to a religious group, CRA is in effect saying that one religion is less worthy than another, thereby denying equality before the law

- Not a violation of the Charter for the government to provide funding to some religious groups while withholding it to others [*Adler* decision]

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E. Recent Policies By CRA Affecting Advancement of Religion

- New CRA policy on Applicants Assisting Ethnocultural Communities
 - Sets out guidelines for registering community organizations assisting disadvantaged ethnocultural communities in Canada
 - Provides framework within which these organizations can attain charitable status
 - Religious organizations must qualify under one of, or a combination of, the four heads of charitable purposes, including advancement of religion

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- An ethnocultural group is defined by the shared characteristics that are unique to, and recognized by that group, which include ancestry, language, country of origin, national identity and religion
- Religion is only considered to be a shared characteristic if it is inextricably linked to the group’s racial or cultural identity
- Concerns were raised 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 revised policy eliminated this reference in response to the concerns raised

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- **New CRA policy guidelines on meeting the Public Benefit Test**
 - New policy seeks to clarify the rules relating to public benefit
 - Two-part public benefit test that requires proof of tangible public benefit being conferred
 - A tangible benefit must be conferred, directly or indirectly
 - Benefit must have a public character, that is, be directed to the public or a sufficient section of the public

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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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F. Advancement of Religion in Other Jurisdictions

- **U.K.:** A new Charities Bill was reintroduced in the House of Lords in May 2005 following the most recent Parliamentary elections. The House of Lords gave the bill Royal Assent on November 8, 2006. The title of the legislation is *Charities Act, 2006*
 - The *Charities Act* provides an expansive list of descriptions of heads of charity, including advancement of religion, advancement of human rights, and conflict resolution or reconciliation
 - It also sets out a statutory public benefit test which eliminates the common law presumption that a purpose of a particular description is for the public benefit, including advancement of religion

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- This may narrow the current common law position for organizations applying under the traditional heads by imposing a new mandatory, but unclear, public benefit threshold requirement
- **Australia:** In 2003, the government released a draft Charities Bill, however, after a consultation process which exposed several deficiencies in the legislation, the government decided to continue to use the common law definition of charity

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- Passed new legislation (*Extension of Charitable Purposes Act*) that has the effect of extending the common law definition of charity to include charitable purposes such as the provision of childcare on a non-profit basis and closed or contemplative religious orders that offer prayerful intervention to the public

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G. 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**
 - **Room for advocacy work on the part of religious organizations to ensure CRA policy respecting single issue religious charities concords with decisions from Supreme Court [*Vancouver Society* decision]**

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- **As a result of the *Amselem* decision (concerning the practical manifestations of faith as an aspect of religious freedom under the Charter) and the broad recognition of the nature and extent of religion by the courts in all jurisdictions, a broader definition of advancement of religion is warranted**

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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**
 - **It is 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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