
The 2004 Annual CHURCH & CHARITY LAW™ SEMINAR

November 10, 2004

Advancing Religion as a Charity: Is it Losing Ground? (Power Point Presentation)

By Terrance S. Carter, B.A., LL.B.
© 2004 Carter & Associates

CARTERS.ca

CARTER & ASSOCIATES
PROFESSIONAL CORPORATION

BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
Affiliated with Fasken Martineau DuMoulin LLP

Main Office Location

211 Broadway, P.O. Box 440
Orangeville, ON, Canada, L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300
Toll Free: 1-877-942-0001

www.carters.ca

National Meeting Locations

Toronto (416) 675-3766
Ottawa (613) 212-2213
London (519) 937-2333
Vancouver (877) 942-0001
"Proactive Advice"®

www.charitylaw.ca

Overview Of Presentation

- Introduction: The Changing Landscape
- Overview of Advancement of Religion in Existing Case Law
- Recent Judicial Decisions on Advancement of Religion
- Recent Proposed Policies From Canada Revenue Agency (CRA) That Refer to Advancement of Religion
- Ongoing Work in Other Jurisdictions Concerning Advancement of Religion

For more details – see Church Law Bulletin #6 “Advancing Religion as a Charity: Is it Losing Ground?” at www.churchlaw.ca

2

A. Introduction: The Changing Landscape

- Historically it has not been clear how broadly advancement of religion as a head of charity could be defined
- The recent SCC decision in *Syndicat Northcrest v. Amselem (Amselem)* states that religious practice, in addition to religious belief, is equally important in defining religious freedom
- As a result, it is hoped that advancement of religion will be given a broad interpretation as are the other heads of charity

3

- CRA intends to release a consultation draft on advancement of religion as a head of charity
- However, based on the scope of religion articulated in policy statements regarding Ethnocultural Communities and Public Benefit it remains to be seen if CRA will give advancement of religion a broader or a narrower interpretation

4

B. Overview of Advancement of Religion in Existing Case Law

1. Advancement of Religion as a Head of Charity

- To be charitable at common law, an organization must have:
 - Exclusively and legally charitable purposes under one or more of the four heads of charity
 - Relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community
 - Purposes must be directed to the public benefit
 - There is a requirement of public benefit for all heads to varying degrees

5

- Advancement of religion is prima facie charitable and presumed for the public benefit unless contrary is shown
 - The contrary can be shown if “doctrines of religious organizations are adverse to the foundations of all religions and subversive of all morality” (Re Watson)
2. Religion Has Been Given a Broad Interpretation by the Courts
- To qualify under advancement of religion, a religious organization must show
 - What religion is being advanced

6

- How it is being advanced
 - Include ancillary actions that have a connection to the charity’s main projects
- However, courts are generally reluctant to decipher religious doctrine and will defer to sincerely held religious beliefs
- Charitable objects intended to advance religion are charitable provided the object is otherwise lawful
- Given evolving nature of religion, religious purpose should be given a wide meaning
 - In keeping with religious freedom guaranteed under the Canadian and Quebec Charters

7

- Should be based on supernatural being, thing or principle and acceptance and observances that give effect to this belief
- Concerned with faith in a God and worship of that God
 - Worship can manifest itself in activities such as praise, thanksgiving
- In other jurisdictions, such as the US, religion is broadly interpreted and captures bona fide religious assertions
 - Does the belief in the mind of the adherent occupy a position equivalent to God?

8

- Does religious practice merit free exercise without state interference?
3. Religion includes worship of a deity, as well as related religious observances and practices
- Promoting religion means:
 - Promoting spiritual teachings in a wide sense
 - Maintaining the doctrines on which it rests
 - Maintaining the observances that promote and manifest it

9

- In the US context, whether a particular belief is religion is a subjective inquiry
- A court may determine whether a belief is sincerely held but should not judge its validity or reasonableness
- When political and economic beliefs are fundamental to an organization's religious beliefs, such beliefs will be considered religious
- In the Canadian context, the worship of God is core to the meaning of religion
- Essential to religion is the need for
 - An established doctrine

10

- Sharing this doctrine both within and outside church membership
- A need for practices and observances
- 4. Advancement of Religion Inherently Involves Dissemination and Propagation of Religious Beliefs
- Advancement of religion involves
 - Promotion, dissemination and propagation of religious beliefs to others which may be done in ways that are pastoral and missionary
 - Involves matters of faith and worship

11

- Other countries concur that religion involves more than worship, including:
 - Moral practice manifested in its believers directly resulting from adherence to its beliefs
 - Acceptance of canons of conduct that give effect to a belief
- 5. Advancement of Religion Can Involve Speaking Out on Social, Moral and Ethical Issues
- Courts take an inclusive approach to the relationship between advancing religion and social, moral and ethical issues

12

- The law errs on the side of over-inclusiveness instead of applying a rigorous definition of religion
- The domain of religious activity is essentially but not exclusively spiritual
- Therefore a non-charitable or incidental activity can still be deemed charitable if done for the larger purpose of advancing religion
- The courts recognize that advancing religion can encompass activities not overtly spiritual by themselves but which promote a recognized religious doctrine

13

C. Recent Judicial Decisions on Advancement of Religion

1. Federal Court of Appeal Decision in Fuaran Foundation

- This is the most recent case endorsing CRA decision not to register a charity under “advancement of religion”
- The court found the foundation did not exclusively advance religion because
 - Its objects were overly broad and could facilitate undertaking non-charitable activities
 - Participation in religious activities was wholly discretionary on the part of attendees at the foundation’s retreat

14

- Decision demonstrates the federal court deference to tradition and a narrow interpretation of advancing religion
 - Decision could be a hurdle to religious organizations not focused primarily on religious proselytizing or worship
 - Decision may be short-lived based on subsequent SCC decision in *Amselem*
- 2. SCC Decision in *Amselem***
- SCC rendered broad interpretation of Charter right to religious freedom and provided broader boundaries within which the definition of advancement of religion could operate

15

- SCC rejected the “unduly restrictive” view of freedom of religion taken by the Court of Appeal, i.e. it is not necessary to show that an action is a mandatory religious obligation in order for it to be religious
- Freedom of religion is triggered when a claimant demonstrates
 - Such belief or practice has a nexus with religion
 - Belief or practice is sincerely held or undertaking as a function of spiritual faith
- It is not within the expertise and purview of secular courts to adjudicate questions of religious doctrine

16

- There should be no legal distinction between “obligatory” and “optional” religious practices in freedom of religion
- Importance of this decision:
 - Establishes that it is the spiritual essence of a belief or practice that is sincerely held, and not the mandatory nature of its observance, that attracts protection
 - Reinforces that it is inappropriate for courts to decipher contentious matters of religious law
 - Decision could provide significant guidance to CRA on how to make its decisions on charitable registration under advancement of religion in determining what activities are considered advancing religion

17

3. *Congregation des Temoins* Decision

- A Jehovah's Witness congregation (congregation) appealed a Quebec Court of Appeal decision dismissing their application for mandamus (i.e. a writ which compels the performance of a public duty, e.g. a lower court to exercise its jurisdiction)
- The issue before the SCC was whether the municipality lawfully denied the rezoning application to allow the congregation to build a place of worship
- Appeal was allowed on procedural and not Charter grounds and matter remitted to the municipality for reconsideration.

18

D. Recent Proposed Policies From Canada Revenue Agency (CRA) That Refer to Advancement of Religion

1. Applicants Assisting Ethnocultural Communities

- Paragraph 35 of proposed policy states as follows regarding advancement of religion:

“In this category of charity, if the undertaking promotes the spiritual teachings of the religion concerns, 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.”

19

“For example, opposing abortion and promoting or opposing same-sex marriage, while in keeping with values of some religious believers and religions, cannot be considered charitable purposes in the advancement of religion category.”

- Paragraph 36 provides an example of acceptable objects for religious worship based on specific linguistic community:
“the promotion of spiritual teachings of the religion concerned and the maintenance of the spirit of the doctrines and observances of which it rests”
- The following was listed as an unacceptable object:
“the pursuit of purposes that are more secular than theological”
- Query what will be considered “more secular than theological”

20

2. Meeting the Public Benefit Test

- Public benefit is a required criteria for charitable status
- CRA proposed two-part public benefit test
- Proposal confirms common law presumption of public benefit for advancement of religion but makes clear it is a rebuttable presumption
- Therefore common law presumption of public benefit for advancement of religion can now be challenged

21

- In relation to the presumption of public benefit, the proposed CRA policy statement on public benefit states as follows:

“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 benefit can be challenged. When the presumption is disputed, the burden of proving public benefit becomes once again the responsibility of the applicant organization.”

22

- No case citation is provided by CRA for the example of where presumption of public benefit may be rebuttable under advancement of religion
- Existing case law stands for proposition that “a religious charity can only be shown not to be for the public benefit of its doctrines are adverse to the foundations of all religion and all morality...” (Re Watson)

23

- Concern that proposed CRA policy statement may unintentionally result in expansion of circumstances where presumption of public benefit can be challenged, e.g. from one where a religious organization “promotes beliefs contrary to all religion and subversive to all morality” to one where a religious organization promotes beliefs contrary to accepted foundations of religion or morality
- While an organization that has been denied charitable status can have its application reviewed by the courts, few organizations are in a position to undertake such a review
- The reality of this limitation underscores why it is important for CRA to clarify these issues in its policy statements

24

E. Ongoing Work in Other Jurisdictions Concerning Advancement of Religion

1. The U.K. Position

- Draft charities legislation (Charities Bill 2004) is currently being considered by the U.K. Parliament
- If adopted, charities legislation will create new statutory definition of charity
- Proposes an expansive list of descriptions as heads of charity
- One important proposal of concern is the proposed removal of common law presumption of public benefit

25

- Appears to represent a narrowing of the current common law position
- Not preserving the current breadth of religious purposes accepted as charitable at common law

2. The Australian Position

- Released a draft Charities Bill in 2003
- Advancement of Religion is confirmed as a charitable purpose
- Definition of religion for charitable purposes is very expansive
 - “advancement” includes “protection, maintenance, support, research and improvement”

26

- Definition of religion does not limit the matters that may be considered in determining whether particular ideas, practices and observances constitute a religion

CONCLUDING COMMENTS

- A broad definition of advancement of religion should be supported based on SCC decision in *Amselem* which
 - Recognizes the importance of freedom of religious belief and freedom of religious practice
 - Emphasizes that the State and the court must not inquire into the validity of an individual's religious beliefs or practices.

27

- *Amselem* should impact the extent to which CRA considers what constitutes advancing religion when reviewing applications for charitable status
- A broad definition of religion is justified in keeping with expansion in the other three heads of charity in recent years
- This would be reflective of fact that religious faith and practice are intrinsically connected for most, if not all, religious faiths

28

- In the context of the Christian faith, many individual Christians and denominations feel that engaging in practices (such as undertaking relief of poverty or other forms of humanitarian relief) that are practical manifestations of their faith, are equally important and necessary as a part of their faith as regular religious worship and adhering to religious teachings and doctrine
- An expansion of the definition of religion would parallel the corresponding change in religious beliefs and practices of many faiths

29

- Any interpretation of advancement of religion should therefore seek to reflect this duality, not restrict it
- 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 manifestation in order to make a meaningful difference
- 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 freedom of religion recognized by the SCC in the *Amselem case*

30