
CHRISTIAN LEGAL FELLOWSHIP - OTTAWA

Ottawa – October 30, 2006

Highlights of Current Legal Issues Facing the Church

By Terrance S. Carter, B.A., LL.B.

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OVERVIEW OF TOPICS

- **PART I - Legal Impact of Same-Sex Marriage on Religious Organizations**
- **PART II - Political Activities: What Churches Can and Cannot Do**
- **PART III - Advancing Religion as a Head of Charity: What Are the Boundaries?**

Note: This powerpoint presentation is a brief overview of the above topics that are dealt with in more detailed powerpoint presentations at www.charitylaw.ca

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PART I - THE LEGAL IMPACT OF SAME-SEX MARRIAGE ON RELIGIOUS ORGANIZATIONS

LEGISLATIVE UPDATE

1. **New Federal Legislation (Bill C-38) *Civil Marriage Act***
 - Received Royal Assent on July 19, 2005
 - Section 2 - Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others
 - Section 3 - It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs

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- Last minute amendments to *Civil Marriage Act* offers some exemptions:

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, ... solely by reason of their exercise, in respect of marriage between persons of the same-sex, of the freedom of conscience and religion ...or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

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- Section 149.1 of the *Income Tax Act* was amended by adding the following:

...a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty... solely because it ... exercises, in relation to marriage between persons of the same-sex, the freedom of conscience and religion guaranteed under the Canadian *Charter of Rights and Freedoms*.

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2. Ontario's *Spousal Relationship Amendment Act, 2005*

- Adds the following exemption to the Ontario *Human Rights Code*:

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in servicing the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

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18.1 (1) The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20 of the *Marriage Act* [Ontario] refuses to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to solemnize the marriage, allow the sacred place to be used or otherwise assist would be contrary to,

- (a) the person’s religious beliefs; or
- (b) the doctrines, rites, usages or customs of the religious body to which the person belongs

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- Also added new exemptions to *Marriage Act* (Ontario):

20 (6) A person registered under this section is not required to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to do so would be contrary to,

- (a) the person’s religious beliefs; or
- (b) the doctrines, rites, usages or customs of the religious body to which the person belongs.

- Definition of “sacred place”

20 (7) In subsection (6), “sacred place” includes a place of worship and any ancillary or accessory facilities.

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- A “person registered under the *Marriage Act*” is defined as follows:

20 (3) No person shall be registered unless it appears to the Minister,

- (a) that the person has been ordained or appointed according to the rites and usages of the religious body to which he or she belongs, or is, by the rules of that religious body, deemed ordained or appointed;
- (b) that the person is duly recognized by the religious body ... as entitled to solemnize marriage;
- (c) that the religious body ... is permanently established both as to the continuity of its existence and as to its rites and ceremonies; and
- (d) that the person is resident in Ontario or has his or her parish or pastoral charge in whole or in part in Ontario;

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- Exemptions only protect religious officials who are licensed to perform marriages under the *Marriage Act*, and would not serve to protect lay persons, such as deacons, elders, or members of para church organizations
- This *Act* extends the exemption for religious officials to “any event related to the solemnization of a marriage,” which presumably would include a wedding reception
- However, the words “ancillary or accessory facilities” in definition of “sacred place” are open to interpretation and could be read down to exclude church halls or even church basements

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- The *Act* only provides protection to religious groups where facilities and services of the religious group are being rented out to or provided for purposes associated with the solemnization of marriage
- Does not include other uses, such as a choir competition or music recitals
- Courts and tribunals will be left to interpret what part of the lands and buildings of a church or religious organization will be included as “ancillary and accessory” facilities, as well as what events will be considered to be “related to the solemnization of marriage.”

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- *Smith v. Knights of Columbus* (2005) B.C. Human Rights Tribunal decision provides an example which may extend beyond the specific exemptions provided in the *Ontario Human Rights Code* under section 18 and 18.1
 - Tribunal found that although the Knights could normally restrict facility use because of religious beliefs, they should have had a clear facility use policy and better screening/ approval process that reflected their religious beliefs and was consistently applied
 - Church hall was not a “sacred place”, as was used in a commercial manner (e.g. it was rented out to the public for events not related to religion) and it did not matter that it was next door to the church and Catholic school

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– There could have been added protection from human rights complaint if the Knights had restricted the use of the hall to its members or church members

– Knights had a duty to accommodate complainants to the point of undue hardship, e.g. should have compensated them for added cost and assisted them in finding other location to hold wedding reception

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WHAT CHURCHES AND RELIGIOUS CHARITIES CAN DO IN RESPONSE

1. The Importance of Constitutional Documents

a) The legal nature of religious organizations

- Churches and other religious organizations are a voluntary association of persons who come together for a collective purpose as reflected in their respective governing agreement, namely their constitution
- A church constitution is a civil law document that can only reflect church law if it is made a part of the church constitution

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b) The need for churches and religious charities to clearly articulate their identity and beliefs through a constitution

- If the church fails to articulate what it is and what it believes, it will be left up to the courts to determine it on behalf of the church. The church may then be left more vulnerable to challenge under the provincial human rights legislation and Bill C-250 (hate propaganda in the *Criminal Code*)

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- In Ontario, a church can articulate what it believes and practices and can avail itself of subsection 18.1(1) of the Ontario *Human Rights Code*
- For unincorporated churches, a constitution is usually a single document that is neither issued nor sanctioned by the government
- For incorporated churches, the constitution usually consists of a collective of the following documents:
 - Letters patent
 - General operating by-law
 - Policy statements

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2. Possible Options Regarding Specific Constitutional Documents

- In light of recent changes in the law, churches and other religious organizations may want to consider taking the following steps
- a) Statement of Faith
 - A statement of faith should always be part of the constitution of a church
 - A more literal and/or orthodox interpretation of Scripture would likely be more consistent with a position not in support of same-sex marriage

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- If applicable, the church’s statement of faith should reflect the church’s theological belief in a literal and/or orthodox interpretation of Scripture
- Scriptural passages that may be construed as promoting hatred against an identifiable group could leave the church open to civil and even criminal liability

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b) Charitable Objects

- The church’s charitable objects are set out in its letters patent and should clearly indicate a religious purpose with references, where possible, to Scripture, i.e. “propagating the Gospel of Jesus Christ”
- The church’s charitable objects should also make reference to upholding the church’s statement of faith, where applicable

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c) General Operating By-law

- The general operating by-law should define membership
- Conditions for church membership could include:
 - Adherence to the church’s constitution and its statement of faith
 - Members would be subject to church authority
 - A requirement to sign a membership statement by a member indicating they agree to comply with the church constitution and its statement of faith

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- Individuals involved in or leading church ministries or programs, as well as key employees, could collectively be required to be members
- The by-law should also have a provision authorizing the directors to implement operating policies for the church, together with an effective discipline procedure

d) Policy Statements

- Policy statements can be of assistance in articulating a practical manifestation of the church’s beliefs

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- Churches should ensure their policy statements make reference to being applied in accordance with the church's statement of faith, where applicable
- Policy statements must be prepared in a manner consistent with applicable human rights legislation
- Examples of the types of policy statements a church might adopt with regard to same-sex marriage are as follows:
 - A policy on marriage including the following, where applicable:

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- If the church does not support same-sex marriage in accordance with a literal and/or orthodox interpretation of Scriptures, the policy should contain a statement recognizing marriage as a holy sacrament of the church and defining marriage as being between one man and one woman in accordance with its statement of faith
- Clergy should be required to subscribe to the church's constitution, including its statement of faith
- Marriage can only be solemnized by clergy of the local church or other clergy approved by the church who have subscribed to the statement of faith and constitution of the church

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- The clergy would need to be prohibited from conducting or solemnizing a same-sex marriage
- A facility use policy providing for the following:
 - Prohibiting the use of any church facility, including all places ancillary or accessory, for the solemnization of a same-sex marriage or an event related to the solemnizing of a same-sex marriage
 - Restricting use of church facilities to church programs and/or members and for purposes which are consistent with the statement of faith and constitution of the church

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- Since a church in Ontario can discriminate in terms of membership and services per s.18 of the *Human Rights Code*, a church may restrict the use of the facilities to only those holding membership status
- If church facilities are restricted for use by members, a church that does not support same-sex marriage may have the ability to prohibit the use of its facilities for conducting same-sex marriages and related events by non-members and members alike beyond what the federal and new Ontario legislation provides for

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- However, such facility use policies must be prepared in a manner consistent with the requirements of the provincial human rights legislation and therefore cannot exclude an identifiable group, except in Ontario where permitted by s.18 and s.18.1 of the Ontario *Human Rights Code* or possibly in accordance with the Knights of Columbus decision
- Churches are cautioned to draft their policy statements utilizing neutral wording where possible and avoid negative or pejorative wording, or wording that refers to an identifiable group

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- Churches are cautioned against implementing conduct or lifestyle statements which may be construed as discriminating against an identifiable group contrary to provincial human rights legislation
- Churches should ensure their policy statements are enforced in a consistent manner, otherwise, the following may occur:
 - The church may waive its ability to enforce its policy statement
 - The church may be vulnerable to allegations of discrimination for inconsistency in enforcement

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- An example is where the church neglects to enforce provisions in a conduct statement with regard to a particular activity, i.e. prohibition on drinking alcohol, but enforces prohibition against adultery
- The church needs to set out a procedure of church discipline reflecting principles of fairness and natural justice. For further details, see an article on church discipline at <http://www.carters.ca/pub/article/church/1995/disciplin.pdf>

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3. Review of Existing Constitutional Documents

- If the church has an existing constitution, it should be reviewed to determine whether the church's documents are consistent with recent developments in the law
- The church should determine if its statement of faith and policy statements are part of its constitution

4. Conducting a legal audit

- Given the severity in liabilities for non-compliance with changes in the law, churches should consider a legal audit of all of their policies and constitutional documents, as well as of their liturgies and teaching materials

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- The purpose of a legal audit would be to:
 - Review whether the church's existing constitutional documents may be inconsistent with applicable legal requirements under Bill C-250 (hate propaganda provisions of the *Criminal Code*) provincial human rights legislation and new federal legislation on same-sex marriage
 - Review whether the documents reflect any discrimination or promotion of hatred against an identifiable group

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5. Education of clergy concerning their legal rights

- It would be prudent for local churches and/or denominations to educate the clergy of their legal rights in relation to the fulfillment of their ministerial duties and the operations of the church as a whole
- The new *Civil Marriage Act* recognizes the right to freedom of conscience and freedom of religion but cannot provide specific exemptions for clergy from having to perform same-sex marriages contrary to their beliefs as this is the purview of the provinces
- It is therefore important for local churches and/or denominations to provide education to both clergy and church

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PART II - POLITICAL ACTIVITIES: WHAT CHURCHES CAN AND CANNOT DO

1. Key CRA Policies and *Income Tax Act* Provisions

- CRA Policy Statement "Political Activities" effective as of Sept. 2, 2003
- CRA Advisory "Political Activities Guidance and Partisan Politics" released on June 11, 2004
- CRA Advisory "Important Advisory on Partisan Political Activities" dated December 14, 2005
- Other related CRA publications based on subsections 149.1(6.1) for charitable foundations and 149.1(6.2) for charitable organizations of the *Income Tax Act* ("ITA") are available at the CRA website
<http://www.cra-arc.gc.ca/tax/charities/menu-e.html>

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- Subsection 149.1(6.2) of the *ITA* provides that where a charitable organization devotes substantially all of its resources to charitable activities carried on by it and
 - a) it devotes part of its resources to political activities,
 - b) those political activities are ancillary and incidental to its charitable activities, and
 - c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,
 the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it
- Subsection 149.1(6.1) contain similar provisions for charitable foundations

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2. The Difference Between Political Purposes and Charitable Purposes

- All registered charities are required by law to have exclusively charitable purposes (as determined at common law)
- An organization established for a political purpose cannot be a charity

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- The courts have determined political purposes to be those that seek to:
 - Further the interest of a political party or support a political party or candidate for public office, or
 - Retain, oppose, or change the law, policy or decision of any level of government in Canada or a foreign country
- CRA will look at the stated purpose of an organization, as well as its activities to determine whether it has adopted political purposes

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3. Three Categories of Activities

- For the purposes of this presentation, activities undertaken by a church or a charity can be separated into three categories:
 1. Charitable activities (permitted without limits)
 2. Political activities (permitted up to prescribed limits)
 3. Prohibited activities (never permitted)

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4. Charitable Activities (Permitted Without Limits)

- If an activity is considered by CRA to be charitable, i.e. it is a means to achieving a charitable purpose, then it is permitted without limits
- However, neither the *Income Tax Act* nor CRA policies define what a “charitable activity” is, while CRA Policy Statement comments as follows:

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- Public awareness campaign about the work of a charity or an issue related to that work, so long as the activity is connected and subordinate to the charity’s purpose
- Communicating with an elected representative or public official, provided that such activity is subordinate to the charity’s purpose and all representations:
 - Relate to an issue that is connected to the charity’s purpose
 - Is well reasoned, and
 - Does not contain information that is false, inaccurate or misleading
- Releasing the text to a representative before or after delivering it to the elected representative or public official, provided that the entire text is released and there is no explicit call to political action

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- Other examples of charitable activities given in the CRA Policy Statement
 - Distributing the charity’s research, including distributing it to all election candidates
 - Publishing a research report on line
 - Presenting a research report to a Parliamentary Committee
 - Giving an interview about a research report
 - Distributing a research report to all Members of Parliament
 - Participating in an international policy development working group
 - Joining a government advisory panel to discuss policy changes

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- Example of church related activities that would likely be considered to be charitable activities:
 - A pastor or a priest speaking out on abortion or same sex marriage from a Biblical context but without commenting on how a political party is or should be dealing with the issue
- However, churches should also be aware of the circumstances under which statements could constitute hate propaganda under the *Criminal Code*, especially in relation to issues involving same sex marriage (see Church Law Bulletin #2 at www.churchlaw.ca)

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5. Political Activities (Permitted Up To Prescribed Limits)

a) What Is a Political Activity?

- An activity is presumed to be a political activity if a charity:
 - Explicitly communicates a call to political action
 - Explicitly communication to the public that the law, policy or decision of any level of government in Canada or a foreign country should be retained, opposed or changed
 - Explicitly indicates in its material that the intention of the activity is to incite, organize or put pressure on governments to retain, oppose or change the law, policy or decision of a government

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- A charity may take part in political activities if such activities are:
 - Non-partisan
 - Connected to the charity’s purposes
 - Subordinate to the charity’s purposes
 - Fall within expenditure limits under the *Income Tax Act*
- An example of a permitted political activity would be a sermon on the interpretation of the Bible’s truths on any given topic and a call for church members to contact their respective MPs to pressure them to support or oppose a particular existing or proposed law

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- **Examples given in the CRA Policy Statement on permitted political activities:**
 - **Buying a newspaper advertisement to pressure the government**
 - **Organizing a march or a rally on Parliament Hill**
 - **Organizing a conference in support of the church’s opinion on a given matter**
 - **Hiring a communications specialist to arrange a media campaign**
 - **Using a mail campaign to urge supporters to contact the government on a particular issue**

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- b) Limits on Expenditures on Permitted Political Activities**
- **Where a church or charity takes part in political activities, it must devote “substantially all” of its “resources” to charitable activities**
 - **“Resources” is not defined in the ITA but administratively CRA considers “resources” to include the total of a church’s financial assets, as well as everything the church can use to further its purposes, such as its staff, volunteers, directors and its premises and equipment**
 - **“Substantially all” usually means 90% or more**
 - **Therefore, as a general rule, a church or charity that devotes no more than 10% of its total “resources” a year to political activities would be operating within the “substantially all” provision**

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- **CRA’s administrative discretion concerning the limits on expenditures on political activities has been extended in certain situations by its Policy Statement:**
 - **A church or charity with annual income of less than \$50,000 can devote up to 20% of resources in a given year**
 - **A church or charity with annual income of between \$50,000 and \$100,000 can devote up to 15% of resources in a given year**
 - **A church or charity with annual income of between \$100,000 and \$200,000 can devote up to 12% of resources in a given year**

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- In limited circumstances, expenditures on political activities can be averaged over a number of years
- Resources used towards permitted political activities do not count toward meeting a church or charity’s disbursement quota
- A church or charity that is involved in political activities will need to keep careful records in order to demonstrate that substantially all of its resources have been devoted to charitable activities in order to be prepared for an audit

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6. Prohibited Activities

- Prohibited activities are activities that are either illegal or involve partisan political activities and therefore are not permitted at all
- The CRA Advisory (June 11, 2004) entitled Political Activities Guidance and Partisan Politics provides as follows:
 - Recognition that charities are confused about what constitutes “partisan political activities” so the Advisory was intended to clarify matters

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- Partisan political activity involves the “direct or indirect support of, or opposition to, any political party or candidate for public office” and is clearly prohibited. (ss.149.1(6.1) and (6.2) of *ITA*)
- A “candidate for public office” is different from an “elected representative”, but support or opposition of an “elected representative” may still be seen as “direct or indirect support of or opposition to, any political party”

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- An example of a prohibited partisan political activity would be a gift of church monies to fund a political party that supports the church’s views on a given matter - not permitted because it is both a prohibited activity and is not a gift to a “qualified donee”
- Another example of a prohibited partisan political activity would be inviting a Christian MP who is running for re-election to speak at a church without giving an equal opportunity to all other candidates seeking election for the same office position

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- Other examples of prohibited partisan activities in the CRA Policy Statement includes the following:
 - Publishing statements that support a particular electoral candidate in the church Sunday service bulletin or church e-mail distribution list or on the church website
 - Distributing leaflets highlighting lack of government support for church’s position on any given matter
 - Preparing a special dinner for campaign organizers of a political party

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- Attendance by a representative of a church e.g. church pastor, elder or deacon in their official capacity at a political fundraising dinner
- Charging fair market value rent to a political party and allowing usage of church facilities is permitted so long as equal access and opportunity is given to all political parties.
- However, this is a grey area, as prolonged association with one party may lead to conclusion the church favours that party, thereby constituting a prohibited political activity – analysis is fact specific

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• **Further examples of prohibited political activities in the CRA Advisory (December 14, 2005) include:**

- Posting of signs in support of, or opposition to, a particular candidate or political party
- Distribution of literature or voters’ guides that promote or oppose a candidate or political party explicitly or by implication
- Explicit connection of the church’s position on an issue to the position taken on the same issue, by a candidate or political party

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7. Implications For Churches and Charities

• **Churches and other Charities need to:**

- Ensure that activities are either inherently “charitable” or are “permitted political activities”
- Ensure that any political activities undertaken fall within expenditure limits
- Remember that any resources expended on permitted political activities cannot be included as an amount used to meet a church’s disbursement quota

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- Keep careful records of all expenditures with respect to permitted political activities
- Abstain from prohibited activities

• **If in doubt over whether an activity is permissible, make formal request for direction from CRA before engaging in the activity**

• **When filling out charitable income tax return (T3010), churches should pay careful attention to the guidelines provided by CRA which accompany the return**

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PART III - ADVANCING RELIGION AS A HEAD OF CHARITY: WHAT ARE THE BOUNDARIES

1. 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?

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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]

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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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2. 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 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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• 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 motive or 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 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

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3. 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
 - Subjective and personal notions of religious belief, obligation, precept, commandment, custom or ritual are encompassed by this freedom

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- 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
- 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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- *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 Supreme Court of Canada 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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- 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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4. 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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