November 3, 2020

Church of Atheism of Central Canada v MNR: Charitable Status for Atheists and the Triviality of Religious Freedom Infringements

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Case Commented On: *Church of Atheism of Central Canada v MNR*, 2019 FCA 296 (CanLII)

On October 29, the Supreme Court of Canada denied leave to appeal in *Church of Atheism of Central Canada v MNR*, 2019 FCA 296 (CanLII), a charitable registration appeal that raised questions about the constitutionality of according tax privileges to a class of "religious" charities in Canada. This result is unsurprising. The decision of the Federal Court of Appeal was unanimous and the Church of Atheism was not represented by counsel. The evidentiary record was probably sparse, since the evidentiary record in charitable registration appeals is limited to the documents in the Canada Revenue Agency's file at the time that registration is denied. Nevertheless, *Church of Atheism of Central Canada v MNR* raised important legal issues that affect the largest segment of Canada's charitable sector. This post discusses several issues that are likely to re-emerge in a future case.

Background and Facts

An entity that wishes to become a registered charity in Canada must apply to the Minister of National Revenue for registered charity status in prescribed form. The *Income Tax Act*, RSC 1985, c 1 (5th Supp) recognizes three types of registered charities: the charitable organization, the public foundation, and the private foundation. Subsection 149.1(1) of the Act defines a charitable organization, in part, as an organization that (1) is constituted and operated exclusively for charitable purposes, and (2) devotes all of its resources to charitable activities carried on by the organization itself. The Minister and her Canada Revenue Agency delegates, as well as Canada's federal courts, have long relied on the common law definition of charity to give meaning to the undefined word "charitable" in the *Income Tax Act*. The common law recognizes four broad categories, or "heads", of charitable purposes: the relief of poverty, the advancement of education, the advancement of religion, and a residual category of "other purposes beneficial to the community" (*Vancouver Society of Immigrant and Visible Minority Women v MNR,* 1999 CanLII 704 (SCC), [1999] 1 SCR 10).

In order to qualify as a "third head" charity, an institution must both "advance" religion, and advance "religion." It must also benefit the public within the meaning of the common law. There are approximately 32,000 charities registered under the "advancement of religion" head in Canada. These charities account for almost 40% of the Canadian charitable sector, and receive approximately 40% of the total value of annual charitable donations.

The appellant in *Church of Atheism* was an incorporated not-for-profit organization that had applied to the Minister of National Revenue for registered charity status. Its sole corporate object was to "preach Atheism through charitable activities." The Minister of National Revenue denied its application, finding that Atheism did not meet any of the established criteria of religion. The Church appealed to the Federal Court of Appeal, arguing (1) that the common law test governing the advancement of religion violated section 2(*a*) of the *Canadian Charter of Rights and Freedoms*, and (2) that the Minister's decision was unreasonable. The Federal Court of Appeal rejected both arguments and upheld the Minister's decision.

Analysis

The first question raised by *Church of Atheism* is how "religion" should be defined for the purposes of charity law. The FCA held that the Church of Atheism did not qualify as a religion because its belief system was not based on "a particular and comprehensive system of doctrine and observances" (at para 22). However, the Court did not answer the more difficult question: whether a belief system that is agnostic or hostile towards religion can constitutionally be excluded from the advancement of religion head.

The common law of charities has traditionally defined religion in terms of two principal characteristics: belief in a supreme being, and an expression of that belief through worship. In recent years, several Anglo-Commonwealth jurisdictions have moved away from that rather narrow understanding of religion through a combination of legislative and judicial action. Subsection 3(2) of the United Kingdom's *Charities Act 2011*, for example, defines religion to include religions that involve belief in more than one god, and religions that do not involve belief in a god. In Canada, which has seen very little litigation on religious charities, the functional legal criteria for "religious" registration are set out in two brief Canada Revenue Agency guidance documents. There is a longer story here of "draft" guidance that has been around for a decade and is applied behind the scenes. However, the published criteria reflect the CRA's understanding of the combined effect of the charity law authorities and *Syndicat Northcrest v Amselem*, 2004 SCC 47 (CanLII), a leading SCC decision on religious freedom under the Charter. The first guidance document identifies three key attributes of religion: "faith in a higher unseen power such as a God, Supreme Being, or Entity; worship or reverence; and a particular and comprehensive system of doctrines and observances." The second states: "There must be an element of theistic worship, which means the worship of a deity or deities in the spiritual sense."

The CRA guidance on advancing religion raises at least two issues, neither of which the Federal Court of Appeal resolved in *Church of Atheism*. First, are the religious attributes that the first CRA guidance identifies legal *requirements* for charitable status, or merely loose *indicia* of religiosity? The language in *Amselem* suggests that the Supreme Court of Canada intended to articulate only general *indicia* of religion in that case: the majority stated that religion "typically involves" a particular and comprehensive system of faith and worth, and "tends to involve" belief in a divine, superhuman or controlling power (at para 39). In the context of the registered charity regime, however, the identified attributes of religion have generally functioned as legal requirements. The FCA treated the first two attributes as loose *indicia* in *Church of Atheism,* holding, based on an old English decision addressing Buddhism, that belief in a Supreme Being is "not always required" (at para 21). This statement alone would seem to require that CRA

amend its published guidance to clarify that theistic worship is not a legal requirement for religious charitable status. However, the FCA applied the third religious attribute as a fixed requirement, holding that the Church of Atheism was not a charity because it "did not demonstrate that its belief system is based on a particular and comprehensive system of doctrine and observances" (at para 22). This makes the relationship between *Amselem* and the charity law criteria somewhat less clear. We are left to wonder whether at least one of *Amselem*'s *indicia* must be present or whether the third is a requirement rather than an *indicium*.

The second issue raised by CRA's published guidance on religious charitable status is just as fundamental: does section 2(*a*) of the *Charter*, which protects freedom of both conscience and religion, require that charity law include within its conception of religion not only non-theistic spiritualities, but belief systems that are agnostic or hostile towards religion as conventionally understood? The FCA decision is unclear on this point. As Kathryn Chan has written elsewhere, however, the common law has always refused admittance to belief systems that are agnostic or hostile towards religion. The promotion of secularism and the discouragement of supernatural belief have been excluded from the third head of charity, as have the study of comparative religion, philosophy and science, and the investigation of "the unexplained law of nature and the powers latent in man." Trusts for the advancement of non-religious beliefs sometimes qualify as charitable under the fourth head of charity on the basis that they tend to promote the moral or spiritual welfare of the community. The charitable nature of such trusts is not assumed, however; the court must be persuaded, on the evidence of the trust's moral worth, that it benefits the public and is within the spirit and intendment of the Preamble to the Statute of Charitable Uses of 1601.

The case law on freedom of conscience is underdeveloped. In *Amselem*, the SCC held that freedom of religion applies only to practices "rooted in religion, as opposed to those that are secular, socially based or conscientiously held" (at para 39). Ten years later, however, the SCC appeared to rely on freedom of religion to vindicate the rights of atheists opposed to a municipal practice of opening council meetings with prayer (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 (CanLII)). The common law's approach to charitable status raises the question of whether an Atheist community ought to enjoy similar legal privileges as a religious community based on its conscientious or religious freedom. The FCA touches on this issue in passing when it considers whether the Church of Atheism's rights were infringed in a manner more than trivial or insubstantial, an issue to which we now turn.

"More than Trivial or Insubstantial"

Apart from its significance to the law of charities, the Federal Court of Appeal's reasoning brings to the fore a sometimes neglected aspect of Canada's religious freedom doctrine. The Court held that "the Minister's refusal to register the appellant as a charitable organization does not interfere in a manner that is more than trivial or insubstantial with the appellant's members ability to practise their atheistic beliefs. The appellant can continue to carry out its purpose and its activities without charitable registration" (at para 16).

As Howard Kislowicz has written elsewhere, the requirement that a claimant prove that an interference with their religious freedom is more than trivial or insubstantial can be traced to *R v Jones*, 1986 CanLII 32 (SCC), [1986] 2 SCR 284. The SCC has consistently reaffirmed this

principle (as in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII) at para 32), but has very rarely relied upon it to defeat a religious freedom claim (by our count, only once in *R v Jones*). Lower courts, however, have relied on the non-triviality requirement as the Federal Court of Appeal did in this case (see here and here for examples). In such cases, courts usually apply something like a reasonableness test. Indeed, that's the language that Chief Justice Dickson used in *R v Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 SCR 713 at para 97: "[t]he Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might *reasonably* or actually be threatened" (emphasis added).

Given this background, two questions emerge from the *Church of Atheism* holding. First, was it doctrinally sound? Second, might the non-triviality requirement itself be in need of further clarification?

The FCA held that any interference with the Church of Atheism's rights was trivial because it could "continue to carry out its purpose and its activities without charitable registration." Similar logic might apply to any house of worship. It may always be possible for a religious community to continue to carry on its purpose and activities with less money: it might rely on volunteer clerics and administrative staff, rent cheaper premises, or go without catered food at communal gatherings. However, registered charity status provides non-profit organizations with both financial support and credibility. The Federal Court of Appeal's conclusion is also inconsistent with *Canada Without Poverty v AG*, 2018 ONSC 4147 (CanLII), where the Ontario Superior Court of Justice held (relying on *Edwards Books)* that the denial of registered charity status to a non-profit applicant imposed a state-imposed cost that violated the applicant's section 2(*b*) rights (of course, the FCA is not bound by this decision).

Further, though the FCA correctly acknowledged that section 2(*a*) protects the rights of atheists, it did not compare the Church of Atheism's interest in charitable registration to that of a religious institution. This may be because, as noted above, the case law on conscientious freedom is underdeveloped. There is, however, an argument to be made that, because section 2(*a*) protects both freedom *and* conscience, communities joined by conscientious belief systems should have similar protections to religious communities. Assuming this argument holds, the Church of Atheism's argument echoes the arguments accepted in *R v Edwards Books and Art Ltd*, 1986 CanLII 12 (SCC), [1986] 2 SCR 713, the second Sunday closing case. The "competitive disadvantage experienced by… Saturday-observing retailers" (at para 115) pressured those retailers to abandon their religious obligations. The relative disadvantage mattered in the religious freedom analysis because religious freedom must be equally available to all. In light of this, we suggest that the Church of Atheism's invocation of the requirement that the *Charter* be interpreted in a "manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" was more significant than the Federal Court of Appeal allowed. Imagine, for example, if charitable status were reserved only to religious institutions of the Abrahamic faiths. Would a court treat a complaint from a Hindu temple as "trivial and insubstantial"? We think not.

The second and deeper question prompted by the FCA's reasoning is whether the non-triviality requirement is in need of some elaboration. Currently, it is unclear whether the requirement applies to the religious practice at issue, the civil consequences of the law, or both. There has

been considerable writing on this in the United States, where the federal *Religious Freedom Restoration Act* provides that the government "shall not substantially burden a person's exercise of religion" without compelling justification. Though there may be some daylight between the Canadian non-triviality requirement and the American substantial burden requirement, the problems are similar. In the United States, the challenge is posed the following way: how can a court evaluate the substantiality of a burden on religious practice without violating the Establishment Clause by making determinations regarding the religious significance of particular practices (see Michael Helfand, "Identifying Substantial Burdens" (2016) 2016(4) U Ill L Rev 1771 at 1787, quoting *Thomas v Review Board*, 450 U.S. 707 (1981) at 715)? In Canada, the issue is similar: how can a court make a non-triviality determination without violating the SCC's admonition that the State not become an arbiter of religious dogma (see *Amselem* at para 50)?

Initially, some US courts looked to whether the religious practice involved a central tenet of the religion or was obligatory, but Congress amended the *Religious Freedom Restoration Act* to protect "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" (See Gabrielle M. Girgis's very helpful article, "What is a 'Substantial Burden' on Religion under RFRA and The First Amendment?" (2020) 97 (6) Washington University Law Review 1755). In response, American scholar Michael Helfand argues that courts should look only to the civil penalty on believers, not the importance of the religious practice. Chad Flanders takes a different approach, arguing that courts should focus on whether government action pressures believers to change their behaviour. Frederick Mark Gedicks argues that courts must develop "neutral principles of law" to determine the substantiality of religious interference lest claimants end up becoming the judges in their own case. Gabrielle Girgis, in her article mentioned above, provides perhaps the most sophisticated framework, arguing that the law should protect both obligatory religious practices and "exercises of religious autonomy" from a series of burdens which she labels "simply punitive, indirectly punitive, non-punitive, and preventive."

In Canada, our distinctive religious freedom case law must guide our approach. The SCC has already held that it is inappropriate for courts to distinguish between mandatory and optional religious practices in identifying a religious freedom violation (*Amselem* at para 50). Instead, courts must focus on whether the claimant sincerely believes that their actions have a "nexus" with religion; the analysis here is subjective. This position is in tension with an approach that assesses, through a reasonableness (i.e. objective) lens, whether the practice is trivial in the context of the claimant's faith tradition. The approaches proposed by Helfand and Flanders in the US may provide a promising way of resolving this tension. These approaches would have the courts assess the triviality of an alleged religious freedom violation by reference to the potential civic consequences to the claimant of continuing their religious practice, and the pressure these consequences exert on the claimant to alter their religious practices. In the context of *Church of Atheism*, such an approach would have required the FCA to focus more squarely on whether the denial of registered charity status had civic consequences for the Church of Atheism, and whether such denial would pressure the organization to alter its conscience-based practices.

This post may be cited as: Kathryn Chan and Howard Kislowicz, "*Church of Atheism of Central Canada v MNR*: Charitable Status for Atheists and the Triviality of Religious

Freedom Infringements" (November 3, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/11/Blog_KC_HK_Church_of_Atheism.pdf

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